ARIZONA COURT OF APPEALS

DIVISION ONE

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

OPENING BRIEF AND APPENDIX OF PLAINTIFFS/APPELLANTS JIE CAO AND HAINING "FRAZER" XIA

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INTRODUCTION

This is a case about whether a private investor may complete a hostile takeover of a condominium development by forcibly taking the private real estate of individual unit owners. The law does not allow this.

An Arizona statute, § 33-1228, allows a supermajority of condominium unit owners to vote to approve to terminate the condominium, but termination does not itself result in eliminating private property. The statute purports to allow the unit owners to sell "all the common elements and units of the condominium," A.R.S. § 33-1228(C), but by its own terms that means that the entire property must be sold on the best terms possible. It does not authorize plucking off individual unit owners at an appraised price.

Moreover, under the Arizona Constitution, "[p]rivate property shall not be taken for private use." Art. 2, § 17. Even though the statute purports to authorize forced sales, that provision is unconstitutional when applied to these facts, which involve a private real estate investor forcing a sale for its own private benefit. The Legislature simply cannot authorize one party to forcibly take another party's private property.

The Court should reverse.

STATEMENT OF FACTS AND CASE*

I. The Xias purchased a condominium in Dorsey Place.

This case concerns a real estate investor's hostile takeover of a condominium and the forced sale of one of its units. Plaintiff/Appellants Jie Cao and Haining "Frazer" Xia (the "Xias") purchased a condominium at Dorsey Place Condominiums that was taken from them less than two years later. Defendant/Appellees are PFP Dorsey Investments LLC, the real estate investment company that took the Xias' unit; and Dorsey Place Condominium Association, the governing body that facilitated the taking.

Dorsey Place is a 96-unit condominium complex built in 2007, with the original units selling for about $400,000. [IR-40 at 3, ¶ 10 (APP079).] In January 2018, the Xias purchased Unit 106 at Dorsey Place. [IR-40 at 2, ¶ 7 (APP078).]

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* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP077), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

II. Dorsey Investments tried to buy up all the units to convert Dorsey Place to rent-generating apartments.

Over the past few years, Dorsey Investments—an out-of-state investment company—acquired 90 of the 96 units at Dorsey Place. [IR-40 at 5, ¶ 25 (APP081); IR-51, Ex. 2 at 8 (APP168) (listing 90 units owned by Dorsey Investments).] The remaining six units were privately owned by people who had bought individual units over the years, including the Xias. [IR-51, Ex. 2 at 10 (APP171) (listing six units as the "purchased property" that was "to be purchased upon condominium termination.").] Dorsey Investments planned to convert Dorsey Place from privately owned condominiums to an apartment complex from which it could collect rent. To do so, Dorsey Investments needed the remaining six units.

But those six owners—including the Xias—declined to sell. The Xias, like the other remaining unit owners, wanted to keep what they had bought, and had no interest in selling to an investment company seeking to convert Dorsey Place to apartments.

The story should stop here. History is filled with examples of investors wanting to get their hands on the last remaining pieces of the real-estate puzzle, but some owners decline to sell. Investors are generally stuck, with

no ability to force the objectors to sell. In such cases, developers must rely on the usual tools in the free market to accomplish their development goals. And if those tools fail, they must adapt the project. *See, e.g.*, Bill O'Leary, *Hell No, We Won't Go! Homeowners Who Wouldn't Budge,* CNBC, https://www.cnbc.com/2015/02/27/hell-no-we-wont-go-homeowners-who-wouldnt-budge.html (Feb. 27, 2015) (collecting photos and stories of developers building around holdouts in Seattle, Portland, New York, and Washington, D.C.).

III. Dorsey Investments invoked A.R.S. § 33-1228, which purports to authorize forced sales.

But in this case the story continued as Dorsey Investments tried to accomplish by force what it could not accomplish through consensual market transactions. To achieve its goal, Dorsey Investments invoked powers purportedly delegated to it by A.R.S. § 33-1228. It decided to (1) terminate the condominium, and (2) gain ownership over the six remaining units by misusing Arizona law.

The first task was simple enough. Like most condominiums, Dorsey Place's Declaration (the servitudes affecting the property) included a termination provision. It allowed for termination "by the agreement of Unit

Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated." [IR-51 Ex. 1 at 49, § 13.4 (APP146).] An Arizona statute, A.R.S. § 33-1228, also provides for termination with 80% of the unit owners, but "any larger percentage the declaration specifies" controls.[1] A.R.S. § 33-1228(A). Here, Dorsey Investments owned 90 out of the 96 units, or 94%, so it could have its way on termination.

But termination does not itself oust any property owners. Instead, upon termination, "title to all the real estate in the condominium vests in the unit owners on termination as tenants in common," and each unit owner has "an exclusive right to occupancy" of his or her unit. A.R.S. § 33-1228(E).

The Declaration here does not provide for any mechanism by which one unit owner can take ownership of someone else's unit against that person's will. The statute instead provides for selling the *entire* condominium: "A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination." A.R.S. § 33-1228(C).

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[1] This brief cites the version of A.R.S. § 33-1228 in effect in April 2019 (the time of the transaction at issue). A copy of that version of the statute is attached at APP067.

Dorsey Investments thought that these provisions would allow it to achieve its investment goals. In February 2019, it obtained an appraisal to value various *types* of units, without individual appraisals of individual units. [IR-40 at 6-7, ¶¶ 29, 40 (APP082-83).] In March 2019, the Association sent a notice of an upcoming April 2019 meeting to the six owners who refused to buckle. [*Id.* at 5, ¶ 26 (APP081).] The notice stated that the Association would be considering a "Motion to adopt appraisal and terminate the condominium." [*Id.* at 5-6, ¶ 26 (APP081).] The notice also stated that, if approved, "the condominium will be terminated and sold in accordance with the Arizona Condominium Act." [*Id.* at 6, ¶ 26 (APP082).] The notice specified that *all* units would be sold, for more than $22 million. [*Id.*, ¶ 30 (APP082).]

At the April meeting, the Association and Dorsey Investments provided a modified version of the Condominium Termination Agreement to the remaining unit owners. [*Id.* at 7, ¶ 35 (APP083).] Under the modified agreement, the entire condominium would not be sold. Instead, Dorsey Investments would *retain* all the units it owned, while forcing the remaining six owners to sell their units *to Dorsey Investments*. [IR-51, Ex. 2 at 1-11 (APP159-72).] The modified agreement did not allow for identifying any

buyers who might offer more favorable terms than Dorsey Investments, nor did it contemplate that the assets could sell for any price other than the appraised values. The agreement guaranteed that Dorsey Investments would end up with everything at a price it liked.

None of the six remaining owners signed the termination agreement. [*Id.* at 7 (APP165).] But Dorsey Investments plowed ahead. Its supermajority ownership interest guaranteed that the proposal would pass.

Under § 33-1228, title to the real estate then vested in the Association as trustee. *See* A.R.S. § 33-1228(D) ("If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale."). As a trustee, the Association owed "a fiduciary duty to a trust's beneficiaries" (here, *all* the unit owners), which required the Association "to sell [the property] for the best price and on the best terms possible." 76 Am. Jur. 2d *Trusts* §§ 334, 525.

But rather than market the property to find the buyer offering the most favorable terms, the Dorsey Investments-controlled Association handed the units over to Dorsey Investments at the predetermined appraised values.

Over the Xias' continued objection, the Association recorded a warranty deed purporting to convey Unit 106 to Dorsey Investments. [IR-40 at 9, ¶ 54 (APP085).] Dorsey Investments and the Association changed the locks on Unit 106 and destroyed the Xias' remaining personal property on the premises. [*Id.* at 7, ¶ 40 (APP083).]

IV. The Xias sued Dorsey Investments and the Association for their unauthorized actions.

The Xias did not believe that Dorsey Investments and the Association had any authority to take their private property. The Xias filed this lawsuit in late 2019. [*See* IR-1.]

The operative second amended complaint alleges various claims against both Dorsey Investments and the Association that arise out of the wrongful conversion of their property. [IR-40 at 8-13, ¶¶ 43-95 (APP084-89).] Dorsey Investments and the Association filed separate motions to dismiss the second amended complaint. [IR-45; IR-51.] Both motions contended that all of the Xias' claims failed because Dorsey Investments and the Association complied with A.R.S. § 33-1228. [IR-45 at 6-9 ("Strict compliance with A.R.S. § 33-1228 bars each cause of action alleged by plaintiffs." (capitalization altered)); IR-51 at 8 ("for Plaintiffs' claims against

the Association to have any merit, they must allege a violation or failure to comply with [A.R.S. § 33-1228] in their Complaint.").] The Xias filed a combined response opposing both motions to dismiss. [IR-56.]

The superior court held oral argument in this case but did not ask a single question. [IR-60; IR-61 (APP173); *see generally* Dec. 15, 2020 Tr. (no questions from judge).] The court then granted the motions to dismiss, explaining only that it granted the motions "for the reasons advanced by Defendants in their motions and reply briefs." [IR-61 at 2 (APP174).] The superior court entered judgment [IR-90]; the Xias timely appealed. [IR-91.]

STATEMENT OF THE ISSUES

1. Under A.R.S. § 33-1228, if any real estate is sold following a condominium termination, (1) the sale must include "all common elements and units," (2) the association must act in the best interests of all owners in selling the property, and (3) the association must pay unit owners a pro rata share of the "proceeds of the sale." Here, the Association and Dorsey Investments sold less than "all common elements and units," did not consider any buyers who might offer better terms than Dorsey Investments, and paid out merely the appraised values of the units instead of the proceeds of a bona fide sale. Is this transaction invalid?

2. Article 2, § 17 of the Arizona Constitution prohibits takings of private property for private use subject except for inapplicable exceptions. As applied, A.R.S. § 33-1228 authorizes a private investor to take private property for private real estate development. In this case, did A.R.S. § 33-1228 authorize an unconstitutional taking of private property for private use?

STANDARD OF REVIEW

All issues in this appeal present questions of law that this Court reviews de novo.

Appellate courts "review a trial court's dismissal of a complaint under Rule 12(b)(6) de novo." *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 7 (2018). "Issues of statutory interpretation are issues of law; [this Court's] standard of review is therefore de novo." *Koller v. Ariz. Dep't of Transp.*, 195 Ariz. 343, 345, ¶ 8 (App. 1999).

"Determining constitutionality is a question of law, which [this Court] review[s] de novo." *Gallardo v. State*, 236 Ariz. 84, 87, ¶ 8 (2014). On the takings issue, "[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really

public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Ariz. Const. art. 2, § 17.

ARGUMENT SUMMARY

This appeal turns on two threshold issues of law. Either issue is sufficient for the Court to reverse.

First, the sale of the Xias' condominium unit to Dorsey Investments was not authorized by A.R.S. § 33-1228. (Argument § I.) That statute requires three things: (1) any sale must include "all the common elements and units" of the condominium (Argument § I.C.1.a); (2) the association must serve as trustee for all unit owners and therefore must sell the property on the most favorable terms without favoring one group of unit owners (Argument § I.C.1.b); and (3) the payments to the unit owners are based on the proceeds from the sale, not a predetermined appraised value (Argument § 1.C.1.c). Dorsey Investments and the Association did not follow any of these statutory requirements, so § 33-1228 did not authorize the transaction and the superior court erred in granting the motions to dismiss. (Argument § I.D.)

Second, and in the alternative, A.R.S. § 33-1228 authorized an unconstitutional taking of the Xias' private property for private use. The

Arizona Constitution provides that "[p]rivate property shall not be taken for private use" with limited exceptions not applicable here. Ariz. Const. art. 2, Sec. 17. Under this prohibition, "the Legislature of a state may not take, or *authorize* the taking of private property, except for public use. . . ." *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 262 (1914) (emphasis added). (Argument § II.A.) Here, Dorsey Investments relied entirely on A.R.S. § 33-1228 for its authority to purchase the Xias' unit—the sale would not have been possible without this purported statutory authorization. And Dorsey Investments purchased the unit for the private purpose of making a profit. (Argument § II.B.) If this transaction was authorized by statute, then it was an unconstitutional taking of private property for a private purpose.

This Court should reverse, vacate, and remand.

ARGUMENT

I. A.R.S. § 33-1228 does not authorize the sale of less than all the common elements and units of a condominium following termination—especially through a non-market transaction.

A. Under Arizona law, a condominium may be created and terminated only by following the governing statutory scheme.

A condominium development is a type of "common-interest community." *See* Restatement (Third) of Property: Servitudes § 1.8 & cmt. c.

(2000). Private ownership is the central feature of a condominium. By statute, "'Condominium' means real estate, portions of which are designated for *separate ownership* and the remainder of which is designated for common ownership *solely by the owners of the separate portions*." A.R.S. § 33-1202(10) (emphasis added). In fact, in Arizona, "[r]eal estate is not a condominium unless the undivided interests in the common elements are *vested in the unit owners*." *Id.* (emphasis added).

In a condominium, therefore, the unit owners own *everything*—both their individual units and the common elements (e.g., hallways, elevators, outdoor areas, swimming pools). The unit owners have separate titles for each unit. *See* A.R.S. § 33-1204(A) ("each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate").

A condominium is created "by recording a declaration." A.R.S. § 33-1211. The declaration is the "recorded document or documents containing the servitudes that create and govern community." Restatement (Third) of Property: Servitudes § 6.2(5). A condominium must have a "unit owners' association," which "consist[s] exclusively of all the unit owners . . . ." A.R.S. § 33-1241.

A condominium may be terminated, but termination requires at least 80% of the votes, or a higher percentage if required by the declaration. A.R.S. § 33-1228(A). Termination does not necessarily require selling any property. If the owners vote to terminate the condominium without selling property, "title to all the real estate in the condominium vests in the unit owners on termination as tenants in common," with a right of occupancy. A.R.S. § 33-1228(E).

B. Under the parties' competing interpretations, A.R.S. § 33-1228 either protects minority unit owners or removes risks for investors seeking to convert condominiums to apartments.

In this case, the parties disagree about the obligations of the Association upon termination under A.R.S. § 33-1228. Under the Xias' interpretation, if a supermajority of unit owners wishes to terminate the condominium and forcibly sell the minority owners' units, they may do so in the following manner:

1. Include a provision in the termination agreement that "provide[s] that all the common elements and units of the condominium shall be sold following termination." A.R.S. § 33-1228(C).

2. Have the association act as "trustee" to sell this property on the open market to maximize the benefit to all unit owners. A.R.S. § 33-1228(D).

3. Divide the proceeds among the unit holders in accordance with their proportional interests in the property. A.R.S. § 33-1228(D).

Construing § 33-1228 in this manner serves to protect the interests of the minority unit holders by requiring the majority to obtain the best possible terms for the sale of the property—even if that means that some other investor values it more than the supermajority owner. This construction prevents a supermajority owner from simply taking other unit owners' property for its own private benefit if the majority likes the appraised price.

In contrast, under Dorsey Investments' and the Association's interpretation, § 33-1228 gives the supermajority owner a guaranteed option to buy any minority unit owner's unit for a fixed appraised value. Under this view, if the supermajority owner likes the appraised values, it can wipe out all of the minority owners. If the supermajority owner does not like the appraised values, then it need not proceed. Here, for example, Dorsey Investments knew the appraised values before it proposed terminating the condominium. [*See* IR-40 at 6, ¶ 29 (APP082) (February 2019 appraisal); IR-40 at 5, ¶ 26 (APP081) (March 2019 notice of meeting re termination).]

Dorsey Investments' and the Association's interpretation of the statute allows an investor to avoid marketing the property to the public. The interpretation removes any risk that another investor would pay more for the units, thereby creating a remarkable opportunity for investors to convert condos without competition from others. Under this view, an investor who buys a supermajority of the units *guarantees* that the investor can acquire the whole condominium development, notwithstanding objections from the minority or another developer's willingness to pay more.

Resolving which of these interpretations is correct turns largely on the proper interpretation of subsection (C)—the provision that permits a condominium termination agreement to provide for the sale of real estate:

> A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

A.R.S. § 33-1228(C).

Under the Xias' interpretation, if the termination will involve selling any real estate, the first sentence in subsection C requires selling "all the common elements and units of the condominium"—not anything less.

Under Dorsey Investments' and the Association's interpretation, because the second sentence in subsection (C) says "any real estate," it trumps the text of the first sentence and permits a termination agreement to provide for selling something less than "all the common elements and units of the condominium." *Id.* The parties also disagree about whether the statute's requirement that the association act "as trustee for the holders of all interest in the units" (A.R.S. § 33-1228(D)) permits the trustee to simply transfer the minority owners' units to the supermajority owner at the appraised value, or whether the trustee as a fiduciary must attempt to obtain the best terms—even if that means selling to a third party.

As explained in the next sections, all relevant considerations—the text, the structure, and purpose of the statute—all demonstrate that the Court should interpret A.R.S. § 33-1228 to protect minority unit holders rather than remove the risk investors would otherwise face when converting condominiums to apartments.

C. Properly construed, A.R.S. § 33-1228 protects minority unit owners instead of eliminating investors' risk.

When interpreting a statute, the "primary goal is to find and give effect to legislative intent." *Secure Ventures, LLC v. Gerlach*, 249 Ariz. 97, 99, ¶ 5

(2020). Courts "look first to the statute's plain language as the best indicator of legislative intent." *Id.* Courts also examine the statutory structure, including "the context of the statute" and "its effects and consequences." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991). In addition, courts look to the statute's "spirit and purpose." *Id.*

1. Under the plain text, a condominium termination may provide for selling *all* common elements and units on the best possible terms, not selling some units to other owners at an appraised price.

The text of A.R.S. § 33-1228 includes many provisions that prohibit merely transferring title in the objecting units to the supermajority owner at the units' appraised values. First, the text requires selling "all the common elements and units," not just the objecting owner's units. Second, the statute requires the association to act as trustee for all the unit owners, which means the association must identify the buyer offering the best terms rather than merely handing over the title to the supermajority owner. Third, the statute requires the payments to unit owners to be based on the actual proceeds of a sale, not merely the appraised values.

(a) Any sale following termination must include "all the common elements and units."

As noted above, A.R.S. § 33-1228 permits a supermajority of unit owners to terminate the condominium, and if the real estate "is *not* to be sold following termination," then the unit owners become "tenants in common" with a right of occupancy. A.R.S. § 33-1228(E) (emphasis added). If, however, any real estate is to be sold, it must all be sold: "A termination agreement may provide that *all the common elements and units* of the condominium shall be sold following termination." A.R.S. § 33-1228(C) (emphasis added). "All" does not mean some, and no other provision authorizes selling anything less than "all" the real estate. "In short, 'all' means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998) (holding that sale agreement that assigned "all right, title and interest" was not ambiguous.). *Id.*

(b) Upon termination, the association as trustee must act in the interests of all owners, not just hand title over to the majority owner.

The text also requires the association to act in the interest of all unit owners, not merely hand over title to the majority owner at the appraised value.

If the unit owners collectively decide to sell the property, the statue requires that the agreement to terminate and sell provide "the minimum terms of the sale." A.R.S. § 33-1228(C). After approval, "title to that real estate on termination vests in the association *as trustee for the holders of all interest in the units*." A.R.S. § 33-1228(D) (emphasis added). The association as trustee then "has all powers necessary and appropriate to effect the sale." A.R.S. § 33-1228(D).

As a trustee, the association "owes a fiduciary duty to a trust's beneficiaries" (here, the unit owners), and must "act with the highest degrees of fidelity and utmost good faith." 76 Am. Jur. 2d *Trusts* § 334 (explaining that trustees owe fiduciary duties). "The duties of a trustee are the highest known to the law." *Id.*

When, as here, "a trust has two or more beneficiaries, the trustee shall act impartially" among the beneficiaries. A.R.S. § 14-10803. "[T]he trustee's duty to each beneficiary precludes it from favoring one party over another." 76 Am. Jur. 2d *Trusts* § 360. For example, the trustee may not favor one beneficiary's interests because that "particular beneficiary has more access to the trustee." Restatement (Third) of Trusts § 79, cmt. b (2007). Instead,

the trustee must do "his or her best for the entire trust as a whole." 76 Am. Jur. 2d *Trusts* § 360.

These obligations apply when the trustee sells property. "A trustee who is empowered to sell trust property is under a duty to sell it for the best price and on the best terms possible." *Id.* § 525. "Consequently, the trustee should secure competitive bidding and surround the sale with such other factors as will tend to cause the property to sell to the greatest advantage." *Id.* § 526; *see also Forest Guardians v. Wells*, 201 Ariz. 255, 262, ¶ 23 (2001) (Trustee "could not reject the high bids without first examining the facts and exercising a fact-based discretion to determine whether those bids would advance the interests of the trust and its beneficiaries.").

Here, the termination statute confirms that the condominium association must act "as trustee for the holders of *all* interest in the units." A.R.S. § 33-1228(D) (emphasis added). As in all cases when the trustee works for multiple beneficiaries, the association cannot favor the interests of the supermajority over the interests of the minority—the association owes fiduciary duties to *all* unit owners, even if the supermajority effectively controls the association.

Once the owners have voted to sell, therefore, the association must try to sell on the best possible terms for the condominium as a whole. That means that the association generally must seek and consider competitive bids. The association cannot fulfill its fiduciary duties to all unit owners by merely handing over the property to the supermajority owner at a predetermined price without considering whether any other buyers would offer better terms. The association cannot, consistent with the statute, merely assume that the supermajority owner will be the buyer. If it could, there would be no need to have the association serve as trustee and facilitate a sale to the highest bidder.

(c) The statute requires the payments to the owners to be based on the proceeds from a sale, not merely the appraised value.

The statute requires the unit owners to receive the actual proceeds from the sale of the development, not merely the appraised value of their units. The appraisal merely serves to define the proportional interests of the condo owners. In particular, after the association sells the property to the highest bidder, the "[p]roceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, *in proportion to* the respective

interests of unit owners as provided in subsection G of this section." A.R.S. § 33-1228(D) (emphasis added).

Subsection (G), in turn, defines the respective interests of the unit owners: "the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests . . . ." A.R.S. § 33-1228(G)(1). The "fair market values" come from an appraiser, with the possibility of arbitration over the appraised amount. *Id.*

Under this scheme (and setting aside the common elements), an appraiser determines the "fair market value" of each unit. *Id.* That number then gets converted to a "respective interest," which is a percentage value equal to the appraised "fair market value" of the particular unit divided by the sum of all of the appraised "fair market values" of all of the units. The sale will yield a common pot of money (the "Proceeds of the sale"). *Id.* The payment to each unit owner is the unit's "respective interest" percentage multiplied by the "Proceeds of the sale." A.R.S. § 33-1228(D), (G)(1).

So the appraised value is used only in determining each owner's respective percentage interest; the owner gets paid that percentage of the sale price (the "Proceeds of the sale"), *not* the appraised value. The "Proceeds of the sale" almost certainly will not match the aggregate "fair

market value" for a variety of reasons. Appraisals are imprecise, market conditions might change between the appraisal and the sale, and the sale may involve commissions and other transaction costs.

If a majority owner could simply force an individual unit owner to sell at the appraised value, none of the steps listed above would be necessary. Instead, the statute would simply give the majority owner an option to buy any unit at the appraised "fair market value," without any need to conduct an actual market transaction, have a trustee, or go through the mathematical exercises required by subsections (D) and (G). And it would not require the association, acting as a trustee, to fetch the best possible price.

Moreover, if the majority owner could buy any units at predetermined appraised values, then the system would only work for the type of hostile internal takeover at issue in this case. If the purchaser came from outside the condominium, the association would run out of money to pay the unit owners if the net proceeds fell short, even if the appraised value exactly equaled the purchase price (because of commissions and other transaction costs).

In addition, the statute requires the owners to agree to the "minimum term of the sale." A.R.S. § 33-1228(C). If the statute merely required paying

the appraised value, then there would be no need to approve the "minimum terms of the sale"—the exact appraised value could be determined with certainty.

2. The statutory purpose of A.R.S. § 33-1228 is to protect minority owners' interests when there is a sale following termination.

Other subsections in A.R.S. § 33-1228 demonstrate that the Legislature intended to protect the interests of minority unit owners and did not intend to permit a majority owner to forcibly acquire the remaining unit at a fixed appraised price.

(a) The statute's requirement that a supermajority authorize a sale protects the minority unit owners' interests.

First, the statute supersedes any provision in a condominium declaration that allows for termination by less than 80% of unit owners. *See* A.R.S. § 33-1228(A) ("a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, *or any larger percentage the declaration specifies*." (Emphasis added)).

But this provision applies only to residential condominiums. Under the statute, "[t]he declaration may specify a smaller percentage" than eighty

percent "only if all of the units in the condominium are restricted exclusively to nonresidential uses." A.R.S. § 33-1228(A).

The Legislature was justifiably concerned about protecting the interests of residential condo owners. By imposing a supermajority requirement on the termination and sale power and superseding any less-protective servitudes, subsection (A) protects the interests of unit owners who would otherwise be forced to sell their homes.

(b) The statute's requirement that "all the common elements and units" be sold protects the minority unit owners' interests.

In addition, by specifying that sales must include "all the common elements and units of the condominium," A.R.S. § 33-1228(C), the statute ensures that the unit owners who vote to sell have the same incentives as those who oppose the sale. It prevents arbitrary enforcement of the forced sale power, such as by singling out a handful of units for sale.

Selling the entire property maximizes the market because anyone who would want to purchase the unit for condos, apartments, or another development would be eligible to buy the property. By contrast, if, as here, the owner of more than 90% of the units wants to convert the complex to

apartments, the market for individual units is extremely limited (if a market exists at all).

Courts confronting similar situations have explained that where *all* the property is to be sold, "the majority owners and the minority owners have the same interest . . . and majority owners can be expected to refuse to agree to any price that is significantly lower than the fair value of their units." *See, e.g., Kai v. Bd. of Dirs. of Spring Hill Bldg.*, __ N.E.3d __, 2020 WL 2904046 at *5, ¶ 22 (Ill. App. Ct. 2020); *cf. Franklin v. Spadafora*, 447 N.E.2d 1244, 1249 (Mass. 1983) (upholding condominium bylaw that restricted total number of units an individual could own, in part because it did not limit the market for the remaining units).

In addition, if only some units will be sold, then why would the other units even get a vote? If the entire condominium property will be sold on the open market to the buyer offering the most favorable terms, then it makes sense for all unit owners to have a vote, as provided by A.R.S. § 33-1228. But if only six units will be sold, and if the sale would be at a predetermined price to a predetermined buyer, then the buyer—here the owner of the remaining 90 units—would have a conflict of interest in the transaction and should not be permitted to vote. *See* A.R.S. § 10-3863 (setting

procedures for conflicts of interest in transactions for nonprofit corporations); [IR-51, Ex. 1, § 1.2.5 (APP098) (Association is a nonprofit corporation)].

If the supermajority owner likes the predetermined price, then of course it will vote to sell the remaining units to itself, without having to sell its own units, and without seeking any other offers. Allowing the predetermined buyer to vote to sell someone else's unit therefore presents an unlawful conflict of interest. By contrast, requiring all of the units to be sold aligns the interests of both the majority and the minority and therefore presents the better interpretation of the statute.

D. Here, Dorsey Investments' purchase of the Xias' unit was not authorized by the statute.

Here, Dorsey Investments and the Association did not do any of the statutorily required acts in authorizing the sale of the Xias' unit:

- The sale agreement did not involve "*all* the common elements and units of the condominium"—it instead included only the units not already owned by Dorsey Investments. A.R.S. § 33-1228(C) (emphasis added).
- The Association did not market the property for sale and identify the buyer with the most favorable terms. Dorsey Investments instead transferred the units to itself without holding a real sale or considering whether other investors would have offered

better terms. The Association and Dorsey Investments merely assumed that Dorsey Investments would be the buyer.

- The Association did not conduct a bona fide sale and distribute the "[p]roceeds of the sale . . . *in proportion to* the respective interests of unit owners . . . ." A.R.S. § 33-1228(D) (emphasis added). Instead, Dorsey Investments merely paid the fixed value determined by Dorsey Investments' appraiser. Likewise, the sale agreement did not provide the "*minimum* terms of the sale"—it provided the *final* terms of the sale (the appraised value). A.R.S. § 33-1228(C) (emphasis added).

Dorsey Investments skipped all these required steps by forcing the six remaining units to sell, at fixed prices determined by an appraiser, solely for Dorsey Investments' benefit.

Dorsey Investments and the Association understandably did not want to place all of the units and common elements up for sale on the best overall terms. Doing so would have risked another investor offering more and outbidding Dorsey Investments. If that occurred, the Association would have distributed the proceeds pro rata to all unit owners—even if that meant the unit owners would receive more than the appraised value.

By forcing a sale of the units at the appraised value, Dorsey Investments *guaranteed* that no other developer could outbid them and take the project away. They guaranteed (to their benefit and the detriment of the

Xias) that the Xias would not benefit if another developer wanted to pay more.

If the Association had marketed the entire condominium development and found a buyer offering better terms, that would have benefited all of the beneficiaries to whom the Association owed fiduciary obligations as trustee. Dorsey Investments of course wanted to pay a lower price in its capacity as a *buyer*, when (1) the Association improperly presupposed to Dorsey Investments would be the only buyer, and (2) the transaction involved only the six minority owners, rather than also including the units Dorsey Investments owned. By forcing this transaction through without soliciting or considering any other offers, the Association effectively put the interests of the *buyers* over the interests of the *sellers*, even though the sellers were the beneficiaries to whom the Association owed its fiduciary obligations as trustee.

Because the sale was not authorized by A.R.S. § 33-1228(C), the superior court erred in granting the motion to dismiss and this Court should reverse.

E. The superior court erred in granting the motions to dismiss.

The superior court provided no analysis or reasoning for its decision to grant the motions to dismiss. Although the superior court agreed with one or more of Dorsey Investments' or the Association's arguments, those arguments do not withstand scrutiny.

1. The text relied upon by Dorsey Investments and the Association does not unambiguously permit the sale of less than all units.

Below, Dorsey Investments and the Association argued that the second sentence of subsection (C), which concerns the minimum-sale-price requirement, demonstrates that the statute permits the sale of less than all units. [IR-58 at 4-5; IR-59 at 7-9.] Specifically, they asserted that the phrase "if . . . any real estate in the condominium is to be sold" demonstrates that a sale of less than all units was contemplated by statute. But that phrase does not authorize any sale at all. The previous sentence of A.R.S. § 33-1228(C) is the only provision authorizing a sale, and it unambiguously states that if there is a sale, it must include "all common elements and units" that formerly made up the condominium.

The sentence relied upon by Dorsey Investments and Association, read in its entirety, merely requires that the termination agreement contain the

minimum terms for a potential sale acceptable to the unit owners. *See id.* "If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale."). As explained above, not all termination agreements involve any sale at all. This sentence is designed to impose an additional requirement on agreements that *do* involve the sale of property—a requirement that "the termination agreement shall set forth the minimum terms of the sale." *Id.* But the sentence does not itself authorize any sales, nor does it purport to define what property can be sold. The sentence is also consistent with authorizing multiple sales, where all of the property is sold, but different parts get sold to different buyers.

Moreover, even if this sentence creates some ambiguity in § 33-1228(C), the statute must be "strictly construed and *any* ambiguity or uncertainty decided in favor of property owners," here, the Xias. *Kubby v. Hammond*, 68 Ariz. 17, 22 (1948) (emphasis added); *Maricopa Cnty. v. Rana*, 248 Ariz. 419, 423, ¶ 11 (App. 2020) (explaining that regulations such as zoning ordinances that "exist in derogation of property rights," must "be strictly construed in favor of the property owner.").

2. Interpreting the statute to require a sale of "all the common elements and units" of property is not absurd.

Second, Dorsey Investments and the Association argued that "it would be **absurd** to require PFP to repurchase the units ***it already owns***." [IR-58 at 3-4 (emphases in original); *accord* IR-59 at 3-4.]

This argument reveals Dorsey Investments' and the Association's fundamental misunderstanding of the statute. The argument presupposes that the statute authorizes the type of hostile takeover at issue here, where one owner scoops up almost all the units through voluntary transactions and then tries to take the remaining ones involuntarily. The argument necessarily assumes that the statute authorizes the majority owner to pluck off individual units for itself, without ever considering whether other buyers would offer better terms. By framing the issue as requiring Dorsey Investments to sell its own property to itself, Dorsey Investments reveals that it views the statute as guaranteeing that Dorsey Investments will be the buyer, regardless of whether other investors would offer better terms.

But the statute does none of these things. Although the statute authorizes a supermajority to force a sale over the objections of the minority,

it does not give the majority owner a guaranteed option to purchase the remaining units for itself at a predetermined price.

Moreover, following the statute's plain text does not result in an absurd result. Consider analogous situations involving common ownership. Imagine Jack and Jill own an Arizona property not capable of physical division as tenancy in common. If Jack wants to force a sale, he will have to file a partition action or get Jill's consent—he cannot dictate the terms of the sale to his cotenant. Indeed, the general rule is that Jack cannot force Jill to sell to him even if he convinces a court to agree that is the equitable result: "It is well established that when there are but two parties and each desires to have allotted to himself or herself the whole cotenancy property, the court cannot arbitrarily decide that one shall have the property to the exclusion of the other." *McCready v. McCready*, 168 Ariz. 1, 4 (App. 1991).

Following the partition action, the land will be sold on the most favorable terms, and "a forced sale of the land will be the result of the partition proceedings and the proceeds of the sale will be divided among" Jack and Jill. Restatement (Second) of Property: Don. Trans. § 4.5, cmt. (a) (1983). Jack will get the property only if he presents the most favorable offer for the entire property. Even characterizing this as Jack having to sell his

interest to himself, this is quite normal in disputes over ownership of property, and is not absurd. *See, e.g.*, *Register v. Coleman*, 130 Ariz. 9, 14 (1981) ("There is no authority in law which would permit appellant to use his interest as a credit against a bid which he might choose to make.").

When a single entity owns a supermajority of the units, it can unilaterally decide to terminate the condominium and sell. But that does not give the supermajority owner the right to run roughshod over the statutory requirements designed to protect the minority owners.

Dorsey Investments, assisted by the Association, ignored the statute to enrich itself at the Xias' expense—something the statute does not authorize. This Court should reverse.

II. As applied, A.R.S. § 33-1228 authorized an unconstitutional taking of the Xias' property for private use in violation of Article 2, Section 17 of the Arizona Constitution.

A. Allowing one party to take another's private property violates the Arizona Constitution.

In the alternative, and regardless of the above interpretive issue, A.R.S. § 33-1228 is an unconstitutional taking of private property for private use as applied to these facts. No statute may authorize one person to take another person's property against the victim's will, even if the statute requires the

taker to compensate the victim. As applied in this case, A.R.S. § 33-1228 does exactly that.

1. Arizona's Constitution expressly prohibits taking private property for private use.

For centuries, the people have limited their governments' ability to take their private property. Under the Magna Carta, the Crown could not "take anyone's grain or other chattels, without immediately paying for them in money." Magna Carta Cl. 28 (1215), *reprinted in* Richard L. Perry & John C. Cooper, *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 17 (1978).

Early charters of the colonies incorporated similar limitations on government authority. For example, Massachusetts's early charter prohibited property from being "taken for any publique use or service, unless it be by warrant grounded upon some act of the general Court, nor without such reasonable prices. . . ." Mass. Body of Liberties 1641, ¶ 8, *reprinted in* Perry & Cooper, *Sources of Our Liberties* at 149 (1978).

The United States Constitution likewise prohibits "private property [from being] taken for public use, without just compensation." U.S. Const., amend. V.

The Arizona Constitution goes much further than this and expressly prohibits almost all takings of private property for private use: "Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes." Ariz. Const. art. 2, § 17.

Indeed, this Court has noted that the "federal constitution provides considerably less protection" for property owners than the Arizona Constitution. *Bailey v. Myers*, 206 Ariz. 224, 229, ¶ 20 (App. 2003). Under the state constitution, "taking one person's property for another person's private use is plainly prohibited" unless it falls within one of the enumerated exceptions. *Id.* at 228, ¶ 12.

Although the Arizona Constitution provides more protection from takings, Arizona courts look to federal cases in determining the threshold question of whether a taking has occurred. *See, e.g., Ranch 57 v. City of Yuma*, 152 Ariz. 218, 226-27 (App. 1986) (reversing trial court determination that no compensable taking occurred under state constitution and remanding for further consideration under federal takings cases); *Corrigan v. City of Scottsdale*, 149 Ariz. 553, 562-64 (App. 1985) (relying on *Loretto* and other

federal cases in holding that zoning ordinance was taking under state constitution), *aff'd in relevant part*, 149 Ariz. 538 (1986).

2. Depriving an owner of the entire property interest qualifies as a traditional taking and a per se violation the takings clause.

Takings cases typically involve either a traditional, or per se, taking, or a regulatory taking. A traditional taking occurs where "the government has physically taken property for itself or someone else—by whatever means"; a regulatory taking occurs where the government has "restricted a property owner's ability to use his own property." *Cedar Point Nursery v. Hassid*, __ U.S. __, 141 S. Ct. 2063, 2072 (2021). But "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred . . . ." *Id.* This case involves a complete deprivation of the Xias' real property, and therefore falls within the traditional takings framework.

3. Authorizing a third party to take privately owned property for a private purpose violates the takings clause.

Such a taking occurs regardless of whether the government formally condemns property, physically occupies it, or authorizes a third party to perform the functional equivalent. In the first case interpreting Article 2, Section 17, the Arizona Supreme Court held that "[t]he Legislature of a state may not take, *or authorize* the taking of private property, except for public

use" and the enumerated exceptions in article 2, section 17. *Inspiration*, 16 Ariz. at 262 (emphasis added) (quoting John Lewis, *Eminent Domain* (3d ed.) § 315, at 595).

More recently, this Court barred a formal condemnation proceeding that would have transferred private property to a municipality and then to a private developer. The Court explained that the state constitution's prohibition on private takings "prevents the condemnation of the [plaintiffs'] property for this redevelopment project." *Bailey*, 206 Ariz. at 230, ¶ 27. Thus under the Arizona Constitution (and subject to the exceptions not applicable here) a statute that authorizes one private party to take another private party's property for a non-public use violates Arizona's takings clause.

Although Arizona's Constitution provides heightened protection, this aspect of Arizona's takings clause is not unique. Federal courts likewise have long held that a taking occurs even if the government authorizes a third party to commit the intrusion. For example, the Supreme Court held that a state statute that permitted cable companies to place a wire across private property was a taking, even though a private company—not the government—committed the intrusion. *Lorretto v. Teleprompter Manhattan*

CATV Corp., 458 U.S. 419, 436 (1982). To underscore its point that the statute authorized a taking, the Court noted that "[f]ew would disagree that if the State *required* landlords *to permit third parties* to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking." *Id.* (emphases added); *see also Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

Other cases confirm that a taking occurs when the government publishes a statute or regulation that authorizes one private party to physically occupy another private party's property. For example, a federal regulation that gave *private* cable companies access to utility companies' telephone poles constituted a taking. *Gulf Power Co. v. U.S.*, 187 F.3d 1324, 1328 (11th Cir. 1999). "[A] regulation becomes a taking when the government authorizes permanent, physical occupation by *a third party*." (Emphasis added).

Recently, in *Cedar Point*, the Supreme Court addressed a state law that granted to third-party, private union organizers "the right of access . . . to the premises of an agricultural employer for the purpose of meeting and

talking with employees . . . . " 141 S. Ct. at 2069 (citing Cal. Code Regs., tit. 8, § 20900(e)). The Court held that granting a private party this access was a taking: "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings . . . ." 141 S. Ct. at 2074.

4. Under Arizona law, property taken for a private development has a private, not public, purpose.

Unlike the Arizona Constitution, however, just compensation will not justify a private taking for private use. The Arizona Constitution completely bars takings "for private use," *regardless of compensation*, with only a few inapplicable exceptions. Ariz. Const. art. 2, § 17. Determining whether a taking is for private or public use "shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." *Id.* On this issue, federal cases "provide no guidance." *Bailey*, 206 Ariz. at 229, ¶ 20.

Instead, Arizona courts consider several factors in deciding whether a taking is for public or private use, such as whether the government holds title to the property following the transaction, whether public health or safety benefits will accrue from the transaction, and whether a private developer is the driving force behind the transaction. *Id.* at 230, ¶ 24. When

a private party is involved in the transaction, the central question is whether "the public characteristics or benefits of the intended use substantially outweigh the private nature of that use." *Id.*, ¶ 26.

B. By authorizing Dorsey Investments to force the sale of Unit 106, A.R.S. § 33-1228 authorized an unconstitutional taking of the Xias' property.

1. Here, A.R.S. § 33-1228 authorized a traditional permanent taking of the Xias' property.

A person who purchases property acquires "a 'bundle of sticks'—a collection of individual rights." *U.S. v. Craft*, 535 U.S. 274, 278 (2002) (citation omitted); *see also Eardley v. Greenberg*, 164 Ariz. 261, 265 (1990) (referring to the "bundle of real property rights"). These include the "right to the possession, use, and disposition of things in such manner as is not inconsistent with law." *See In re Forsstrom*, 44 Ariz. 472, 481 (1934), *overruled in part on other grounds by State ex. rel Morrison v. Thelberg*, 87 Ariz. 318 (1960); *accord Hanigan v. Wheeler*, 19 Ariz. App. 49, 52 (1972) ("We accept the fundamental principle that one of the primary incidents inherent in the ownership of property is the right of alienation or disposition.").

If the government deprives a property owner of each the rights in the bundle of rights that accompanies property ownership, that is a traditional, per se, taking of property. *Loretto*, 458 U.S. at 435. When the government

authorizes a permanent physical appropriation of property, "it effectively destroys *each* of these rights" in the bundle, which is a taking. *Id.*

As applied to these facts, A.R.S. § 33-1228 authorized an impermissible traditional taking. Third parties (here, Dorsey Investments acting through the Association) deprived the claimants (here, the Xias) of *all* their property rights in Unit 106. [IR-40 at 9, ¶ 54 (APP085).] On April 8th, 2019, the Xias had the full bundle of property rights—the right to exclude others, the right to use and enjoy the unit, and the right to alienate or dispose of the unit. The next day, they had none of those rights. Their property rights went from *full* to *zero*.

To top it off, Dorsey Investments changed the locks on Unit 106 (thereby excluding the Xias from their unit), destroyed the Xias' personal property, and recorded a deed with the County Recorder. [IR-40 at 7, ¶ 40 (APP083); *id.* at 9, ¶ 54 (APP085).]

Absent A.R.S. § 33-1228, Dorsey Investments and the Association would have no authority to take the Unit 106 for themselves and wipe out the Xias' property rights. As applied to these facts, therefore, § 33-1228 constitutes a taking.

2. The taking was for private use with no public benefit or purpose.

Moreover, this taking was for private use. In the superior court, Dorsey Investments and the Association did not dispute this point. [IR-58 at 8-9; IR-59 at 6-7.] And for good reason. The property ended up in private hands (not public ownership), used for for-profit renting of apartments, without providing any public services. The record contains no evidence of any public purpose whatsoever. As in *Bailey*, because "the intended use of the property is fundamentally for private development," it was taken for private use. 206 Ariz. at 230, ¶ 26.

Under Arizona's Constitution, a government-authorized taking by a private party for a private purpose is fatal. The law simply does not permit one private party to strip away another private party's property rights with the stroke of a pen, with no judicial intervention. This taking was unconstitutional and the superior court should have denied the motion to dismiss.

C. The arguments raised below by Dorsey Investments and the Association and fail.

The superior court gave no explanation for its apparent rejection of the Xias' takings argument. [IR-61 at 2 (APP174).] Below, Dorsey Investments

and the Association presented three arguments, none of which overcome Arizona's strong constitutional prohibition of takings for a private purpose.

1. Formal condemnation proceedings or other government involvement is not required to finding a taking of private property.

First, Dorsey Investments argued that because "the government is not involved and is not taking their property," Arizona's constitutional prohibition on private takings is inapplicable. [IR-58 at 8.] Dorsey Investments attempted to distinguish *Bailey* by claiming that "in that [case] the Court was evaluating whether a government entity improperly condemned private property," whereas this case does not involve a formal condemnation. [*Id.*]

But the taking clause does not require direct government involvement or formal condemnation. As explained above (Argument § II.A.3), courts have repeatedly held that a taking occurs when a private actor physically occupies another person's property as authorized by law or regulation. Courts have repeatedly rejected the argument that formal government involvement is required to find a taking.

This argument is inconsistent with the Arizona Supreme Court's first decision interpreting its state constitutional prohibition on takings of private

property. In *Inspiration Consolidated Copper Company*, the plaintiff mining company sought "a right of way across . . . one of the [defendant's] mines and throughout the length thereof for the construction, maintenance, and operation of a tunnel or drift 9 feet high and 11 feet wide" so that it would be able to "develop and mine [its] claims." 16 Ariz. at 258-59. Lacking other authority, the plaintiff relied upon a general grant of legislative authority that authorized private actors to take property for public use. *Id.* at 267 (citing title 13, Revised Statutes 1913 (Civ. Code, ¶¶ 3071-3097)). The defendant mine argued that this action amounted to a taking unauthorized by the statute and was instead barred by the Arizona Constitution because it would be a private taking for private use. *Id.* at 260. The Court agreed, stating that "[by] an analysis of the facts, it is easily discovered that the tunnel asked for is for the private and individual use of the plaintiff" and affirmed a lower court decision blocking the development. *Id.* at 259.

In *Inspiration*, the government had no involvement outside of passing the statute authorizing certain takings for public use. *Id.* at 267. Title would not have passed to the government before the mine took possession of the property. *Id.* at 258-59. The state government was not otherwise involved with the litigation. *Id.* But the Court nevertheless concluded that the

proposed action was not authorized by statute or by the Arizona Constitution. *Id.* at 260, 267-68.

Similarly, if Dorsey Investments' position were correct, the law permitting *private* labor unions to occupy an agricultural facility's property in *Cedar Point* would not be a taking. That case, like this one, involved *private* action authorized by law. 141 S. Ct. at 2076-77. And the Supreme Court in that case explained that even where "the government's intrusion does not vest it with a property interest recognized by state law . . . we recognize a taking all the same." *Id.* at 2076. "Any other result would allow the government to appropriate private property . . . so long as it avoids formal condemnation." *Id.*

Moreover, if a taking required direct government involvement, then the statute permitting a permanent physical occupation of the apartment building in *Loretto* would not have been a taking. *See* 458 U.S. at 433-34. After all, the state government there passed a statute that authorized a *private* cable company to place the wire on the property, just as the Legislature here passed a statute permitting the forced sale. *Id.* at 423. In *Loretto*, just like here, the government's only involvement was to give a third party authority

to physically occupy the plaintiff's property. *Id.* Yet in both cases, a taking occurred. *Id.* at 434-35.

In sum, Arizona's prohibition on takings for private use does not require formal condemnation or other direct government involvement.

2. The Declaration does not independently authorize the sale of the condominium unit.

Second, Dorsey Investments and the Association argued that no taking occurred because the Declaration independently authorized the sale of the Xias' unit. [IR-58 at 8; IR-59 at 6.]

Section 13.4 of the Declaration provides for terminating the condominium, but does not allow a forced sale or other taking of the privately owned units:

> Except in the case of a taking of all the Units by eminent domain, the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners.

[IR-51 Ex. 1, § 13.4 (APP146-47).]

This provision allows the unit owners to terminate the condominium. But terminating the condominium does not wipe out private ownership.

Even if a declaration *could* provide for the forced sale of individual units upon dissolution, this one does not.

3. A.R.S. § 12-1841 does not bar the Xias' as-applied constitutional challenge to the condominium statute.

Third, Dorsey Investments and the Association argued that the Xias' constitutional challenge fails because they did not comply with A.R.S. § 12-1841. But A.R.S. § 12-1841's notice requirement does not apply to as-applied challenges to the constitutionality of particular statutes. *See Merrill v. Merrill*, 238 Ariz. 467, 470, ¶ 15 (2015), *vacated on unrelated federal grounds*, 137 S. Ct. 2156 (mem) (2017) ("We are persuaded that § 12-1841 applies only when a litigant assert that a statute is facially unconstitutional.").

D. Investors and developers have repeatedly abused § 33-1228 to the detriment of homeowners.

The Xias are not the only victims of A.R.S. § 33-1228. In Dorsey Place alone, six unit owners opposed the hostile takeover and forced displacement. The media characterized Dorsey Place as "the latest victims of Arizona's Condominium Termination law." Joe Ducey & Courtney Homes, *Tempe Condo Owners May Be Forced to Sell to Investor Group*, ABC15 Arizona, https://www.abc15.com/news/let-joe-know/tempe-condo-

owners-may-be-forced-to-sell-to-investor-group (discussing Dorsey Place conversion) (Apr. 4, 2019).

News articles about this statute tell the same story—an investor sees an opportunity for profit and uses "a little known Arizona law to take over a condo complex and force owners into a sale." Joe Ducey & Courtney Holmes, *State Law Forces Condo Owner into Sale*, ABC15 Arizona, https://www.abc15.com/letjoeknow/contact/state-law-forces-condo-owner-into-sale (Dec. 12, 2018).

But the problem is that the law does not actually allow this. It does not allow the majority to pluck off just the minority owners, rather than marketing and selling the entire development on the most favorable terms. And even if it did, it would violate Arizona's bedrock protections for private property owners.

This law has been abused many times. *See, e.g.*, Courtney Holmes, *91-Year-Old Woman Among Dozens Slated to Lose Condos in Forced Sale to Investors Due to Arizona Law*, ABC15 Arizona, https://www.abc15.com/news/state/91-year-old-woman-amongst-dozens-slated-to-lose-condos-in-forced-sale-to-investors-due-to-arizona-law (May 17, 2021); Joe Ducey, *State Law Allows for Condos to Be Forcibly Taken*, ABC15 Arizona, https://www.abc15.com/

news/let-joe-know/is-your-home-at-risk-for-takeover-state-law-allows-for-condos-to-be-forcibly-taken (Mar. 1, 2016).

Commentators in other states have also called for similar termination states to be found unconstitutional. For example, a recent *Real Estate Law Journal* article analyzed a similar statute in Florida. *See* Marlene Brito, *Terminating a Condominium or Terminating Property Rights: A Distinction Without a Difference*, 45 Real Est. L.J. 200 (2016). The author explained that "[d]evelopers have found a loophole in the statute." *Id.* at 205. But because the objecting "unit owner is losing title to his property along with all possible uses" after the forced sale, and because the investor-prompted sales have no public purpose, the "termination provision must be found unconstitutional." *Id.* at 217, 222.

Despite the widespread abuses of the termination statute, the proper interpretation and constitutional analysis of § 33-1228 is an issue of first impression. In Arizona, the Constitution simply does not permit one person to forcibly take another person's private property.

The Xias never agreed to sell Unit 106 to Dorsey Investments, and did not agree to any servitudes or other instruments that granted anyone the

authority to take their property. The law respects voluntary transactions, not involuntary ones. The Court should reverse.

REQUEST FOR ATTORNEYS' FEES

The Xias request their attorneys' fees under ARCAP 21 and A.R.S. §§ 12-1103, 33-420, and 12-341.01.

CONCLUSION

The Court should reverse the superior court's dismissal and remand for further proceedings.

RESPECTFULLY SUBMITTED this 18th day of August, 2021.

OSBORN MALEDON, P.A.

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

A.R.S. § 33-1228

§ 33-1228. Termination of condominium

Effective: August 3, 2018 to August 26, 2019

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit. During the period of that occupancy, each unit owner and the successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit owner's unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units that were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F of this section are as follows:

1. Except as provided in paragraph 2 of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the association's appraiser, the unit owner shall submit to arbitration at the association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, on foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C, D, E, F, H and I of this section do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contains provisions inconsistent with these subsections.

K. Beginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

CAO ET AL VS PFP DORSEY INVESTMENTS ET AL

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1.	CIVIL COMPLAINT	Nov. 20, 2019
2.	CERTIFICATE OF COMPULSORY ARBITRATION	Nov. 20, 2019
3.	CIVIL COVER SHEET	Nov. 20, 2019
4.	PLAINTIFF'S DEMAND FOR JURY TRIAL	Nov. 20, 2019
5.	DECLARATION OF SERVICE BY CERTIFIED MAIL	Dec. 9, 2019
6.	DECLARATION OF SERVICE BY CERTIFIED MAIL	Dec. 9, 2019
7.	DECLARATION OF SERVICE BY CERTIFIED MAIL	Dec. 9, 2019
8.	NOTICE OF APPEARANCE	Dec. 9, 2019
9.	APPLICATION AND AFFIDAVIT FOR DEFAULT	Dec. 13, 2019
10.	DEFENDANTS' NOTICE REQUESTING ASSIGNMENT TO COMMERCIAL COURT	Dec. 18, 2019
11.	MOTION FOR MORE DEFINITE STATEMENT	Dec. 18, 2019
12.	ANSWER	Dec. 20, 2019
13.	CREDIT MEMO	Dec. 30, 2019
14.	APPLICATION AND AFFIDAVIT FOR DEFAULT	Jan. 2, 2020
15.	MOTION FOR ENTRY OF DEFAULT JUDGMENT	Jan. 2, 2020
16.	MOTION TO WITHDRAW AS COUNSEL WITHOUT CONSENT	Jan. 3, 2020
17.	MOTION FOR TREBLE DAMAGES	Jan. 6, 2020
18.	**ME: ORDER ENTERED BY COURT [01/06/2020]**	**Jan. 7, 2020**
19.	AFFIDAVIT OF SERVICE	Jan. 8, 2020
20.	MOTION TO COMPEL DEFENDANTS TO COMPLY WITH MAILING REQUIREMENTS	Jan. 14, 2020
21.	MOTION TO STRIKE QUINN/POLGER'S ANSWER	Jan. 14, 2020
22.	MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST MATT QUINN (AMENDED)	Jan. 14, 2020

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23.	DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR TREBLE DAMAGES	Jan. 15, 2020
24.	**ME: ORDER ENTERED BY COURT [01/17/2020]**	**Jan. 21, 2020**
25.	MOTION TO SUPPORT TREBLE DAMAGES SOUGHT IN "MOTION FOR TREBLE DAMAGES" SUBMITTED JANUARY 6, 2020	Jan. 21, 2020
26.	**ME: RULING [01/17/2020]**	**Jan. 22, 2020**
27.	**ME: ORDER ENTERED BY COURT [01/21/2020]**	**Jan. 22, 2020**
28.	MOTION TO REQUEST LOOK UP OF UNIT AND INJUNCTION ON DEFENDANTS.	Jan. 22, 2020
29.	MOTION TO STRIKE DEFENDANTS' ANSWER, NOTICE AND MOTION	Jan. 22, 2020
30.	**ME: ORDER ENTERED BY COURT [01/22/2020]**	**Jan. 24, 2020**
31.	MOTION FOR MORE DEFINITE STATEMENT	Jan. 24, 2020
32.	**ME: CASE REASSIGNED [01/24/2020]**	**Jan. 27, 2020**
33.	ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL WITHOUT CONSENT	Jan. 29, 2020
34.	NOTICE OF APPEARANCE	Feb. 5, 2020
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36.	[PART 2 OF 2] DEFENDANTS' NOTICE OF OUTSTANDING MOTIONS	Feb. 5, 2020
37.	**ME: STATUS CONFERENCE SET [02/13/2020]**	**Feb. 18, 2020**
38.	**ME: STATUS CONFERENCE [02/25/2020]**	**Feb. 27, 2020**
39.	FIRST AMENDED COMPLAINT	Mar. 27, 2020
40.	SECOND AMENDED COMPLAINT	Jul. 6, 2020
41.	ACCEPTANCE OF SERVICE FOR PFP DORSEY INVESTMENTS, LLC PURSUANT TO ARIZ. R.CIV. P. 4(F)(2)	Jul. 17, 2020
42.	STIPULATION TO DISMISS CERTAIN DEFENDANTS WITHOUT PREJUDICE	Jul. 20, 2020

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No.	Document Name	Filed Date
43.	ACCEPTANCE OF SERVICE FOR DORSEY PLACE CONDOMINIUM ASSOCIATION PURSUANT TO ARIZ. R.CIV. P. 4(F)(2)	Jul. 20, 2020
44.	ORDER DISMISSING CERTAIN DEFENDANTS WITHOUT PREJUDICE	Jul. 27, 2020
45.	[PART 1 OF 5] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	Aug. 13, 2020
46.	[PART 2 OF 5] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	Aug. 13, 2020
47.	[PART 3 OF 5] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	Aug. 13, 2020
48.	[PART 4 OF 5] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	Aug. 13, 2020
49.	[PART 5 OF 5] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	Aug. 13, 2020
50.	DEFENDANT PFP DORSEY INVESTMENTS, LLC'S RULE 8.1(E)(4) GOOD FAITH CONSULTATION CERTIFICATE	Aug. 13, 2020
51.	DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT	Aug. 13, 2020
52.	DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S GOOD FAITH CONSULTATION CERTIFICATE	Aug. 13, 2020
53.	CREDIT MEMO	Aug. 17, 2020
54.	CREDIT MEMO	Aug. 17, 2020
55.	NOTICE OF PLAINTIFF'S FIRST EXTENSTION(SIC) OF TIME FOR PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT	Sep. 2, 2020
56.	PLAINTIFFS' RESPONSE TO DEFENDANTS DORSEY PLACE CONDOMINIUM ASSOCIATION'S MOTION TO DISMISS AND PFP DORSEY INVESTMENTS, LLC'S MOTION TO DISMISS	Sep. 16, 2020
57.	DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT	Sep. 25, 2020

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59.	DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT	Oct. 5, 2020
60.	**ME: ORAL ARGUMENT SET [10/12/2020]**	**Oct. 16, 2020**
61.	**ME: UNDER ADVISEMENT RULING [12/15/2020]**	**Dec. 18, 2020**
62.	NOTICE OF LODGING JUDGMENT	Jan. 7, 2021
63.	VERIFIED REQUEST FOR AN AWARD OF TAXABLE COSTS	Jan. 7, 2021
64.	MOTION FOR AUTHORIZATION TO FILE DOCUMENTS RELATED TO PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND TAXABLE COSTS UNDER SEAL	Jan. 7, 2021
65.	[PART 1 OF 3] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 7, 2021
66.	[PART 2 OF 3] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND COST	Jan. 7, 2021
67.	[PART 3 OF 3] DEFENDANT PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND COST	Jan. 7, 2021
68.	[PART 1 OF 2] AFFIDAVIT OF NICHOLAS NOGAMI IN SUPPORT OF THE ASSOCIATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 7, 2021
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71.	[PART 2 OF 4] DEFENDANT FORSEY PLACE CONDOMINIUM ASSOCIATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 7, 2021
72.	[PART 3 OF 4] DEFENDANT FORSEY PLACE CONDOMINIUM ASSOCIATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 7, 2021

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No.	Document Name	Filed Date
73.	[PART 4 OF 4] DEFENDANT FORSEY PLACE CONDOMINIUM ASSOCIATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 7, 2021
74.	[PART 1 OF 2] DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S STATEMENT OF COSTS AND NOTICE OF TAXATION	Jan. 7, 2021
75.	[PART 2 OF 2] DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S STATEMENT OF COSTS AND NOTICE OF TAXATION	Jan. 7, 2021
76.	PLAINTIFFS' OPPOSITION TO DEFENDANTS PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATIONS' APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 19, 2021
77.	NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLIES IN SUPPORT OF DEFENDANTS' APPLICATIONS FOR ATTORNEYS' FEES AND COSTS	Jan. 29, 2021
78.	[PART 1 OF 2] PFP DORSEY INVESTMENTS, LLC'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 8, 2021
79.	[PART 2 OF 2] PFP DORSEY INVESTMENTS, LLC'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 8, 2021
80.	DEFENDANT DORSEY PLACE CONDOMINIUM ASSOCIATION'S REPLY IN SUPPORT OF ITS APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 8, 2021
81.	ORDER GRANTING MOTION TO FILE UNDER SEAL	Feb. 23, 2021
82.	**ME: ORDER ENTERED BY COURT [02/22/2021]**	**Feb. 24, 2021**
83.	NOTICE OF LODGING OF ITEMIZED BILLING RECORDS IN SUPPORT OF PFP DORSEY INVESTMENTS, LLC'S APPLICATION FOR ATTORNEYS' FEES AND TAXABLE COSTS UNDER SEAL	Feb. 24, 2021
84.	***SEALED*** ORIGINAL SEALED DOCUMENT (BILLING RECORDS)	Feb. 24, 2021
85.	**ME: RULING [03/15/2021]**	**Mar. 18, 2021**
86.	JUDGMENT	Mar. 18, 2021

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No.	Document Name	Filed Date
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88.	NOTICE OF LODGING AMENDED PROPOSED FINAL JUDGMENT	Mar. 26, 2021
89.	NOTICE OF APPEAL	Apr. 19, 2021
90.	JUDGMENT	Apr. 27, 2021
91.	NOTICE OF APPEAL	May. 12, 2021
92.	STIPULATED MOTION TO DIMISS(SIC) PLAINTIFFS' NOTICE OF APPEAL	May. 12, 2021

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 05/18/2021

CAPTION: CAO ET AL VS PFP DORSEY INVESTMENTS ET AL

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: ORIGINAL SEALED DOCUMENT INCLUDED IN INDEX OF RECORD

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: heather.kish on May 18, 2021; [2.5-17026.63]
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CAO ET AL VS PFP DORSEY INVESTMENTS ET AL

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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JIE CAO and HAINING "FRAZER" XIA, a married couple; STONE XIA, an individual, **Plaintiffs;** **vs.** **PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company; DORSEY PLACE CONDOMINIUM ASSOCIATION, an Arizona nonprofit corporation;** **Defendants.**	**Case No.: CV2019-055353** **SECOND AMENDED COMPLAINT** **(Assigned to the Honorable Daniel Martin)** **(Tier II Case)** **(Jury Trial Requested)**

Plaintiffs Jie Cao, Haining "Frazer" Xia, and Stone Xia (collectively "Plaintiffs") hereby file their Second Amended Complaint against Defendants PFP Dorsey Investments, LLC and Dorsey Place Condominium Association (collectively "Defendants").

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs Jie Cao ("J. Cao") and Haining "Frazer" Xia ("Xia") are a married couple residing in Maricopa County, Arizona at all relevant times.

2. Plaintiff Stone Xia ("S. Xia") is an individual residing in Maricopa County, Arizona at all relevant times. Stone Xia is the son of Plaintiffs Jie Cao and Frazer Xia.

3. Defendant Dorsey Place Condominium Association ("the Condo Association") is an Arizona nonprofit corporation. The Condo Association has conducted business in Maricopa County, Arizona at all relevant times herein.

4. Defendant PFP Dorsey Investments, LLC ("PFP Dorsey") is a Delaware limited liability company, registered in Arizona as a foreign limited liability company and member-managed. PFP Dorsey has conducted business in Maricopa County, Arizona at all relevant times herein.

5. This Court has jurisdiction of the subject matter of this action and of the persons and entities named as Defendants.

6. Jurisdiction is proper in this Court pursuant to Article 6 § 14, of the Arizona Constitution and given that all defendants are either Arizona residents or caused acts or events that occurred in Maricopa County, State of Arizona. Further, venue is proper in Maricopa County pursuant to A.R.S. § 12-401.

GENERAL ALLEGATIONS

7. On or around January 30, 2018, Haining Xia and Jie Cao purchased Unit 106 at 1275 E. University Drive, Tempe, Arizona 85281 ("Xia Condo"), at the Dorsey Place Condominiums ("Dorsey Place").

8. The Warranty Deed for the Xia Condo was recorded with the Maricopa County Recorder's Office on February 9, 2018, bearing recording number 2018-0103716 ("Warranty Deed").

9. The Xia Condo is a high-end condominium, with high-end appliances, access to a heated swimming pool, and conveniently located within walking distance of Arizona State University's Tempe campus.

10. In or around 2007, Dorsey Place was completed at a cost of approximately twenty-three million dollars ($23,000,000). At least six condominiums were sold by the developer for prices in excess of four hundred thousand dollars ($400,000).

11. On or around December 15, 2006, the Board of the Condo Association adopted bylaws ("Bylaws").

12. The Bylaws discuss the Annual Member Meeting under Section 3.3, stating, "The annual meeting of the Members shall be held in the month of March each year, beginning in March, 2006, with the exact date to be determined each year by the Board, provided that the Board may elect to delay the annual meeting past March in any given year (but in no event later than May 31) if necessary to permit preparation of financial statements or budgets, or for such other reason as may be determined by the Board, in its good faith discretion. At each annual meeting the Members shall elect the Board and transact such other business as may properly be brought before the meeting."

13. The Bylaws discuss Special Meetings of the Members under Section 3.4, stating "Unless otherwise prescribed by Arizona statute or by the Articles, special meetings of the Members, for any purpose or purposes, may be called by: (a) the president; (b) a majority of the directors; or (c) after the Declaration is recorded, Members having at least ten percent (10%) of all votes in the Association (as determined in accordance with the Declaration)."

14. The Bylaws also discuss the requirements of Notice of Members Meetings under Section 3.5, stating "Not less than ten (10) nor more than fifty (50) days before the date of any annual or special meeting of the Members, either the secretary or any other officer of the Association shall cause written notice stating the place, date and time of the meeting (and, in the case of a special meeting, the items on the agenda, including, but not limited to, the general nature of any proposed amended to the Declaration, Articles or Bylaws, any budget changes and any proposal to remove a director or officer) to be hand-delivered or sent prepaid by United States

mail to the last known mailing address of each Ember, as shown in the Association records, or to the mailing address of such Member's Unit). If mailed, such notice shall be deemed to be delivered when mailed. Business transacted at any special meeting of Members shall be limited to the items stated in the notice unless determined otherwise by a unanimous vote of the Members present at such meeting."

15. The Bylaws provide that directors are to be elected at the Annual Meeting: "The business and affairs of the Association shall be managed, conducted and controlled by the Board. The directors shall be appointed or elected as provided in the Declaration, and for the term(s) specified therein. Except as provided in the Declaration, each director shall be elected at the annual meeting of Members concurrent with the expiration of the term of the director he or she is to succeed, and, except as otherwise provided in these Bylaws or in the Articles or the Declaration, shall hold office until his or her successor is elected and qualified." Section 4.1, Bylaws.

16. On or around August 15, 2017, Dorsey Place recorded a Declaration of Condominium for Dorsey Place with the Maricopa County Recorder's Office, bearing recording number 2007-0921387 ("Declaration").

17. The Declaration was amended with a first amendment on July 31, 2009, and recorded with the Maricopa County Recorder's Office, bearing recording number 2009-0825688 ("First Amendment to Declaration").

18. The Declaration and First Amendment to Declaration were amended with a second amendment on August 15, 2011, and recorded with the Maricopa County Recorder's Office, bearing recording number 2012-0168217 ("Second Amendment to Declaration").

19. The Declaration, First Amended to Declaration, and Second Amendment to Declaration were amended with a third amendment on February 9, 2018, and recorded with the Maricopa County Recorder's Office, bearing recording number 2018-0161234 ("Third Amendment to Declaration") (the Declaration, First Amendment to Declaration, Second

Amendment to Declaration, and Third Amendment to Declaration shall be referred to herein as the "Declaration with Amendments").

20. Under Section 6.4 of the Declaration with Amendments, each "Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners."

21. Under Section 6.7 of the Declaration with Amendments provided each Unit Owner with one vote for each Unit owned by the Unit Owner on "any Association matter which is put to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws."

22. Under Section 13.4 of the Declaration with Amendments, "the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners."

23. Under Section 2.4 of the Third Amendment to Declaration, there were ninety-six (96) units in the Condo Association consisting of Units 101 through 121, Units 201 through 225, Units 301 through 325, and Units 401 through 425.

24. In or around 2011, Pathfinder Partners LLC, a California limited liability company, acquired Dorsey Place from the original developer for approximately eleven million three hundred thousand dollars ($11,300,000). The six additional units stayed with their current owners and were not part of this transaction by Pathfinders Partners, LLC.

25. On information and belief, at some time Dorsey Place was transferred from Pathfinder Partners LLC, to the Condo Association, PFP Dorsey, PFP LP, and/or PFP LLC.

26. In or around March 2019, a 2019 Annual Meeting Notice was noticed, to be held on April 4, 2019 ("Notice"). The letter notifying the members of the meeting listed seven items on the agenda, as follows:

1. Call to Order and Verification of Quorum
2. Introduction of Board Members and Management Company Representatives
3. Presentation of the Affidavit of Mailing
4. Financial Review
5. Status of the Community
6. Discussion on proposed termination of condominium
    a. Motion to adopt appraisal and terminate the condominium
        i. Vote to adopt the independent appraisal* procured to determine the fair market value of the Condominium;
        ii. Vote to ratify a termination agreement* whereby the condominium will be terminated and sold in accordance with the Arizona Condominium Act (A.R.S. § 33-1228 *et seq*.)
7. Adjournment

*For your convenience and in preparation of the Annual Meeting as scheduled herein, the following documents are enclosed: 1) Official Ballot for matters to be voted upon; 2) Appraisal of Property; and 3) Proposed Condominium Termination Agreement.

27. This Notice did not include a notice to elect directors, consistent with the requirement of Annual Meetings under Section 4.1 of the Bylaws.

28. Therefore, this Notice was for a Special Meeting, rather than an Annual Meeting of the Members.

29. Along with the Notice, a draft Condominium Termination Agreement was sent to the members ("Draft Condominium Termination Agreement"); five appraisal reports prepared by K & T Appraisals dated February 5, 2019; and an incomplete and misleading copy of A.R.S. § 33-1228.

30. The Draft Condominium Termination Agreement stated that the Condo Association was agreeing to sell all ninety units to PFP Dorsey for twenty-two million six hundred forty-six thousand dollars ($22,646,000).

31. The Draft Condominium Termination Agreement stated that at least ninety (90%) percent of the Unit Owners voted to approve the Draft Condominium Termination Agreement.

32. Further, the Draft Condominium Termination Agreement provided that the distribution of the sale shall be allocated to unit owners of five different types of property: Owners

of a Type A Unit will receive $234,000 and their proportional interest in the Common Elements; Owners of a Type B Unit will receive $236,000 and their proportional interests in the Common Elements; Owners of a Type C Unit will receive $224,000 and their proportional interests in the Common Elements; Owners of a Type D Unit will receive $244,000 and their proportional interests in the Common Elements; and Owners of a Type E Unit will receive $244,000 and their proportional interests in the Common Elements.

33. The Xia Condo was determined to be a Type A Unit.

34. Plaintiffs were present at the April 4, 2019 Special Meeting ("Special Meeting").

35. At the Special Meeting, the members were provided with a modified Condominium Termination Agreement ("Modified Condominium Termination Agreement"). The Modified Condominium Termination Agreement provided that the Condo Association were agreeing to sell all interests of Dorsey Place that were not already owned by PFP Dorsey.

36. Under Section 3.5 of the Condo Association's bylaws, "business transacted at any special meeting of Members shall be limited to the items stated in the notice unless determined otherwise by a unanimous vote of the Members present at such meeting."

37. The members of the Condo Association did not take a vote at the Special Meeting to introduce the Modified Condominium Termination Agreement.

38. Had a vote of the Members been taken at the Special Meeting, the Plaintiffs would have objected to introducing the Modified Condominium Termination Agreement, thereby preventing the business to be transacted as indicated in Section 3.5 of the Bylaws.

39. Plaintiffs informed the Defendants that they were only obligated to sell the Xia Condo if following the termination of the condominium, the entire project would be sold, similar to a drag-along clause by the super majority.

40. On or around January 2, 2020, Plaintiffs learned that the Defendants changed the locks on the Xia Condo; and destroyed and/or disposed of personal property in the Xia Condo.

41. On May 6, 2020, Plaintiffs provided notice to PFP Dorsey of its wrongful recording under A.R.S. § 33-420.

42. To date, PFP Dorsey has not corrected or released its wrongful recording.

COUNT I

Declaratory Judgment

43. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

44. There exists a real and justiciable controversy regarding whether Defendant Dorsey Condo Association validly terminated the condominium and validly transferred title of the Plaintiffs' real property to PFP Dorsey.

45. Under A.R.S. § 33-1228(A), "a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies."

46. In the event the termination is not completed in accordance with the Condo Association's bylaws and requirements, any termination agreement that is recorded is invalid and void. 6

47. Under the Condo Association bylaws, a special meeting may only be held to conduct business as demonstrated in the notice for special meeting.

48. The special meeting may conduct business that is outside of the special meeting notice only if the members present at the special meeting unanimously vote to amend the special meeting notice.

49. The Condo Association called for a special meeting to be held on April 4, 2019.

50. The Condo Association stated that the members would vote on the Draft Condominium Termination Agreement.

51. On April 4, 2019, at the Special Meeting ("Special Meeting"), the members voted on the Condominium Termination Agreement.

52. At the Special Meeting, the members did not unanimously vote to amend the special meeting notice.

53. The Condo Association did not notice a separate board meeting or special meeting to vote on the Condominium Termination Agreement.

54. On November 15, 2019, the Condo Association recorded a Warranty Deed with the Maricopa County Recorder's Office, bearing recording number 2019-0923560, granting the Xia Condo to PFP Dorsey.

55. Plaintiffs contend that this conduct violated the bylaws, rendering the proceedings of the Condo Association board, and the subsequent purported transfer of title, invalid.

56. Under A.R.S. § 33-1228(D), "If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units."

57. Under A.R.S. § 33-1228(E),"If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests…"

58. A.R.S. § 33-1228 provides only for the sale of "all the common elements and units of the condominium," together; and as trustee, the condo association's fiduciary duties require that the entire real estate be sold for the highest possible price.

59. Plaintiffs contend that the Defendant Condo Association violated A.R.S. § 33-1228, and breached its fiduciary duties to Plaintiffs, by forcibly selling the Plaintiffs' unit to PFP Dorsey, at a price determined by the Condo Association; rather than offering the entire "real estate constituting the condominium" for sale, and selling for the highest price.

60. To the extent that A.R.S. § 33-1228 could be construed as giving Defendants the power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a public purpose and the statute is therefore

invalid/unenforceable. Because Plaintiffs do not allege a facial challenge to the statute, but rather an "as-applied" challenge, A.R.S. § 12-1841 does not apply.

COUNT II

Quiet Title

61. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

62. The Plaintiffs are credibly informed and believe Defendants have made claims adverse to the Plaintiffs' interests in the Xia Condo.

63. The Plaintiffs requests that the Court order that Plaintiffs are the lawful owners of the Xia Condo (and/or, of an undivided interest in the real estate formerly constituting the condominium).

64. The Plaintiffs request that the Defendant be barred and forever estopped from having or claiming any right or title to the Xia Condo adverse to Plaintiffs.

65. The Plaintiffs request an award of their attorneys' fees and costs pursuant to A.R.S. § 12-1103.

COUNT III

Civil Trespass, Conversion

66. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

67. On January 30, 2018, Plaintiffs acquired title to the Xia Condo.

68. On April 9, 2019, the Defendants recorded the Condominium Termination Agreement with the Maricopa County Recorder's Office, bearing recording number 2019-0248170.

69. The Condominium Termination Agreement was not adopted by the Condo Association consistent with the Declaration with Amendments or the Bylaws and Arizona statute, and therefore invalid.

70. As of April 9, 2019, the Plaintiffs still held title to the Xia Condo.

71. On or before January 2, 2020, Defendants caused the locks on the Xia Condo to be changed.

72. On or before January 2, 2020, Defendants destroyed personal property and belongings, which were in the Xia Condo and belonged to Plaintiffs.

73. According to a representative of PFP Dorsey, the personal property and belongings were either thrown away or donated.

74. The Defendants took these actions, because they knew that the Plaintiffs were disputing the Condominium Termination Agreement, and because a Complaint had been filed in this action in November 2019.

75. The Defendants took these actions with malice, fraud, oppression, and with a conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed the Condominium Termination Agreement and because the Complaint had been filed in this Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

Count IV

Breach of Fiduciary Duty

76. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

77. Plaintiffs were minority members of the Condo Association, a nonprofit corporation.

78. As a majority member of the Condo Association, PFP Dorsey owed fiduciary duties to the Plaintiffs.

79. If the condominium were validly terminated, and any real estate in the condominium were to be legally sold following termination, then the Condo Association became a "trustee for the holders of all interest in the units," including Plaintiffs, by which it owed them a fiduciary duty.

80. Defendants breached their fiduciary duties by forcing Plaintiffs to involuntarily sell their condo to PFP Dorsey, at a price that it determined, and without publicly offering the entire real estate constituting the condominium for sale, in order to obtain the best price.

81. Defendants breached their fiduciary duties by deliberately conducting invalid condo association meeting(s) over Plaintiffs' objection.

82. Defendants breached their fiduciary duties by destroying and/or otherwise disposing of the Plaintiffs' personal property.

83. Plaintiffs are therefore entitled to a constructive trust over the Xia Condo (and/or the real estate formerly constituting the condominium), and damages in an amount to be determined at trial.

84. The Defendants took these actions with malice, fraud, oppression, and with a conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed the Condominium Termination Agreement and because the Complaint had been filed in this Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

COUNT V

Unjust Enrichment

85. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

86. Defendant PFP Dorsey, by its actions, has been unjustly enriched.

COUNT VI

Ejectment, Constructive Trust

87. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

88. Plaintiffs have a valid subsisting interest in the Xia Condo and a right to immediate possession thereof. They are therefore entitled to recover possession from Defendants.

89. Defendants have obtained, or sought to obtain title to the Xia Condo through actual fraud, misrepresentation, concealment, undue influence, duress and other means which render it unconscionable for Defendants to continue to retain and enjoy its beneficial interest.

90. Plaintiffs therefore seek an order of ejectment and the imposition of a constructive trust over the Xia Condo.

COUNT VII

Wrongful Recording

91. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

92. PFP Dorsey purports to claim an interest in, or a lien or encumbrance against, the Xia Condo (and/or real estate formerly constituting the condominium), and caused a document asserting that claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, or contains a material misstatement or false claim.

93. Plaintiffs provided notice to PFP Dorsey on May 6, 2020 pursuant to A.R.S. § 33-420, with regard to the wrongful recording.

94. PFP Dorsey has not corrected the recording which is forged, groundless, or contains a material misstatement or false claim.

95. PFP Dorsey is therefore liable to Plaintiffs, as the owner or beneficial title holder of the real property, for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

GENERAL PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully seek a judgment against Defendants that:

A. Quiets title to the Xia Condo in their favor (and/or their undivided interest of the real estate formerly constituting the condominium); declares that the termination of

the condominium was invalid; and/or imposes a constructive trust over the Xia Condo (or real estate formerly constituting the same);

B. Declares that, to the extent A.R.S. § 33-1228 could be construed as giving Defendants the power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a public purpose and the statute is therefore invalid/unenforceable;

C. Provides that Plaintiffs are entitled to recover possession of the Xia Condo, and/or imposes a constructive trust over the Xia Condo;

D. For damages in an amount to be determined at trial, including punitive damages;

E. For attorneys' fees and costs under any applicable authority, including A.R.S. §§ 12-1103, 12-341, 33-420, and 12-341.01;

F. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED July 6, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John D. Wilenchik

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ELECTRONICALLY filed July 6, 2020, via AZTurboCourt.com.

COPY electronically transmitted by the Clerk of the Court via AZTurboCourt.com to the Honorable Daniel Martin

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By */s/ Christine M. Ferreira*

EXHIBIT 1

WHEN RECORDED, MAIL TO:

D. Randall Stokes
Lewis and Roca LLP
40 North Central Avenue
Phoenix, Arizona 85004

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2007-0921387 08/15/07 04:38 PM
1 OF 1
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DECLARATION OF CONDOMINIUM

FOR

DORSEY PLACE CONDOMINIUMS

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DECLARATION OF CONDOMINIUM FOR DORSEY PLACE CONDOMINIUMS

This Declaration of Condominium for Dorsey Place Condominiums is made this 15th day of August, 2007, by Dorsey Place Condominiums, L.L.C., an Arizona limited liability company.

ARTICLE 1 DEFINITIONS

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

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

1.2.1 **"Architectural Committee"** means the Architectural Committee established pursuant to Section 6.12 of this Declaration.

1.2.2 **"Articles"** means the Articles of Incorporation of the Association as amended from time to time.

1.2.3 **"Assessments"** means the Common Expense Assessments and Special Assessments levied and assessed against each Unit pursuant to Article 7 of this Declaration.

1.2.4 **"Assessment Lien"** means the lien granted to the Association by the Condominium Act to secure the payment of Assessments.

1.2.5 **"Association"** means Dorsey Place Condominium Association, an Arizona nonprofit corporation, its successors and assigns.

1.2.6 **"Board of Directors"** means the Board of Directors of the Association.

1.2.7 **"Buildings"** means the structures which are hereafter constructed on the Property to the extent such buildings are designated or shown as buildings on the Condominium Plat.

1.2.8 **"Bylaws"** means the Bylaws of the Association, as amended from time to time.

1.2.9 **"Commercial Unit"** shall mean Unit 1, as shown on the Condominium Plat, as may be further subdivided by the Declarant.

1.2.10 **"Common Elements"** means all portions of the Condominium other than the Units.

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

1.2.12 **"Common Expense Assessment"** means the assessment levied against the Units pursuant to Section 7.2 of this Declaration.

1.2.13 **"Common Expense Liability"** means the liability for Common Expenses allocated to each Unit by this Declaration.

1.2.14 **"Condominium"** means the Property together with all Buildings and other Improvements located thereon.

1.2.15 **"Condominium Act"** means the Arizona Condominium Act, A.R.S. §33-1201, et seq., as amended from time to time.

1.2.16 **"Condominium Documents"** means this Declaration and the Articles, Bylaws and the Rules.

1.2.17 **"Condominium Plat"** means the condominium plat for Dorsey Place Condominiums, recorded in Book 938 of Maps, Page 7, in the Official Records of the Maricopa County Recorder, Maricopa County, Arizona, and any replats, amendments, supplements and corrections thereto.

1.2.18 **"Declarant"** means Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, and its successors and any person or entity to whom either such party may transfer any Special Declarant Rights. For purpose of Article 12 only, any contractor(s) which are affiliated with Declarant and which construct a Unit or any Common Elements shall also be deemed to be a Declarant.

1.2.19 **"Declaration"** means this Condominium Declaration, as amended from time to time.

1.2.20 **"Development Rights"** means any right or combination of rights reserved by or granted to the Declarant in this Declaration to do any of the following: (i) add real estate to the Condominium; (ii) create easements, licenses, Units, Common Elements or Limited Common Elements within the Condominium; (iii) subdivide and re-subdivide Units; (iv) convert Units into Common Elements or convert Common Elements into Units; (v) withdraw real estate from the Condominium and this Declaration; (vi) amend the Declaration during the Period of Declarant Control to comply with the Condominium Act or any other applicable law or to correct any error or inconsistency in the Declaration provided such amendment does not adversely affect the rights of any Unit Owner; (vii) amend the Declaration during the Period of Declarant Control to comply with the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments, including, without limitation, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration or the Veterans Administration; and (viii) make the Condominium part of a larger condominium.

1.2.21 **"Eligible Insurer or Guarantor"** means an insurer or governmental guarantor of a First Mortgage who has requested notice of certain matters in accordance with Section 11.1 of this Declaration.

1.2.22 **"Eligible Mortgage Holder"** means a First Mortgagee who has requested notice of certain matters from the Association in accordance with Section 11.1 of this Declaration.

1.2.23 **"First Mortgage"** means any mortgage or deed of trust on a Unit with first priority over any other mortgage or deed of trust on the same Unit.

1.2.24 **"First Mortgagee"** means the holder of any First Mortgage.

1.2.25 **"Garage"** shall mean the underground parking garage constructed as part of the Condominium, as depicted on the Condominium Plat.

1.2.26 **"Improvement"** means any physical structure, fixture, facility or improvement existing or constructed, placed, erected or installed on the land included in the Condominium, including, but not limited to, Buildings, roadways, driveways, parking areas, sidewalks, paving, fences, walls, recreational amenities, lighting fixtures, sprinkler and irrigation systems, hedges, plants, trees, shrubs and landscaping of every type and kind.

1.2.27 **"Lessee"** means any Person who is the tenant or lessee under a written lease of a Unit.

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

1.2.29 **"Member"** means any Person who is or becomes a member of the Association.

1.2.30 **"Period of Declarant Control"** means the time period commencing on the date this Declaration is recorded with the County Recorder of Maricopa County, Arizona, and ending on the earlier of: (i) Ninety (90) days after the conveyance to Unit Owners other than a Declarant of seventy-five percent (75%) of the Units which may be created, or (ii) five (5) years after the date of the Recording of this Declaration.

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

1.2.32 **"Property"** means the real property described on Exhibit "A" attached to this Declaration together with all Improvements situated thereon and all easements and rights appurtenant thereto.

1.2.33 **"Purchaser"** means any Person, other than a Declarant or any affiliate of a Declarant, who by means of a voluntary transfer becomes a Unit Owner, except any Person who purchases a Unit and then leases it to a Declarant for use as a model in connection with the sale of other Units, and except any Person who, in addition to purchasing a Unit, is assigned any Special Declarant Rights.

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

1.2.35 **"Resident"** means any person, other than a Declarant and any Unit Owners, who resides in a Unit for a period of thirty (30) days or more in a twelve (12) month period, or who occupies or is in possession of a Unit, whether as a Lessee, guest or otherwise.

1.2.36 **"Residential Dwelling"** means the dwelling structure (including, without limitation, a garage) and all related Improvements located on or consisting of a Unit and which is intended for use and occupancy as a residence.

1.2.37 **"Rules"** means the rules and regulations adopted by the Association, as amended from time to time.

1.2.38 **"Service and Amenity Common Area"** means the area or areas as depicted on the Condominium Plat which shall be for the use of the Unit Owners and Residents and shall (i) be a Common Element, (ii) contain the mailbox for each Unit, and (iii) contain such other amenities for the sole use of the Unit Owners and the Residents as determined by the Board of Directors.

1.2.39 **"Single Family"** means a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of not more than five (5) persons not all so related, who maintain a common household in a Unit.

1.2.40 **"Special Declarant Rights"** means any right or combination of rights reserved by or granted to the Declarant in this Declaration or by the Condominium Act to do any of the following: (i) construct Improvements provided for in this Declaration or shown on the Condominium Plat; (ii) exercise any Development Right; (iii) maintain sales offices, management offices, models and signs advertising the Condominium; (iv) use easements through the Common Elements for the purpose of making Improvements within the Condominium; and (v) appoint and remove any officer of the Association or any member of the Board of Directors during the Period of Declarant Control.

1.2.41 **"Unit"** means the portions of the Condominium as described in this Declaration and as designated on the Condominium Plat as Units and which are designated for separate ownership and occupancy, the boundaries of which are more thoroughly described in Section 2.5 of this Declaration.

1.2.42 **"Unit Owner"** means the record owner, whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Unit. Unit Owner shall not include Persons having an interest

in a Unit merely as security for the performance of an obligation or a Lessee or tenant of a Unit. Unit Owner shall include a purchaser under a contract for the conveyance of real property, a contract for deed, a contract to convey or an agreement for sale subject to A.R.S. §33-741, et seq. Unit Owner shall not include a purchaser under a purchase contract and receipt, escrow instructions or any similar executory contract which is intended to control the rights and obligations of the parties to executory contracts pending the closing of a sale or purchase transaction. In the case of Units the fee simple title to which is vested in a trustee pursuant to A.R.S. §33-801 et seq., the Trustor shall be deemed to be the Unit Owner. In the case of Units the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement, the beneficiary of any such trust who is entitled to possession of the Unit shall be deemed to be the Unit Owner.

ARTICLE 2
SUBMISSION OF PROPERTY; UNIT BOUNDARIES; ALLOCATION OF PERCENTAGE INTERESTS, VOTES AND COMMON EXPENSE LIABILITIES

2.1 **Creation of Condominium.** Declarant hereby submits the Property and all easements, rights and appurtenances thereto, to the provisions of the Condominium Act for the purpose of creating a condominium in accordance with the provisions of the Condominium Act and hereby declares that the Property shall be held and conveyed subject to the terms, covenants, conditions and restrictions set forth in this Declaration. By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, binds himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof. In addition, each such Person, by accepting a deed or by acquiring any ownership interest in any portion of the Condominium, thereby acknowledges that the Condominium Documents set forth a general scheme for the improvement and development of the Condominium and hereby evidences his intent that all the restrictions, conditions, covenants, rules and regulations contained in the Condominium Documents shall run with the land and be binding on all subsequent and future Unit Owners, grantees, purchasers, assignees and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Condominium Documents shall be mutually beneficial, prohibitive and enforceable by the Association and the various subsequent and future Unit Owners. Declarant and its respective successors, assigns and grantees, covenant and agree that the Units and the membership in the Association and the other rights created by the Condominium Documents which are appurtenant to a Unit shall not be separated or separately conveyed, and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

2.2 **Name of Condominium**. The name of the Condominium created by this Declaration is Dorsey Place Condominiums.

2.3 **Name of Association**. The name of the Association is Dorsey Place Condominium Association.

2.4 **Identifying Numbers of Units**. The identifying numbers of the Units within the Property as of the date of this Declaration are Units 101 through 115, inclusive, Units 201 through 225, inclusive, Units 301 through 325, inclusive, Units 401 through 425, inclusive, as shown on the Condominium Plat.

2.5 **Unit Boundaries and Description.**

2.5.1 The lower horizontal boundary of each story or level of living space of each Unit is the top of the unfinished floors thereof.

2.5.2 The upper horizontal boundary of each story or level of living space of each Unit is the bottom of the finished ceilings thereof.

2.5.3 The lateral boundaries of each the attached Units, though appearing to share a single common wall, are actually separated by an approximately one-inch airspace between two parallel vertical walls. The vertical boundaries between such attached Units shall consist of a vertical plane bisecting that airspace, such that the entire wall on a Unit's side of that vertical plane is within and a part of that Unit (as are any and all pipes, wires, conduits and other utility or other systems within that wall). All other vertical boundaries of a Unit shall consist of a plane defined by the unfinished exterior surface of the exterior walls of such Unit, including any exterior plywood sheathing and studs, but excluding exterior styrofoam or other exterior insulation materials, lath, stucco and exterior paint; thus, such plywood sheathing and studs (and any and all pipes, wires, conduits and other utility or other systems within such exterior walls) are a part of the Unit, while such exterior styrofoam or other exterior insulation materials, lath, stucco and exterior paint are a part of the Common Elements. The lateral boundary of an unattached Units are the unfinished interior surfaces of the perimeter walls, windows and doors thereof and vertical planes coincidental with the unfinished interior surfaces of the perimeter walls thereof extended upwards and downwards to intersect the upper and lower horizontal boundaries.

2.5.4 Each Unit includes the surfaces so described and the airspace contained within said boundaries. All furring, drywall, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces of the walls, floor and ceiling are part of the Unit. Each Unit shall also include the range, garbage disposal units, dishwasher, microwave, water heaters, elevator, if any, and other facilities, systems and other appliances lying within the boundaries of the Unit.

2.5.5 Unless otherwise indicated, all airspace boundary lines intersect at approximately right angles.

2.5.6 The following are not part of a Unit but rather are Common Elements: structural parts of the Building of which the Unit is a part, bearing walls, columns, vertical supports, roofs, floors, foundations, slabs, all waste, water and gas pipes, fire sprinkler system, tubing for delivery of insecticide, ducts, flues, chimneys, conduits, wires and other utility and installation lines wherever located, except the lines, outlets and traps thereof when located within the Unit. Air conditioning and heating units located on a Common Element or a Limited Common Element and not within a Unit are owned by and shall be maintained, repaired and

replaced by the Unit Owner served by same. The existing physical boundaries of a Unit constructed or reconstructed in substantial accordance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the description expressed in any deed, plat, plan or declaration, regardless of settling or lateral movement of the Building, and regardless of minor variances between the boundaries as shown on same and those of the Unit.

2.5.7 Declarant reserves the right to relocate the boundaries of Units owned by a Declarant and to reallocate each such Unit's Common Element interest, votes in the Association and Common Expense Liabilities subject to and in accordance with A.R.S. Section 33-1222 of the Condominium Act as it may be amended.

2.6 **Description and Allocation of Common Element Interests and Common Expense Liabilities**. The Common Elements shall include all portions of the Condominium other than the Units, including, without limitation, the land upon which the Buildings are located, the structural part of Buildings, all bearing walls, columns, vertical supports, roofs, space above the upper horizontal boundaries of Units (except as provided below), floors, foundations, slabs, all waste, water and gas pipes, ducts, flues, chimneys, (except those within the boundaries of a Unit) conduits and wires, fire sprinkler system, swimming pool and pool equipment, recreation buildings, cabanas, landscaping, exterior lighting (including lights attached to the Buildings although the electricity for such lighting will be the responsibility of the applicable Unit Owner), fences, walkways, streets, private drives, guest parking spaces, utility meters, outdoor cooking facilities, patios and all other devices and premises not situated within a Unit; provided, however, air conditioning and heating units not located within a Unit but serving only the Unit are owned by the Unit Owner. The space between the bottom of the unfinished ceiling of living space on a lower floor and the top of the unfinished floor of an upper story of living space is not part of a Unit but rather are Common Elements. The undivided interests in the Common Elements and in the Common Expenses of the Association shall be allocated equally among the Units. Accordingly, the fraction of undivided interest in the Common Elements and in the Common Expenses of the Association for each Unit shall be $1/97^{th}$.

2.7 **Allocation of Votes in the Association**. The total votes in the Association shall be equal to the number of Units. The votes in the Association shall be allocated equally among all the Units with each Unit having one (1) vote. Notwithstanding the foregoing, during the Period of Declarant Control, Declarant shall be entitled to three (3) votes for each Unit owned by Declarant.

2.8 **Allocation of Limited Common Elements.**

2.8.1 The following portions of the Common Elements are Limited Common Elements and are allocated to the exclusive use of one Unit as follows, except that the Commercial Unit(s) shall only have use of the Limited Common Elements that are located outside of the fenced area for the Residential Dwellings:

(i) Any entryways, doorsteps, patios, decks, stoops, porches and balconies, and any other fixtures and facilities designed to exclusively serve or benefit a single Unit, if and to the extent located outside the boundary of the Unit, are Limited Common Elements allocated exclusively to the Unit and their use is limited to that Unit.

(ii) Any chute, flue, pipe, duct, wire, conduit or other fixtures (including, but not limited to, gas, cable television, water and electric pipes, lines or meters) which lie outside the designated boundaries of a Unit and which serve only the Unit is a Limited Common Element allocated solely to the Unit.

(iii) The mailbox designated with the corresponding Unit number located in the Service and Amenities Common Area.

(iv) Space within the Common Elements of a size and location adequate to install, operate and maintain air conditioning and heating units and appurtenant facilities, said areas to be as originally designed, designated and installed by or on behalf of Declarant or as subsequently approved by the Board of Directors. The air conditioning and heating units and appurtenant facilities shall be owned and maintained by the Unit Owner.

(v) The utility meter serving the Unit as originally designed, designated and installed by or on behalf of Declarant and as may thereafter be modified with the approval of the Architectural Committee.

(vi) Any light(s) attached to a Building shall be for the exclusive use of the Units in that Building.

(vii) Any parking space allocated to a designated Unit located in the garage. Declarant, during the Period of Declarant Control, and thereafter the Board, shall allocate each Unit Owner one (1) designated parking space in the garage. Additional parking spaces may be assigned by Declarant during the Period of Declarant Control, and thereafter the Board, on a first-come, first serve basis at a monthly rental amount and payment terms as determined by Declarant, during the Period of Declarant Control, and thereafter the Board. Such additional parking spaces shall not be deemed "Limited Common Elements," but each Owner to whom such an additional parking space is assigned shall have the same maintenance and other obligations with respect thereto as if such space were a Limited Common Element allocated to such Owner's Unit. Storage of items, materials, or non-working vehicles by any Unit Owner, Resident, family or guests thereof is not permitted on any allocated, assigned or unassigned parking space located in the garage at any time.

2.8.2 A Limited Common Element may be reallocated by an amendment to this Declaration made in accordance with the provisions of A.R.S. § 33-1218(B) of the Condominium Act, except that a parking space allocated as Limited Common Elements pursuant to Section 2.8.1(vii) may be reallocated (with the consent of each Owner to whom such space was allocated or is being reallocated) by Declarant, during the Period of Declarant Control, and thereafter the Board.

2.8.3 The Board of Directors shall have the right, without a vote of the Members, to allocate as a Limited Common Element any portion of the Common Elements not previously allocated as a Limited Common Element. Any such allocation by the Board of

Directors shall be made by an amendment to this Declaration and an amendment to the Condominium Plat if required by the Condominium Act.

2.9 **As-Built Conditions**. Various engineering and architectural plans pertaining to the Condominium, including, but not limited to, the Condominium Plat, subdivision maps, grading plans, plot plans, improvement plans and building plans (collectively, the "Plans"), contain dimensions regarding certain aspects of the Common Elements, the Units and other parts of the Condominium. By accepting a deed to a Unit, each Unit Owner shall be deemed to have acknowledged and agreed that (a) if there is a discrepancy between the Plans and the actual as-built conditions of any Unit, Residential Dwelling, Common Element or any other Improvement within the Condominium, the as-built conditions will control and be deemed to be accepted as-is by the Unit Owner; (b) the usable or buildable area, location and configuration of the Units, Common Elements and any other Improvements located within the Condominium may deviate from the Plans or from any other display or configuration related thereto; (c) the location, size, height and composition of all walls and fences to be constructed on or as part of a Unit or adjacent thereto shall be determined by Declarant in its sole and absolute discretion. Despite the Plans or any other materials that may exist, Declarant shall be deemed to have made no representations, warranties or assurances with respect to any such matters or with respect to the size, height, location or composition of any wall or fence to be constructed on or adjacent to any Units; and (d) each Unit Owner waives the right to make any demands of or claims against Declarant as a result of any discrepancies between the Plans and any actual as-built conditions of any Unit.

ARTICLE 3
EASEMENTS AND DEVELOPMENT RIGHTS

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

3.2 **Easements for Ingress and Egress**. There is hereby created easements for ingress and egress for pedestrian traffic over, through and across streets, driveways, sidewalks, paths, walks and lanes that from time to time may exist upon the Common Elements. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across such driveways and parking areas as from time to time may be paved and intended for such purposes provided that such easements shall be subject to all other restrictions and provisions contained in this Declaration, and provided further that such easements shall not extend to any Limited Common Elements. Such easements shall run in favor of and be for the

benefit of the Unit Owners and Residents and their guests, families, tenants and invitees and in favor of Declarant.

3.3 **Unit Owners' Easements of Enjoyment.**

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

(i) The right of the Association to adopt reasonable rules and regulations governing the use of the Common Elements to the extent consistent with applicable laws including, without limitation, the right to suspend or deny access to certain recreational Common Elements by any Unit Owner (including any Lessee or Resident of such Unit Owner's Unit) who fails to timely pay any Assessments or who otherwise is in breach of any covenants, restrictions or obligations under this Declaration;

(ii) The right of the Association to convey the Common Elements or subject the Common Elements to a mortgage, deed of trust or other security interest in the manner and subject to the limitations set forth in the Condominium Act, but in no event, without the vote or written assent of those Unit Owners representing at least eighty percent (80%) of the votes in the Association and of Declarant during the Period of Declarant Control and, in all events, subject to a Unit Owner's easement for ingress and egress if access to such Unit Owner's Residential Dwelling is through the Common Elements to be so conveyed or mortgaged.

(iii) All rights and easements set forth in this Declaration including, but not limited to, the rights and easements granted to the Declarant by Sections 3.4 and 3.5 of this Declaration;

(iv) The right of the Association to suspend the right of a Unit Owner and any Resident or Lessee to use the Common Elements for any period during which the Unit Owner, a Resident or Lessee is in violation of any provision of the Condominium Documents.

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

3.3.3 The guests and invitees of a Unit Owner, Lessee or Resident entitled to use the Common Elements pursuant to Subsection 3.3.1 of this Declaration may use the Common Elements provided they are accompanied by a Member, Lessee or Resident entitled to use the Common Elements pursuant to Subsection 3.3.1 or 3.3.2 of this Declaration.

3.3.4 A Unit Owner's right and easement of enjoyment in and to the Common Elements shall not be conveyed, transferred, alienated or encumbered separate and apart from a Unit. Such right and easement of enjoyment in and to the Common Elements shall be deemed to be conveyed, transferred, alienated or encumbered upon the sale, transfer or encumbrance of any

Unit, notwithstanding that the description in the instrument of conveyance, transfer, alienation or encumbrance may not refer to such right and easement.

3.3.5 Any lease by a Unit Owner of a Unit shall be in writing and shall expressly state that the lease is subject to the requirements of this Declaration, the Association's Articles and Bylaws, the Condominium Plat and all Rules promulgated by the Board of Directors, and that all such tenants will comply with all requirements of the foregoing.

3.4 **Declarant's Rights and Easements for Sales and Leasing Purposes.**

3.4.1 Declarant shall have the right and an easement to maintain sales or leasing offices, management offices and models throughout the Condominium and to maintain advertising signs on the Common Elements while a Declarant is marketing Units in the Condominium. Declarant reserves the right to place models and sales offices in any Units owned by the Declarant and on any portion of the Common Elements in such number, of such size and in such locations as the Declarant deems appropriate.

3.4.2 Declarant may from time to time relocate models, sales offices and management offices to different locations within the Condominium. Upon the relocation of a model, management office or sales office constituting a Common Element, Declarant may remove all personal property and fixtures therefrom.

3.4.3 So long as the Declarant is marketing Units in the Condominium, Declarant shall have the right to restrict the use of the parking spaces within the Condominium. Such right shall include reserving such spaces for use by prospective Unit purchasers, employees of the Declarant and others engaged in sales, maintenance, construction or management activities.

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

3.4.5 In the event of any conflict or inconsistency between this Section 3.4 and any other provision of the Condominium Documents, this Section 3.4 shall control and prevail over such other provisions.

3.5 **Declarant's Development Rights and Easements.**

3.5.1 Declarant shall have the right and an easement on and over the Condominium to construct the Common Elements and the Units shown on the Condominium Plat and all other Improvements the Declarant may deem necessary, and to use the Common Elements and any Units owned by a Declarant for construction or renovation related purposes including the storage of tools, machinery, equipment, building materials, appliances, supplies and fixtures and the performance of work in the Condominium.

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

3.5.3 Declarant shall have an easement through the Units for any access necessary to complete any renovations, warranty work or modifications to be performed by a Declarant.

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

3.5.5 Declarant reserves the right to exercise any Development Rights and Special Declarant Rights and to exercise the rights of the Declarant as provided for in this Declaration and to subdivide Units pursuant to A.R.S. Section 33-1223, relocate boundaries between adjoining Units pursuant to A.R.S. Section 33-1222, and to convert Units into Common Elements and Common Elements into Units subject to any further restrictions set forth in this Declaration, the Condominium Act and by applicable City of Tempe zoning ordinances.

3.5.6 Declarant shall have the right to create additional Units, Common Elements and Limited Common Elements within the Condominium.

3.5.7 To the extent not expressly reserved by or granted to Declarant by other provisions of this Declaration, Declarant reserves all Development Rights and Special Declarant Rights.

3.5.8 In the event of any conflict or inconsistency between this Section 3.5 and any other provision of the Condominium Documents, this Section 3.5 shall control and prevail over such other provisions.

3.6 **Declarant's Use of Recreational Facilities**. So long as a Declarant is marketing Units for sale, such Declarant shall have the right to the exclusive use, without charge, of any portion of the recreational facilities, if any, within the Common Elements on a short-term basis for employee meetings, administrative purposes, special events or any other purpose, subject to the following: (i) the availability of the facilities at the time a request is submitted by such Declarant to the Association; (ii) the Declarant using such facilities shall indemnify the Association against any loss or damage resulting from such Declarant's use thereof; and (iii) the Declarant using such facilities shall return the facilities to the Association in the same condition as existed prior to such Declarant's use thereof. The rights of the Declarant set forth in this Section 3.6 shall be enforceable by injunction, by any other remedy in law or in equity and/or by any other means provided in this Declaration. In the event of any conflict or inconsistency between this Section 3.6 and any other provision of the Condominium Documents, the provisions of this Section 3.6 shall control and prevail over other such provisions.

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

3.8 **Common Elements Easement in Favor of the Association.**

3.8.1 The Common Elements and the Units shall be subject to an easement in favor of the Association and the agents, employees and independent contractors of the Association for the purpose of the inspection, upkeep, maintenance, repair and replacement of the Common Elements and for those components of the Units which the Association is obligated to maintain pursuant to this Declaration and for the purpose of exercising all rights of the Association and discharging all obligations of the Association.

3.8.2 Each Unit shall be subject to an easement in favor of the Association and the agents, employees and contractors of the Association for the purpose of performing such pest control activities as the Association may deem necessary to control or prevent the infestation of the Condominium by insects, rodents or other pests or to eradicate insects, rodents or other pests from the Condominium.

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

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

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

3.9.3 For the performance of the Unit Owners' obligation to maintain, repair, replace and restore those portions of the Units and the Limited Common Elements that the Unit Owners are obligated to maintain under Section 5.2 of this Declaration.

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

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

3.10.2 For inspection, maintenance, repair and replacement of the Common Elements or the Limited Common Elements situated in, on, under or above or which is accessible from such Units or Limited Common Elements;

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

3.10.4 For the purpose of enabling the Association, the Board of Directors or any other committees appointed by the Board of Directors to exercise and discharge their respective rights, powers and duties under the Condominium Documents.

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

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

ARTICLE 4
USE AND OCCUPANCY RESTRICTIONS

The following covenants, conditions and restrictions shall apply to the Property and to the Unit Owners, Residents and Lessees thereof.

4.1 **Residential Use**. All Units shall be used, improved and devoted exclusively to residential use by a Single Family. No trade or business may be conducted on any Unit or in or from any Unit, except that a Unit Owner or other Resident may conduct a business activity within a Unit so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Residential Dwelling; (ii) the business activity conforms to all applicable zoning ordinances and requirements for the Condominium; (iii) the business activity does not involve more than one (1) employee working on or from such Unit who is not a Resident thereof; (iv) the volume of vehicular or pedestrian traffic or parking generated by such trade or business does not result in congestion or parking violations; (v) the business activity does not involve persons coming onto the Unit or the door-to-door-solicitation of Unit Owners or other Residents in the Condominium; and (vi) the business activity is consistent with the residential character of the Condominium and does not constitute a nuisance or a hazardous or offensive use or threaten security or safety of other Residents in the Condominium, as may be determined from time to time in the sole discretion of the Board of Directors. The terms "business" and "trade" as used in this Section shall be construed to have

ordinary, generally accepted meanings and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (i) such activity is engaged in full or part time; (ii) such activity is intended or does generate a profit; or (iii) a license is required for such activity. The leasing of a Unit by the Unit Owner thereof shall not be considered a trade or business within the meaning of this Section.

4.2 **Antennae**. Declarant has or shall enter into one or more agreements with providers of television, broadcast satellite, cable and internet services (the "Master Technology Agreements") pursuant to which the provider(s) identified in the Master Technology Agreements shall have the exclusive right to (a) provide for the Condominium television, cable, satellite and internet services and any other services involving the providing of television service, broadcast satellite service, video programming service, multitechnical multipoint distribution service and internet service (the "Technology Services") and (b) install any cable, antenna, satellite dish or television dish and equipment other devices and improvements for the providing of such Technology Services. The Master Technology Agreements may, subject to the terms and provisions contained therein, be modified and/or replaced as the Board of Directors may deem appropriate. As the Units do not include any exterior components of any Buildings, Unit Owners are prohibited from installing or locating or causing to be installed or located on any Building, Common Element or Limited Common Element, any cable, antenna, dish, or other devise, equipment or improvement for the providing of Technology Services.

4.3 **Utility Service**. Except for lines, wires and devices existing on the Condominium as of the date of this Declaration or hereafter constructed by Declarant and except for maintenance and replacement of the same, no lines, wires or other devices for the communication or transmission of electric current or power, including telephone, television and radio signals, shall be erected, placed or maintained anywhere in or upon the Condominium unless they are installed and maintained underground or concealed in, under or on Improvements or other structures permitted under this Declaration. No provision hereof shall be deemed to forbid the erection of temporary power or telephone structures incident to the construction of Improvements by Declarant or structures approved by the Architectural Committee.

4.4 **Maintenance, Improvements and Alterations.**

4.4.1 Any Unit Owner may make nonstructural additions, alterations and improvements within his Unit without the prior written approval of the Architectural Committee, but such Unit Owner shall, to the extent permitted under Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such alterations, additions or improvements. No Unit Owner shall make any structural additions, alterations or improvements within a Unit, unless prior to the commencement of each addition, alteration or improvement, the Unit Owner receives the prior written approval of the Architectural Committee and unless an architect or engineer, licensed in Arizona, certifies that such addition, alteration or improvement will not impair the structural integrity of the Building and Unit within which such addition, alteration or improvement is to be made. The Unit Owner shall, to the extent permitted by Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such additions, alterations or improvements. Notwithstanding the

foregoing, no addition, alteration or improvement to any Unit, whether structural or not, which would be visible from the exterior of the Unit, shall be made without the prior written approval of the Architectural Committee, which approval may be granted only if the Architectural Committee affirmatively finds that the proposed addition, alteration or improvement is aesthetically pleasing and in harmony with the surrounding Improvements. Each Unit Owner shall maintain his or her Unit in good condition and repair. Except for a Unit Owner's obligation to maintain his or her Unit and any Limited Common Element for his Unit, no Unit Owner shall make any addition, alteration or improvement to the Common Elements without the prior written approval of the Architectural Committee. No exterior components of any of the Buildings are part of any Units but rather are part of the Common Elements. Accordingly, no Unit Owner shall have any right or obligation to repair, improve, paint, refinish or modify in any way any exterior components of the Buildings. All windows, exterior doors, garage doors, roof materials and other exterior surfaces and finishes of any Buildings may only be replaced by the Association and any such replacement shall be with materials of the same design, appearance, color and quality unless the Architectural Committee approves different materials and finishes.

4.4.2 The Architectural Committee shall consider and act upon any and all plans and specifications submitted for its approval under this Declaration and perform such other duties as from time to time shall be assigned to it by the Board of Directors, including the inspection of construction in progress to assure its conformance with plans approved by the Architectural Committee. No construction, alteration, location, relocation, repainting, demolishing, addition, installation, modification, decoration, redecoration or reconstruction of an Improvement, which is subject to the Architectural Committee's review as provided in this Section, shall be commenced or maintained until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and location of the same have been submitted to the Architectural Committee and approved by the Architectural Committee. It shall be the responsibility of the Unit Owner to submit the written plans and specifications to an authorized agent of the Architectural Committee. Until changed by the Board of Directors, the address for the submission of such plans and specifications shall be the principal office of the Association. The Architectural Committee may condition its approval of proposals or plans and specifications for any Improvement (i) upon the Unit Owner's furnishing the Association with security acceptable to the Association against any mechanics' liens or other encumbrance which may be Recorded against the Condominium as a result of such work; (ii) on such changes therein as it deems appropriate; (iii) upon the Unit Owner's agreement to complete the proposed work within a stated period of time; or (iv) any or all of the above, and may require submission of additional plans and specifications or other information prior to approving or disapproving material submitted.

4.4.3 The Architectural Committee may issue Architectural Committee Rules setting forth procedures for the submission of plans for approval. The Architectural Committee shall impose a reasonable fee for the review of any submitted plans and shall require that such fee accompany each application for approval. The Architectural Committee shall also be entitled to impose additional requirements and state additional factors which it will take into consideration in reviewing submissions.

4.4.4 Notwithstanding the foregoing provisions of this Section, Improvements within a Unit which are damaged or destroyed may be fully repaired, restored, replaced and/or

reconstructed in conformance with previously approved plans, specifications and materials without the necessity of submitting additional plans and specifications to the Architectural Committee or obtaining the Committee's approval.

4.4.5 Until receipt by the Architectural Committee of any required plans and specifications, the Architectural Committee may postpone review of any plans submitted for approval. Decisions of the Architectural Committee and the reasons therefore shall be transmitted by the Architectural Committee to the Unit Owner at the address set forth in the application for approval within forty-five (45) days after receipt by the Architectural Committee of all materials required by the Architectural Committee. Any application submitted pursuant to this Section shall be deemed disapproved unless written approval thereof has been transmitted by the Architectural Committee to the Unit Owner within forty-five (45) days after date of receipt by the Architectural Committee of all required materials. If any Unit Owner resubmits an application which was deemed disapproved pursuant to the preceding sentence, and in the event the Architectural Committee fails to approve or disapprove in writing such resubmitted application within thirty (30) days after the receipt by the President of the Association and any management company retained by the Association of a complete resubmitted application, duly prepared in accordance with the rules promulgated by the Declarant or the Board of Directors, as the case may be, the application shall be deemed approved by the Architectural Committee, provided such improvement, addition or alteration described in the resubmitted application is carried out in precise conformity with such application.

4.4.6 The approval of the Architectural Committee of any proposals or plans and specifications or drawings for any work done or proposed or in connection with any other matter requiring the approval and consent of the Architectural Committee shall not be deemed to constitute a waiver of any right to withhold approval or consent to any similar proposals, plans and specifications, drawings or matters subsequently or additionally submitted for approval or consent. The approval by the Architectural Committee of any construction, installation, addition, alteration, repair, change or other work pursuant to this Section shall not be deemed a warranty or representation by the Architectural Committee as to the quality of such construction, installation, addition, alteration, repair, change or other work or that such construction, installation, addition, alteration, repair, change or other work conforms to any applicable building codes or other federal, state or local law, statute, ordinance, rule or regulation.

4.4.7 The Architectural Committee may authorize variances from compliance with any of the architectural provisions of this Declaration when circumstances such as topography, natural obstructions, hardship, aesthetic or environmental considerations may require. Such variances must be evidenced in writing and must be signed by a majority of the members of the Architectural Committee. After the Period of Declarant Control expires, the Board of Directors must approve any variance recommended by the Architectural Committee before any such variance shall become effective. If such variances are granted, no violation of the covenants, conditions and restrictions contained in this Declaration shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such a variance shall not operate to waive any of the terms and provisions of this Declaration for any purpose except as to the particular Improvement and provision hereof covered by the variance, nor shall it affect in any way the Unit Owner's obligation to comply with all governmental laws and regulations affecting the use of his Unit.

4.4.8 Decisions of the Architectural Committee may be appealed to the Board of Directors. After the Period of Declarant Control expires or is terminated, the Board of Directors may adopt Rules for the appeal of Architectural Committee decisions for reconsideration by the Board of Directors.

4.4.9 Following the approval by the Architectural Committee and/or the Board of Directors of any plans for Improvements, and as a condition of commencement of construction pursuant to such approved plans, the Unit Owner shall pay to the Association a construction deposit (the "Construction Deposit") in an amount equal to the greater of (a) ten percent (10%) of the anticipated cost of the proposed improvements and (b) twelve (12) times the then current monthly Common Expense Assessment. Each Unit Owner shall be fully responsible for any damage to the Condominium and any loss, fees, costs, and expenses that may be incurred as a result of any work performed by, on behalf of, or at the request of such Unit Owner, and in the event that such amounts are not timely paid to the Association, the Association may, in addition to any other remedies the Association may have, deduct such amounts from the Construction Deposit. Upon the completion of construction, any unused portion of the Construction Deposit shall be returned to the Unit Owner.

4.4.10 No Unit Owner, other than Declarant, may subdivide his Unit without the written approval of the Architectural Committee.

4.4.11 Declarant is exempt from the provisions of this Section and need not seek nor obtain the Architectural Committee's approval of any Improvements constructed on the Condominium by Declarant.

4.5 **Trash Containers and Collection**. No garbage or trash shall be placed or kept outside of any Unit except in centralized trash containers of a type, size and style to be approved by the Board of Directors and to be situated within the Condominium at locations to be designated by the Board of Directors, provided, however, following the expiration of the Period of Declarant Control, if any change is proposed with respect to the number, location or type of trash, recycling, or compaction containers or processes, such change shall require the written approval of the City. The Board of Directors shall have the right to sign leases and/or other agreements to subscribe to trash compaction, pickup and related services for the use and benefit of the Association and all Unit Owners and Residents, and to adopt and promulgate rules and regulations regarding garbage, trash, compaction and recycling, containers, processes and collection. No incinerators shall be kept or maintained in any Unit and all Unit Owners and Residents shall comply with all trash disposal and compaction requirements and all recycling requirements contained in such rules and regulations.

4.6 **Machinery and Equipment**. No machinery or equipment of any kind shall be placed, operated or maintained upon the Condominium except such machinery or equipment as is usual and customary in connection with the use, maintenance or construction of buildings, improvements or structures which are within the uses permitted by this Declaration, and except that which a Declarant or the Association may require for the construction, operation and maintenance of the Common Elements.

4.7 **Animals**. No animals, birds, fowl, poultry or livestock shall be maintained or kept in any Units or on any other portion of the Condominium except that no more than two Permitted Pets may be kept or maintained in a Unit if they are kept, bred or raised solely as domestic pets and not for commercial purposes. For purposes of this Section, a "Permitted Pet" shall only mean a dog weighing no more than 35 pounds, a cat or a household bird. No Permitted Pet shall be allowed to make an unreasonable amount of noise, cause an odor or become a nuisance. All Permitted Pets shall be kept on a leash not to exceed six (6) feet in length when outside a Unit, and all Permitted Pets shall be directly under the Unit Owner's or Resident's control at all times. If the pet of a Unit Owner or any Lessee or Resident or any pet of any guest of a Unit Owner, Lessee or Resident relieves itself on any portion of the Condominium, the Unit Owner, Lessee, Resident or guest of the Unit Owner shall immediately pick up and properly dispose of such pet waste. No structure for the care, housing, confinement or training of any animal or pet shall be maintained in or on any Unit so as to be visible from any Common Element or any other Unit. Upon the written request of any Unit Owner, the Board of Directors shall determine whether, for the purposes of this Section, a Permitted Pet is a nuisance or is making an unreasonable amount of noise or causing an odor.

4.8 **Temporary Occupancy**. No trailer, tent, shack, garage or other structure on the Condominium and no temporary Improvement of any kind shall be used at any time for a residence, either temporarily or permanently.

4.9 **Clothes Drying Facilities**. Outside clotheslines or other outside facilities for drying or airing clothes shall not be erected, placed or maintained on the Condominium.

4.10 **Mineral Exploration**. No portion of the Condominium shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

4.11 **Diseases and Insects**. No Unit Owner shall permit any thing or condition to exist upon the Condominium which could induce, breed or harbor infectious plant diseases or noxious insects. Each Unit Owner shall perform such pest control activities as may be necessary to prevent insects, rodents and other pests from being present in his Unit.

4.12 **Vehicle and Parking Restrictions**. Except as otherwise provided in this Section, and except as otherwise expressly mandated by applicable state law with respect to certain utility service and/or emergency vehicles, all Vehicles (as defined below) must be parked only in the Garage (or, if applicable, in surface parking spaces within the Condominium, subject to the Rules). For purposes of this Section and Section 4.13 below, the terms "Vehicle" and "Vehicles" include any domestic or foreign car, station wagon, sport wagon, pickup truck of less than one (1) ton capacity with camper shells not exceeding seven (7) feet in height measured from ground level, mini-van, jeep, sport utility vehicle, motorcycle motorbikes, mopeds, mini-bikes, motor scooters, motorhomes, recreational vehicles, trailers, travel trailers, tent trailers, camper shells, detached campers, boats, boat trailers, mobile homes, or other similar machinery or equipment, whether motorized or not and similar non-commercial and non-recreational vehicles that are used by a Unit Owner for family and domestic purposes and which are used on a regular and recurring basis for basic transportation. Except for emergency repairs, no Vehicle shall be repaired, constructed or reconstructed within the Condominium.

4.13 **Towing of Vehicles**. The Board has the right, without notice, to have any Vehicle which is parked, kept, maintained, constructed, reconstructed or repaired in violation of the Condominium Documents towed away at the sole cost and expense of the owner of the Vehicle. Any expense incurred by the Association in connection with the towing of any Vehicle must be paid to the Association upon demand by the owner of the Vehicle. If the Vehicle is owned (or leased) by a Unit Owner (or by a resident of a Unit Owner), any amounts payable to the Association will be secured by the Assessment Lien against that Unit Owner's Unit, and the Association may enforce collection of those amounts in the same manner provided for in this Declaration for the collection of Assessments.

4.14 **Parking Spaces.** Except for parking spaces assigned as contemplated by Section 2.8.1(vii), the parking spaces in the Common Elements are unreserved parking spaces to be used for parking by guests and invitees of Unit Owners, Lessees, and Residents, and in no event shall such parking spaces be used by Unit Owners, Lessees, or Residents, as such persons may only park vehicles owned, leased, used, operated or controlled by them in the parking space(s) assigned to the respective Units subject, however, to the other covenants and restrictions contained in this Declaration. Notwithstanding the foregoing, parking by guests and patrons of the Commercial Unit shall only be permitted in marked spaces on non-gated portions of the Common Elements, and the Board of Directors may post signs to designate parking spaces for the Commercial Unit.

4.15 **Signs and Flags**. Except as may otherwise be permitted with respect to the Commercial Unit by this Declaration, the Board, or the Rules, and subject to the requirement of applicable law, no signs, (including, but not limited to, "For Sale" or "For Rent" or "For Lease" signs), stickers, billboards or flags of any kind shall be displayed to the public view on any exterior portion (or interior portion of a Unit if the sign would be visible from the exterior of the Building in which the Unit is located) of the Condominium except for: (i) signs as may be required by legal proceedings; (ii) not more than two (2) signs for each Unit for identification of the address of such Unit with a combined total face area of eighty-four (84) square inches or less; (iii) such signs as may be erected by a Declarant in connection with the development of any Unit or the Condominium or the sale by Declarant of any Unit; (iv) signage for the Condominium at such locations designated or installed by a Declarant; and (v) American flags attached to a Unit and displayed in a manner consistent with the federal flag code, 4 U.S.C. § 4-10, and any other flags an Owner or Occupant is specifically authorized by applicable Arizona law to display; provided, however, that except as otherwise provided by applicable law, the Architectural Committee may adopt reasonable rules and regulations regarding the placement and manner of display of any American or other flag(s) and may regulate the location and size of flagpoles to be attached to any Unit; (vi) not more than two (2) security signs and stickers with maximum dimensions of six (6) inches by six (6) inches for professional security companies which may be retained by Unit Owners to provide security monitoring services; and (vii) such other signs, the nature, number and location of which shall have been approved in advance by the Association. The Board, or the Rules, may designate a "Notice Board" for the use of the Owners or Occupants of a Unit to post a notice that a Unit is available for sale, rent or lease, and the location and installation of such Notice Board shall be determined by the Board. All signs permitted under this Section shall require the approval of the Architectural Committee as to the size, color, design, message content, location, type and hours of display.

4.16 **Lawful Use**. No unlawful use shall be made of any part of the Condominium. All laws, zoning ordinances and regulations of all governmental bodies having jurisdiction over the Condominium shall be observed. Any violation of such laws, zoning ordinances or regulations shall be a violation of this Declaration.

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

4.18 **Window Coverings**. The Declarant shall initially install draperies or suitable window treatments on all windows facing the streets and Common Elements adjacent to its Unit. A Unit Owner may replace any such drapery or window treatment with a drapery or window treatment of equal of better quality, subject to further regulation by the Board. Any such replacement window treatment which is visible from neighboring property must be neutral in color. No bed sheets, blankets, bedspreads or other items not designed for use as curtains or other window coverings may be used. No reflective coating, materials or covering may be placed on the interior or exterior of any window of any Unit or other improvement. No external window covering may be placed, or permitted to remain, on any window of any Unit or other improvement without the prior written approval by the Architectural Committee.

4.19 **Limitation on Leasing or Rental of Units**. A Unit Owner may rent or lease the entire Unit, or a portion of a Unit as described below, and if so rented or leased, the occupancy thereof shall be limited to the Lessee under the lease, or leases, and his family and guests. A Unit Owner may lease a portion of a Unit, although the total number of Persons permitted to be Residents of a Unit shall not exceed five (5). Notwithstanding the foregoing, no Unit Owner shall be permitted to lease a Unit for transient or hotel purposes. All lease agreements shall be in writing, shall be for terms of at least six (6) months and shall provide that the terms of the Lease shall be subject in all respects to the provisions of this Declaration and the Condominium Documents and any failure by Lessee to comply with the terms of such documents shall be a default under the lease. For purposes of this Declaration, "lease" shall mean any agreement for the leasing or rental of a Unit. Upon leasing his Unit or a portion of his Unit, a Unit Owner shall promptly notify the Association in writing of the commencement date and termination date of the lease, together with the names of each Lessee or other person who will be occupying the Unit during the term of the lease. The Board reserves the right to modify the permitted number of Residents per Unit.

4.20 **Porches, Balconies, Patios**. Subject to further regulation by the Board, acceptable items to be kept on any porch, balcony or patio include patio furniture, potted plants, and small barbeques, which items must at all times be in good condition and repair and kept in an orderly and uncluttered fashion. The Board of Directors may require that an item be removed from any porch, balcony or patio if such item is deemed to be a hazard to the Condominium, or if such item is a nuisance to other Unit Owners or Residents.

4.21 **Declarant Approval Required**. After the expiration of the Period of Declarant Control and for so long as a Declarant owns any Unit, any action for which the consent or approval of the Board of Directors is required under this Declaration may be taken only if such action is also consented to or approved by the Declarant.

4.22 **Basketball Goals**. No basketball goals of any type (whether portable or permanent) may be installed, placed, situated or kept on any Unit or within the Condominium.

4.23 **Commercial Unit**. As of the date this Declaration is Recorded, the property comprising the Condominium is located within the MU-4 zone ("MU-Zone"), as more particularly described in the City of Tempe Land Use Code. References in this Section 4.23 to the "Code" shall mean the City of Tempe Land Use Code as in effect on the date this Declaration is Recorded, and references in this Section 4.23 to the MU-Zone shall mean such zone, as defined and described in the Code as of the date this Declaration is Recorded. No use of any Unit, including but not limited to the Commercial Unit, shall be permitted if that use (a) is prohibited by the Code within the MU-Zone, or (b) would require a special exception approval procedure under the Code, or (c) violates any conditions or restrictions placed by the City of Tempe on the property comprising the Condominium as a part of any zoning or subdivision approval process or procedure; or (d) is a Secondary Land use in the MU-Zone under the Code. Further, only the following uses, as defined and described in the Code for the MU- Zone, shall be permitted within the Commercial Unit:

(a) Administrative and Professional;

(b) Childcare Center; Tutoring and After School Learning Center;

(c) Financial Services (but not drive through);

(d) Clinic (medical, dental, veterinary (small animals);

(e) Religious Use; and

(f) Services (i.e. Fitness Studio, Barber/Beauty Salon).

Notwithstanding the foregoing, or any other provision of this Declaration, to the contrary, no change in the use of the Commercial Unit shall be made or permitted unless and until: (a) the Owner thereof (or its designee) has provided written notice to the Board of the proposed new use, which notice shall provide a reasonably detailed description of the proposed new use and shall list and describe any new, additional or replacement permits, approvals or requirements imposed or required by the City of Tempe or any other municipal or other governmental agency in connection with the proposed new use; and (b) the Owner thereof (or its designee) has demonstrated, to the reasonable satisfaction of the Board, either: (i) that the proposed new use will not, under applicable codes, ordinances or stipulations, require an increase in parking spaces available for the Commercial Unit and its employees, guests, customers and invitees, and will not otherwise impose any greater adverse impact or use of other parking spaces in the Condominium by the Owners of the other Units and their permitted residents, occupants, tenants, guests and invitees than existed for the use to be supplanted by the proposed new use; or (ii) the

manner in which the Owner will accommodate any such increase in parking requirements (such as, but without limitation, through use of valet services and agreements with owners of property outside the condominium for use of parking facilities on such property). The Board may also impose such reasonable rules and regulations (as a part of the Rules) on the uses and operation of or in the Commercial Unit as the Board reasonably deems necessary for the protection, preservation and general benefit of the Condominium as a whole and all Unit Owners, including, without limitation, reasonable rules and regulations on parking within the parking spaces in the Condominium or other portions of the property comprising the Condominium by employees and customers.

ARTICLE 5
MAINTENANCE AND REPAIR OF COMMON ELEMENTS AND UNITS

5.1 **Duties of the Association**. Except as otherwise specifically set forth in this Declaration the Association shall maintain, repair and make necessary improvements to all Common Elements including, without limitation, the exteriors of all Buildings, all windows and exterior doors within the Condominium, all Limited Common Elements, the Private Street, all parking spaces, sidewalks, landscaping, street lights, lighting and light fixtures in the Common Elements, and all other Improvements within the Condominium. All items to be maintained by the Association under this Declaration must be maintained in a first class manner in accordance with applicable requirements of the City of Tempe, and in substantial conformance with the original plans for such Common Elements and all applicable warranty manuals. The cost of all such repairs and maintenance shall be a Common Expense and shall be paid for by the Association. Subject to the foregoing, the Board of Directors shall determine, in its sole discretion, the level and frequency of maintenance of the Common Elements. No Unit Owner, Lessee, Resident or other Person shall construct or install any Improvements on the Common Elements or alter, modify or remove any Common Elements without the written approval of the Board of Directors. No Unit Owner, Lessee, Resident or other Person shall obstruct or interfere with the Association in the performance of the Association's maintenance, repair and replacement of the Common Elements. The Association shall be responsible for all costs to water any landscaping on the Common Elements.

5.2 **Duties of Unit Owners**. Each Unit Owner shall (i) maintain his Unit in good condition and repair, (ii) maintain all sewer taps, lines and facilities located within its Unit and all sewer taps, lines and facilities situated outside of its Unit but which serve only its Unit, including, without limitation, the sewer tap, lines and facilities serving its Unit which are located in the Common Elements. In addition to the foregoing, each Unit Owner is responsible for maintaining and repairing and is liable for any expense related to the utility connections within his Unit or which serve his Unit exclusively, the sewer clean-out, the water box and the power meter appurtenant to said Unit, except to the extent the regulated utility maintains the same. Each Unit Owner is responsible for all mold remediation in such Unit Owner's Unit.

5.3 **Repair or Restoration Necessitated by Unit Owner**. Each Unit Owner shall be liable to the Association, to the extent permitted by Arizona law, for any damage or excessive wear and tear to the Common Elements or the Improvements thereon, the Unit Owner's allocable Limited Common Elements, or any other part of the Condominium (including without limitation, windows, and exterior doors) the Association is responsible to maintain, repair, paint

and replace to the extent such damage or excessive wear and tear results from the negligence, neglect, abuse or willful conduct of the Unit Owner or of any Lessee or Resident of a Unit, and any guest or invitee of a Unit Owner. An amount equal to one hundred twenty percent (120%) of the cost to the Association of any repair, painting, maintenance or replacements required by the act of a Unit Owner, or a Lessee, family member, guest or invitee of a Unit Owner or of any other occupant of a Unit Owner's Unit shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.4 **Unit Owner's Failure to Maintain**. If a Unit Owner fails to maintain in good condition and repair his Unit or any Limited Common Element or any other portion of the Condominium he is obligated to maintain under this Declaration, and the required maintenance, repair or replacement is not performed within fifteen (15) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. An amount equal to one hundred twenty percent (120%) of the cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Subsection 7.2.4 of this Declaration.

ARTICLE 6
THE ASSOCIATION; RIGHTS AND DUTIES, MEMBERSHIP

6.1 **Rights, Powers and Duties of the Association**. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than two-thirds (2/3) of the votes in the Association. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board of Directors. The Association has the specific duty to make available to Declarant, Eligible Mortgage Holders, Unit Owners and insurers or guarantors of any First Mortgage during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expense.

6.2 **Directors and Officers.**

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

6.2.2 Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors, which must consist of at least five (5) members, at least a majority of whom must be Unit Owners. Of the five members of the Board, one (1) shall be elected by a majority vote of the Owners of the Commercial Unit, and the remainder shall be elected by a majority vote of the remaining owners. If, after termination of the Period of Declarant Control any seat on the Board becomes vacant due to the death, removal or resignation of a director, the replacement for that director will be selected in the following manner: if the vacant seat was held by a director elected by the Unit Owners of the Commercial Unit, the replacement for such director shall be selected by the vote or written consent of the Unit Owners of a majority of the Commercial Unit, and if the vacant seat was held by a director elected by the Unit Owners of the other Units, the replacement for such director shall be selected by the vote or written consent of the Unit Owners of a majority of the Units excluding the Commercial Unit. In any such case, the replacement director shall serve for the remainder of the term of the director he or she was selected to replace (but shall not be disqualified from being elected to a new term upon the completion of the remainder of his or her predecessor's term). The Board of Directors elected by the Unit Owners shall then elect the officers of the Association. The terms of the Directors shall be staggered as set forth in the Bylaws.

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

6.3 **Rules**. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend and repeal rules and regulations. The Rules may, among other things, restrict and govern the use of any area by any Unit Owner, Resident, by the family of such Unit Owner or Resident, or by any invitee, licensee or Lessee of such Unit Owner; provided, however, that the Rules may not unreasonably discriminate among Unit Owners and shall not be inconsistent with the Condominium Act, the applicable federal and state Fair Housing Acts, this Declaration, the Articles or Bylaws. A copy of the Rules, as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Unit Owner and may be Recorded.

6.4 **Composition of Members**. Each Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners. Membership in the Association is mandatory, and the allocated interests thereof are appurtenant thereto, and may not be separated from, ownership of the Unit; provided, however, the allocated interests of Units from time to time may be modified or changed as expressly permitted in this Declaration and authorized under the Condominium Act. No Unit

Owner, during his ownership of a Unit, shall have the right to relinquish or terminate his membership in the Association.

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

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

6.7 **Voting Rights**. Subject to Section 6.8, and except as may be otherwise provided in this Declaration, each Unit Owner of a Unit, including the Declarant, shall be entitled to cast one (1) vote for each Unit owned by such Unit Owner, on any Association matter which is put to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws.

6.8 **Voting Procedures**. No change in the ownership of a Unit shall be effective for voting purposes unless and until the Board is given actual written notice of such change and is provided satisfactory proof thereof. The vote for each such Unit must be cast as a unit, and fractional votes shall not be allowed. In the event that a Unit is owned by more than one (1) Person and such Persons are unable to agree among themselves as to how the vote for their Unit shall be cast, they shall lose their right to vote on the matter in question. If any Member casts a vote representing a certain Unit, it will thereafter be conclusively presumed for all purposes that such Unit Owner was acting with the authority and consent of all other Unit Owners of the same Unit unless objection thereto is made at the time the vote is cast. In the event more than one (1) vote is cast by a Member for a particular Unit, none of the votes shall be counted and all of the votes shall be deemed void.

6.9 **Transfer of Membership**. The rights and obligations of any Member other than the Declarant shall not be assigned, transferred, pledged, conveyed or alienated in any way except upon transfer of ownership of a Unit Owner's Unit, and then only to the transferee of ownership of the Unit. A transfer of ownership of a Unit may be effected by deed, intestate succession, testamentary disposition, foreclosure of a mortgage or deed of trust of record, or such other legal process as now in effect or as may hereafter be established under or pursuant to the laws of the State of Arizona. Any attempt to make a prohibited transfer shall be void. Any transfer of ownership of a Unit shall operate to transfer the membership appurtenant to said Unit to the new Unit Owner thereof. Each Purchaser of a Unit shall notify the Association of its purchase within ten (10) days after becoming the Unit Owner of a Unit.

6.10 **Suspension of Voting Rights**. If any Unit Owner fails to pay any Assessments or other amounts due to the Association under the Condominium Documents within fifteen (15) days after such payment is due or if any Unit Owner violates any other provision of the Condominium Documents and such violation is not cured within fifteen (15) days after the Association notifies the Unit Owner of the violation, the Board shall have the right to suspend such Unit Owner's right to vote until such time as all payments, including interest and attorneys' fees, are brought current, and until any other infractions or violations of the Condominium Documents are corrected.

6.11 **Conveyance or Encumbrance of Common Elements**. The Common Elements shall not be conveyed or subjected to a mortgage, deed of trust or security interest without the prior written consent or affirmative vote of Unit Owners representing at least eighty percent (80%) of the votes allocated to Unit Owners other than the Declarant. In addition, any conveyance, encumbrance, judicial sale or other transfer (whether voluntary or involuntary) of an individual interest in the Common Elements shall be void unless the Unit to which that interest is allocated also is transferred.

6.12 **Architectural Committee**. The Board of Directors shall establish an Architectural Committee consisting of not less than three (3) members appointed by the Board of Directors to regulate the external design, appearance, use and maintenance of the Condominium and to perform such other functions and duties as are imposed upon it by the Condominium Documents or the Board of Directors. Plans submitted to the Committee may be approved with the consent of a majority of Committee members. Subject to the right and power of the Board of Directors to remove and replace, at any time, any member of the Architectural Committee, Committee members shall serve one (1) year terms. If the Board of Directors does not appoint an Architectural Committee at any time, then the Board of Directors members shall serve as the Architectural Committee. Notwithstanding any provision contained in this Declaration, Declarant shall, as long as it owns any Unit or any Annexable Property, have the exclusive right to appoint the members of the Architectural Committee and such persons need not be Unit Owners.

6.13 **Management and Maintenance Contracts**. The Association shall enter into a management agreement with a professional management company to manage the operation and affairs of the Association, and in no event shall the Association be self-managed unless a self-management agreement program is approved by at least two-thirds (2/3) of the Unit Owners. The management company must (a) have significant experience in managing communities such as the Condominium; (b) be bonded and maintain insurance in amounts acceptable to the Association, which at a minimum shall include general liability insurance with coverage equal to or exceeding $1,000,000 per occurrence and $2,000,000 in the aggregate; (c) require its financial accounting services be completed by a degreed accountant and be reviewed at year end by a Certified Public Accountant; and (d) possess such qualifications as deemed necessary and appropriate by the Association. The Association shall also enter into a landscaping agreement with a professional landscape company to provide all landscaping services for the Common Elements. The landscape company must (a) be a licensed Arizona contractor, and (b) must maintain insurance acceptable to the Association; (c) employ an Arizona Certified Landscape Professional and an Arborist certified by the International Society of Arboriculture; and (d) shall possess such other qualifications and certifications as the Association shall deem necessary and

appropriate. Any agreement for professional management of the Association or any other Association contract or lease executed by a Declarant or any member, agent or representative of Declarant during the Period of Declarant Control must allow for termination by either party without cause and without payment of a termination fee upon thirty (30) days or less written notice.

ARTICLE 7
ASSESSMENTS

7.1 **Preparation of Budget.**

7.1.1 At least thirty (30) days before the beginning of each fiscal year of the Association, commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the Board of Directors shall adopt a budget for the Association containing an estimate of the total amount of funds which the Board of Directors believes will be required during the ensuing fiscal year to pay all Common Expenses, including, but not limited to: (i) the amount required to pay the cost of maintenance, management, operation, repair and replacement of the Common Elements, Limited Common Elements and those parts of the Units, if any, which the Association has the responsibility of maintaining, repairing and replacing; (ii) the cost of wages, materials, insurance premiums, services, supplies and other expenses required for the administration, operation, maintenance and repair of the Condominium; (iii) the amount required to render to the Unit Owners all services required to be rendered by the Association under the Condominium Documents; and (iv) such amounts as may be necessary to provide general operating reserves and reserves for contingencies, major repairs and replacements, including for the Common Elements and Limited Common Elements. The amount budgeted for reserves shall be established in accordance with Section 7.13 of this Declaration. The budget shall separately reflect any Common Expenses to be assessed against less than all of the Units pursuant to Subsection 7.2.4 or 7.2.5 of this Declaration and must include an adequate allocation to reserves as part of the Common Expense Assessment.

7.1.2 Upon the adoption of a budget, the Board of Directors shall make available to each Unit Owner a summary of the budget and a statement of the amount of the Common Expense Assessment assessed against the Unit of the Unit Owner in accordance with Section 7.2 of this Declaration. The failure or delay of the Board of Directors to prepare or adopt a budget for any fiscal year shall not constitute a waiver or release in any manner of a Unit Owner's obligation to pay his allocable share of the Common Expenses as provided in Section 7.2 of this Declaration, and each Unit Owner shall continue to pay the Common Expense Assessment against his Unit as established for the previous fiscal year until a notice of the Common Expense Assessment for the new fiscal year has been established by the Board of Directors.

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

7.2 **Common Expense Assessment.**

7.2.1 For each fiscal year of the Association commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the total amount of the estimated Common Expenses set forth in the budget adopted by the Board of Directors (except for the Common Expenses which are to be assessed against less than all of the Units pursuant to Subsections 7.2.4 and 7.2.5 of this Declaration) shall be assessed against each Unit based upon the type of each Unit in proportion to the Unit's Common Expense Liability as set forth in Section 2.11 of this Declaration. The amount of the Common Expense Assessment assessed pursuant to this Subsection 7.2.1 shall be in the sole discretion of the Board of Directors; provided, however, the Common Expense Assessment for each Unit shall be during each year following the year of the conveyance of the first Unit to a Purchaser be increased in accordance with Section 7.2.2 of this Declaration. If the Board of Directors determines during any fiscal year that its funds budgeted or available for that fiscal year are, or will become, inadequate to meet all Common Expenses for any reason, including, without limitation, nonpayment of Assessments by Members, it may increase the Common Expense Assessment for that fiscal year and the revised Common Expense Assessment shall commence on the date designated by the Board of Directors.

7.2.2 The Common Expense Assessments shall commence as to all Units on the first day of the month following the conveyance of the first Unit to a Purchaser; provided, however, the Common Expense Assessment for any Unit which has not been conveyed to an initial Purchaser shall be an amount equal to twenty-five percent (25%) of the Common Expense Assessments for Units. So long as any Unit owned by the Declarant qualifies for the reduced Common Expense Assessment provided for in this Subsection 7.2.2, Declarant shall be obligated to pay to the Association any deficiency in the monies of the Association due to the Declarant having paid a reduced Common Expense Assessment and necessary for the Association to be able to timely pay all Common Expenses. The first Common Expense Assessment shall be adjusted according to the number of months remaining in the fiscal year of the Association. Declarant shall receive a credit toward any obligation of Declarant to pay Assessments or any subsidy for the amount of any Common Expenses advanced or paid by Declarant, but Declarant shall have no obligation whatsoever to make any such advances or payments. Declarant shall also receive a credit toward any assessment or subsidy for any "in-kind" contributions by Declarant of goods or services, which shall be valued at the fair market value of the goods and services contributed. The Board of Directors may require that the Common Expense Assessments or Special Assessments be paid in monthly, quarterly, semi-annual or annual installments. Upon commencement of the first fiscal year of the Association immediately following the conveyance of the first Unit to a Purchaser, the maximum monthly assessment payment for the Common Expense Assessment payable by each Unit Owner shall be in such amount as determined by the Board of Directors prior to such first conveyance. Upon the commencement of the first fiscal year of the Association immediately following the conveyance of the first Unit to a Unit Owner and at the commencement of each and every fiscal year thereafter, the Board of Directors may increase the maximum Common Expense Assessments payable by each Unit Owner by any amount determined by the Board of Directors to be appropriate in order to maintain the Condominium and operate the Association subject to any limits imposed by applicable law.

7.2.3 Except as otherwise expressly provided for in this Declaration, all Common Expenses, including, but not limited to, Common Expenses associated with the

maintenance, repair and replacement of a Limited Common Element, shall be assessed against all of the Units in accordance with Subsection 7.2.1 of this Declaration.

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

7.2.5 Assessments to pay a judgment against the Association may be made only against the Units in the Condominium at the time the judgment was entered in proportion to their Common Expense Liabilities.

7.2.6 All Assessments, monetary penalties and other fees and charges levied against a Unit shall be the personal obligation of the Unit Owner at the time the Assessments, monetary penalties or other fees and charges become due. The personal obligation of a Unit Owner for Assessments, monetary penalties and other fees and charges levied against his Unit shall not pass to the Unit Owner's successors in title unless expressly assumed by them.

7.2.7 Any funds in the Association's operating account at the end of such fiscal year which are not needed to pay Common Expenses payable within thirty (30) days shall be deposited into the Association's Working Capital Account to be established pursuant to Section 7.10 below.

7.3 **Special Assessments**. In addition to Common Expense Assessments, the Association may levy in any fiscal year of the Association a special assessment applicable to that fiscal year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement of the Common Elements, including landscaping, fixtures and personal property related thereto, or for any other lawful Association purpose; provided that any Special Assessment (other than a Special Assessment levied pursuant to Article 9 of this Declaration as a result of the damage or destruction of all or part of the Common Elements) shall have first been approved by Unit Owners representing two-thirds (2/3) of the votes in the Association who are voting in person or by proxy at a meeting duly called for such purposes. Special Assessments shall be allocated among the Units in accordance with the Units' respective shares of Common Expense Assessments. Unless otherwise specified by the Board of Directors, Special Assessments shall be due thirty (30) days after they are levied by the Association and notice of the Special Assessment is given to the Unit Owners.

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

7.4.1 Any Assessment or any installment of an Assessment which is not paid within fifteen (15) days after the Assessment first became due shall be deemed delinquent and shall bear interest from the date of delinquency at the highest rate which the Association is entitled to charge or at such lower rate of interest as may be established from time to time by the Board of Directors. In addition to or in lieu of interest, the Board of Directors may establish a reasonable late fee for delinquent assessments to be charged to a Unit Owner and assessed against his Unit as part of the Assessment Lien for each installment of an Assessment not paid within fifteen (15) days of its due date.

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

7.4.3 The Association shall have the right, at its option, to enforce collection of any delinquent Assessments, monetary penalties and all other fees and charges owed to the Association in any manner allowed by law, including, but not limited to: (i) bringing an action at law against the Unit Owner personally obligated to pay the delinquent amounts and such action may be brought without waiving the Assessment Lien securing any such delinquent amounts; (ii) bringing an action to foreclose its Assessment Lien against the Unit in the manner provided by law for the foreclosure of a realty mortgage; and (iii) suspending voting and recreational amenities use rights as provided in the Bylaws. The Association shall have the power to bid in at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any and all Units purchased at such sale.

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

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

7.7 **Certificate of Payment**. The Association, upon written request, shall furnish or cause the Association's management company to furnish, to a lienholder, Unit Owner or person designated by a Unit Owner a recordable statement setting forth the amount of unpaid Assessments against his Unit. The statement shall be furnished within fifteen (15) days after receipt of the request and is binding on the Association, the Board of Directors and every Unit Owner. The Association or the Association's management company, as the case may be, may charge a reasonable fee in an amount established or approved by the Board of Directors for each such statement.

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

7.9 **Working Capital Assessments.** To insure that the Association shall have adequate funds to meet its expenses and to purchase necessary materials and services and to meet unforeseen expenditures, each Unit Owner who purchases a Unit from Declarant (an "Initial Purchaser") shall pay to the Association, immediately upon becoming the Unit Owner, a sum equal to one-sixth (1/6) of the then current annual Common Expense Assessment for the Unit. With respect to conveyances of a Unit following the conveyance of the Unit to the Initial Purchaser, each such subsequent Purchaser of a Unit shall pay to the Association at the closing of its purchase of the Unit a Working Capital Assessment in such amount as is established from time to time by the Board of Directors but which Working Capital Assessment shall not exceed one-sixth (1/6 of the then current annual Common Expense Assessment for the Unit. The Working Capital Assessment described in the immediately preceding sentence of this Section, shall not be payable with respect to (a) the transfer or conveyance of a Unit by device or intestate succession; (b) a transfer or conveyance of a Unit to a family trust, family limited partnership or other Person for bona fide estate planning purposes; (c) a transfer or conveyance of a Unit to a corporation, partnership or other entity in which the grantor owns a majority interest unless the Board of Directors determines, in its sole discretion, that a material purpose of the transfer or conveyance was to avoid payment of any Assessments or a Working Capital Assessment; (d) the conveyance of a Unit by a trustee's deed following a trustee's sale under a deed of trust; or (e) a conveyance of a Unit as a result of the foreclosure of a realty mortgage or the forfeiture or foreclosure of a purchaser's interest under a Recorded contract for the conveyance of real property subject to A.R.S. § 33-741, et seq. All Working Capital Assessments shall be non-refundable and shall not be considered as an advance payment of any Assessments levied by the Association pursuant to this Declaration. The Association shall establish a separate working capital account (the "Working Capital Account") into which all working capital assessments shall be deposited. The Board of Directors may use the Working Capital Assessments deposited in the Working Capital Account for any lawful purpose.

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

7.11 **Transfer Fee**. Each Unit Owner other than Declarant shall pay to the Association immediately upon becoming the Unit Owner a transfer fee in an amount determined by the Board of Directors to cover administrative costs incurred by the Association in connection with such transfer. The transfer fee provided for above shall be in addition to, and shall not be offset against or considered as an advance payment of any Assessment levied by the Association pursuant to this Declaration.

7.12 **Utility Charges**. Each Unit Owner shall be responsible for separately paying all utility bills for his or her Unit, and the Association shall have no involvement with the providing of and billing for utility services.

7.13 **Reserves**. The Assessments shall include reasonable amounts as determined by the Board of Directors to be collected as reserves for the future periodic maintenance, repair or replacement of all or a portion of the Common Elements, or any other purpose as determined by the Board of Directors. All amounts collected as reserves, whether pursuant to this Section or otherwise, shall be deposited by the Board of Directors in a separate bank account to be held in trust for the purposes for which they are collected and which are to be segregated from and not commingled with any other funds of the Association. Such reserves shall be deemed a contribution to the capital account of the Association by the Members. The Board of Directors shall not expend funds designated as reserve funds for any purpose other than those purposes for which they were collected and except as authorized in a Resolution of the Board of Directors. The Board of Directors shall obtain a reserve study at least once every three (3) years following the expiration of the Period of Declarant Control, which study shall be prepared by an independent company experienced and qualified to prepare such studies and which study shall, at a minimum, include (a) reserves of the major components of the Common Elements identified on Exhibit B to this Declaration which the Association is obligated to repair, replace, restore or maintain; (b) identification of the probable remaining useful life of the identified major components as of the date of the study; (c) an estimate of the cost of repair, replacement, restoration or maintenance of the identified major components during and at the end of their useful life; (d) an estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the identified major components during and at the end of their useful life, after subtracting total reserve funds as of the date of the study. The Board of Directors shall modify the budget in accordance with the findings of the reserve study.

ARTICLE 8
INSURANCE

8.1 **Scope of Coverage.**

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

(i) A blanket causes of loss – special form policy of property insurance with sprinkler leakage, debris removal and water damage endorsements, insuring the entire Condominium, except for (i) options, extras, additions, alterations and improvements supplied or installed by or at the request of the Unit Owners; and (ii) furniture, furnishings or other personal property of the Unit Owners. Such property insurance shall cover the interests of the Association, the Board of Directors and all Unit Owners and their mortgagees, as their interests may appear (subject, however, to the loss payment adjustment provisions in favor of an Insurance Trustee), in an amount equal to one hundred percent (100%) of the then current replacement cost of the Condominium (exclusive of the land, excavations, foundations and other items normally excluded from such coverage), without deduction for depreciation. The replacement cost shall be reviewed annually by the Board of Directors with the assistance of the insurance company affording such coverage. The Board of Directors shall also obtain and maintain such coverage on all personal property owned by the Association.

(ii) Commercial general liability insurance, for a limit to be determined by the Board of Directors, but not less than $1,000,000 for any single occurrence and $2,000,000 general aggregate and an umbrella policy in the amount of not less than $1,000,000. Such insurance shall cover all occurrences commonly insured against for death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the Common Elements. Such policy shall include (i) a cross liability clause to cover liabilities of the Unit Owners as a group to a Unit Owner, (ii) medical payments insurance and contingent liability coverage arising out of the use of hired and non-owned automobiles, (iii) coverage for any legal liability that results from lawsuits related to employment contracts in which the Association is a party; and (iv) a waiver of the contractual liability exclusion for personal injury.

(iii) Workmen's compensation insurance to the extent necessary to meet the requirements of the laws of Arizona and a policy of employer's liability insurance with coverage limits determined by the Board of Directors.

(iv) Directors' and officers' liability insurance covering all the directors and officers of the Association in such limits as the Board of Directors may determine from time to time, but not less than $1,000,000.

(v) Such other insurance as the Association shall determine from time to time to be appropriate to protect the Association, the members of the Board of Directors, the members of any committee of the Board of Directors and the Unit Owners, including, without limitation, umbrella general liability insurance which would provide general liability coverage in excess of the coverage provided by the policy to be obtained pursuant to Section 8.1.1(i) above.

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

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

(b) There shall be no subrogation with respect to the Association, its agents, servants and employees against Unit Owners and members of their household.

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

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

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

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

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

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

(vii) If applicable, pressured, mechanical and electrical equipment coverage on a comprehensive form in an amount not less than $500,000 per accident per location.

(viii) If required by any governmental or quasi-governmental agency (including, without limitation, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation) flood insurance in accordance with the applicable regulations of such agency.

(ix) Such other insurance as may be required to be carried by the Association in order for the Association to be in compliance with all applicable requirements established by the Federal Housing Administration, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association or any other governmental agency, except to the extent such coverage is not reasonably available or has been waived in writing by such agencies, as applicable.

(x) "Agreed Amount" and "Inflation Guard" endorsements, except where not applicable or available.

8.1.2 If, at the time of a loss insured under an insurance policy purchased by the Association, the loss is also insured under an insurance policy purchased by a Unit Owner, the Association's policy shall provide primary coverage.

8.1.3 The Board of Directors may select deductibles applicable to the insurance coverage to be maintained by the Association pursuant to this Section 8.1 in order to reduce the premiums payable for such insurance. The Unit Owner which is the subject of any claim shall be responsible for paying or reimbursing the Association for any deductible payable in connection with such claim. In the event any single claim is made with respect to more than one (1) Unit and only a single deductible is charged by the insurance carrier, the deductible amount shall be assessed in equal shares to each of the affected Units. The deductible payable with respect to

damage to Common Elements shall be a Common Expense, but the Association may assess to a Unit Owner any such deductible amount necessitated by the negligence, misuse or neglect for which such Unit Owner is responsible. Each Unit Owner will be responsible for any and all deductibles for all insurance maintained by a Unit Owner pursuant to Section 8.4.

8.1.4 Notwithstanding any of the other provisions of this Article 8 to the contrary, there may be named as an insured, on behalf of the Association, the Association's authorized representative, including any trustee with whom the Association may enter into any Insurance Trust Agreement or any successor to such trustee who shall have exclusive authority to negotiate losses under any policy providing such property or liability insurance and to perform such other functions as are necessary to accomplish such purpose. Each Unit Owner appoints the Association, as attorney-in-fact for the purpose of purchasing and maintaining such insurance, including: (a) the collection and appropriate disposition of the proceeds thereof; (b) the negotiation of losses and execution of releases of liability; (c) the execution of all documents; and (d) the performance of all other acts necessary to accomplish such purpose.

8.1.5 The Association and its directors and officers shall have no liability to any Unit Owner or First Mortgagee or other Person having a lien on a Unit if, after a good faith effort, (a) the Association is unable to obtain insurance required hereunder because the insurance is no longer available; (b) if available, the insurance can be obtained only at a cost that the Board of Directors, in its sole discretion, determines is unreasonable under the circumstances; or (c) the Members fail to approve any increase in the Common Expense Assessment needed to pay the insurance premiums.

8.1.6 The Board of Directors shall determine annually whether the amounts and types of insurance the Association has obtained provide adequate coverage in light of increased construction costs, inflation, practice in the area in which the Condominium is located, or any other fact which tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interests of the Unit Owners and of the Association.

8.2 **Fidelity Bonds.**

8.2.1 The Association shall maintain blanket fidelity bonds for all officers, directors, trustees and employees of the Association and all other persons handling or responsible for funds of or administered by the Association, including, but without limitation, officers, directors and employees of any management agent of the Association, whether or not they receive compensation for their services. The total amount of the fidelity bonds maintained by the Association shall be based upon the best business judgment of the Board of Directors, and shall not be less than the greater of the estimated maximum funds, including reserve funds, in the custody of the Association or the management agent, as the case may be, at any given time during the term of each bond, or the sum equal to three (3) months aggregate Common Expense Assessments on all Units plus reserve funds. Fidelity bonds obtained by the Association must comply with all requirements imposed by governmental agencies which insure home mortgages and must also meet the following requirements:

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

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

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

8.2.2 The Association shall require any management agent of the Association to maintain its own fidelity bond in an amount equal to or greater than the amount of the fidelity bond to be maintained by the Association pursuant to Subsection 8.2.1. The fidelity bond maintained by the management agent shall cover funds maintained in bank accounts of the management agent and need not name the Association as an obligee.

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

8.4 **Insurance Obtained by Unit Owners**. Each Unit Owner shall be responsible for: (a) property insurance on his personal property located in his Unit and elsewhere on the Condominium; (b) property insurance on any options, extras, additions, alterations and improvements to his Unit (whether installed by a Declarant, by such Unit Owner or any prior Unit Owner); and (c) comprehensive general liability insurance to the extent not covered by the policies of liability insurance obtained by the Board of Directors for the benefit of all of the Unit Owners. Each Unit Owner shall be responsible for any and all deductibles for any insurance obtained by the Unit Owner and maintained on the Unit. All policies of property insurance carried by a Unit Owner shall be without contribution with respect to the policies of property insurance obtained by the Board of Directors for the benefit of all of the Unit Owners. No Unit Owner shall separately insure his Unit against loss by fire or other casualty covered by any insurance carried by the Association. If any Unit Owner violates this provision, any diminution in insurance proceeds otherwise payable under the Association's policies that results from the existence of other insurance will be chargeable to the Unit Owner who acquired other insurance.

8.5 **Reporting a Claim.** No Unit Owner or Resident may make any claim against any Association policy without first conferring with the Board of Directors.

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

8.7 **Certificate of Insurance**. An insurer that has issued an insurance policy pursuant to this Article 8 shall issue certificates or memoranda of insurance to the Association and, on written request, to any Unit Owner, mortgagee or beneficiary under a deed of trust. The insurer issuing the policy shall not cancel or refuse to renew it until thirty (30) days after notice of the

proposed cancellation or nonrenewal has been mailed to the Association, each Unit Owner and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

8.8 **Annual Insurance Review**. After the termination of the Period of Declarant Control, the Board of Directors shall determine annually whether the amounts and types of insurance it has obtained provide adequate coverage in light of increased construction costs, inflation, practice in the area in which the Condominium is located, or any other factor which tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interests of the Unit Owners and of the Association.

ARTICLE 9
DESTRUCTION OF IMPROVEMENTS

9.1 **Automatic Reconstruction**. Any portion of the Condominium for which insurance is maintained by the Association which is damaged or destroyed shall be repaired or replaced promptly by the Association unless (i) the Condominium is terminated, (ii) repair or replacement would be illegal under any state or local health or safety statute or ordinance or (iii) eighty percent (80%) of the Unit Owners' vote not to rebuild. The cost of repair or replacement of the damaged or destroyed portion of the Condominium in excess of insurance proceeds and reserves shall be a Common Expense and shall be assessed to the Members as a Special Assessment pursuant to Section 7.3 of this Declaration.

9.2 **Determination Not to Reconstruct without Termination**. If eighty percent (80%) of the Unit Owners vote not to rebuild and the Condominium is not terminated in accordance with the Condominium Act, the insurance proceeds shall be distributed to the Unit Owners of the Units and/or Limited Common Elements destroyed in proportion to their respective share of Common Expense Liability relative to the total share of Common Expense Liability allocated to such Units, or to lienholders as their interests may appear. The remainder of the proceeds shall be distributed to all Unit Owners or lienholders in proportion to their respective obligation for Common Expense Liability bears to the Common Expense Liability for all the Units.

9.3 **Distribution of Insurance Proceeds in the Event of Termination of the Condominium**. Notwithstanding any provisions of this Article 9 to the contrary, the distribution of insurance proceeds resulting from the damage or destruction of all or any part of the Common Elements shall be distributed as provided in the Condominium Act in the event of a termination of the Condominium.

9.4 **Negotiations with Insurer**. The Association shall have full authority to negotiate in good faith with representatives of the insurer of any totally or partially destroyed portion of the Common Elements and to make settlements with the insurer for less than full insurance coverage on the damage to such Common Elements. Any settlement made by the Association in good faith shall be binding upon all Unit Owners and First Mortgagees. Insurance proceeds for any damage or destruction of any part of the Condominium covered by property insurance maintained by the Association shall be paid to the Association and not to any First Mortgagee or

other lienholder. The Association shall hold any proceeds in trust for the Unit Owners and lienholders as their interests may appear. Except as otherwise provided in Sections 9.1 and 9.2 of this Declaration, all insurance proceeds shall be disbursed first for the repair or restoration of the damaged Common Elements, and Unit Owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the damaged or destroyed Common Elements have been completely repaired or restored or the Condominium is terminated.

9.5 **Repair of Units**. Installation of improvements to, and repair of any damage to, a Unit shall be made by and at the individual expense of the Unit Owner of that Unit and shall be completed as promptly as practicable and in a lawful and workmanlike manner.

9.6 **Priority**. Nothing contained in this Article shall entitle a Unit Owner to priority over any lender under a lien encumbering his Unit as to any portion of insurance proceeds allocated to such Unit.

ARTICLE 10
EMINENT DOMAIN

10.1 **Total Taking of a Unit**. If a Unit is acquired by eminent domain, or if part of a Unit is acquired by eminent domain leaving the Unit Owner with a remnant which may not be practically or lawfully used for any purpose permitted by this Declaration, the award must compensate the Unit Owner for his Unit and interest in the Common Elements, regardless of whether any Common Elements are taken. Upon such a taking, unless the decree otherwise provides, that Unit's allocated interests in the Common Elements and the Common Expenses shall automatically be reallocated to the remaining Units in proportion to their respective allocated interests immediately before the taking. Upon such a taking, the Association shall prepare, execute and record an amendment to the Declaration in compliance with the Condominium Act. Any remnant of a Unit remaining after part of a Unit is taken shall become a Common Element.

10.2 **Partial Taking of a Unit**. Except as provided in Section 10.1, if part of a Unit is acquired by eminent domain, the award must compensate the Unit Owner for the reduction in the value of his Unit and interest in the Common Elements, regardless of whether any Common Elements are taken.

10.3 **Taking of Common Elements**. If part of the Common Elements is acquired by eminent domain, the portion of the award attributable to the Common Elements taken shall be paid to the Association for the benefit of the Unit Owners, and any portion of the award attributable to the acquisition of a Limited Common Element shall be equally divided among the Unit Owners of the Units to which that Limited Common Element was allocated at the time of the acquisition.

10.4 **Taking of Entire Condominium**. In the event the Condominium in its entirety is acquired by eminent domain, the Condominium shall be terminated and the provisions of A.R.S. Section 33-1228 of the Condominium Act shall apply.

10.5 **Priority and Power of Attorney**. Nothing contained in this Article shall entitle a Unit Owner to priority over any First Mortgagee under a lien encumbering his Unit as to any portion of any condemnation award allocated to such Unit. Each Unit Owner hereby appoints the Association as attorney-in-fact for the purpose of negotiations and settlement with the condemning authority for the acquisition of the Common Elements or any part thereof. This power of attorney is coupled with an interest, shall be irrevocable, and shall be binding on any heirs, personal representatives, successors or assigns of a Unit Owner.

ARTICLE 11
RIGHTS OF FIRST MORTGAGEES

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

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

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

11.1.3 Any lapse, cancellation or material modification of any insurance policy or fidelity bond maintained by the Association; and

11.1.4 Any proposed action which requires the consent of a specified percentage of Eligible Mortgage Holders as set forth in this Declaration.

11.2 **Approval Required for Amendment to Declaration, Articles or Bylaws.**

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

(i) Voting rights;

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

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

(iv) Insurance or fidelity bonds;

(v) Responsibility for maintenance and repairs;

(vi) Expansion or contraction of the Condominium, the addition or annexation of property to the Condominium, or the withdrawal of property from the Condominium;

(vii) Boundaries of any Unit;

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

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

(x) Leasing of Units;

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

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

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

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

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

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

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

11.2.4 The provisions of this Section 11.2 shall not affect or apply to the amendments that may be executed by Declarant in the exercise of its Development Rights.

11.3 **Prohibition Against Right of First Refusal**. The right of a Unit Owner to sell, transfer or otherwise convey his Unit shall not be subject to any right of first refusal or similar restriction.

11.4 **Right of Inspection of Records**. Any Unit Owner, First Mortgagee or Eligible Insurer or Guarantor will, upon written request, be entitled to: (i) inspect the current copies of the Condominium Documents and the books, records and financial statements of the Association during normal business hours, provided that the Association shall have up to ten (10) days after any such request to make such items available for inspection; (ii) receive within ninety (90) days following the end of any fiscal year of the Association, an audited financial statement of the Association for the immediately preceding fiscal year of the Association, free of charge to the requesting party; and (iii) receive written notice of all meetings of the Members of the Association and be permitted to designate a representative to attend all such meetings.

11.5 **Prior Written Approval of First Mortgagees**. Except as provided herein or by statute in case of condemnation or substantial loss to the Units or the Common Elements and unless at least two-thirds (2/3) of all First Mortgagees (based upon one (1) vote for each First Mortgage owned) and at least two-thirds (2/3) of all Unit Owners (other than Declarant or other sponsor, developer or builder of the Condominium) of the Units have given their prior written approval, the Association shall not be entitled to:

11.5.1 By act or omission, seek to abandon or terminate this Declaration or the Condominium;

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

11.5.3 Partition or subdivide any Unit;

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

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

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

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

11.7 **Condemnation or Insurance Proceeds**. No Unit Owner or any other party shall have priority over any rights of any First Mortgagee of the Unit pursuant to its mortgage in the case of a distribution to such Unit Owner of insurance proceeds or condemnation awards for losses to or a taking of Units and/or Common Elements.

11.8 **Limitation on Partition and Subdivision**. No Unit shall be partitioned or subdivided without the prior written approval of the Holder of any First Mortgage on such Unit.

11.9 **Conflicting Provisions**. In the event of any conflict or inconsistency between the provisions of this Article and any other provision of the Condominium Documents, the provisions of this Article shall prevail; provided, however, that in the event of any conflict or inconsistency between the different Sections of this Article or between the provisions of this Article and any other provision of the Condominium Documents with respect to the number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors that must consent to (i) an amendment of the Declaration, Articles or Bylaws, (ii) a termination of the Condominium or (iii) certain actions of the Association as specified in Subsections 11.2 and 11.5 of this Declaration, the provision requiring the consent of the greatest number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors shall prevail; provided, however, that Declarant, without the consent of any Unit Owner being required, shall have the right to amend this Declaration, the Articles or the Bylaws during the Period of Declarant Control in order to (i) comply with the Condominium Act or any other applicable law if the amendment does not adversely affect the rights of any Unit Owner, (ii) correct any error or inconsistency in the Declaration, the Articles or the Bylaws if the amendment does not adversely affect the rights of any Unit Owner, (iii) comply with the requirements or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments including, without limitation, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration and the Veterans Administration or (iv) the rules or requirements of any federal, state or local governmental agency whose approval of the Condominium or the Condominium Documents is required by law or requested by Declarant.

ARTICLE 12
DISPUTE RESOLUTION FOR DEVELOPMENT AND CONSTRUCTION RELATED MATTERS

It is the Declarant's intent that all Improvements constructed by any builder who may construct a Unit within the Condominium including the Declarant (each, a "Builder" and, collectively, the "Builders") shall be built in compliance with all applicable building codes and ordinances and will be of a quality that is consistent with good construction and development practices. Nevertheless, disputes may arise as to whether a defect exists with respect to the construction by a Builder of any of the Improvements constructed within the Condominium and a Builder's responsibility therefore. It is the intent of the Builders that all disputes and claims

regarding Alleged Defects (as defined below) be resolved amicably, and without the necessity of time-consuming and costly litigation. Accordingly, the Association, the Board of Directors, the Builders and all Unit Owners shall be bound by the claim resolution procedures, provisions and limitations set forth or described in this Article 12. Nothing in this Article 12 shall be amended, revised, revoked or modified in any respect except with the express written consent of the Owners of all Units.

12.1 **Limitation on Unit Owners' Remedies**. In the event that the Association, the Board of Directors or any Unit Owner (collectively, "Claimant") claims, contends or alleges that any portion of a Unit, the Common Elements or any other part of any Condominium is defective or that one or more of the Builders, their agents, consultants, contractors or subcontractors (collectively, "Agents") were negligent in the planning, design, engineering, grading, construction or other development thereof (collectively, an "Alleged Defect"), the only right or remedy that any Claimant shall have with regard to any such Alleged Defect is the right to have the Alleged Defect repaired and/or replaced by the Builder which was responsible for the construction of the Improvement which is the subject of the Alleged Defect, but such right or remedy shall only be available if and to the extent such Builder is, at that time, still obligated to repair such Alleged Defect pursuant to applicable statutes or common law or pursuant to any applicable rules, regulations and guidelines imposed by the Arizona Registrar of Contractors (the "Applicable Laws"). By accepting a deed to a Unit, each Unit Owner shall, with respect to any Alleged Defect(s), be deemed to have waived the right to seek damages or other legal or equitable remedies from any Builder or from any affiliates, subcontractors, agents, vendors, suppliers, design professionals and materialmen of any Builder under any common law, statutes and other theories of liability, including, but not limited to, negligence, tort and strict liability. Under no circumstances will any Builder or Declarant be liable for any consequential, indirect, special, punitive or other damages, including, but not limited to, any damages based on a claim of diminution in the value of the Claimant's Unit and each Unit Owner, by accepting a deed to a Unit, shall be deemed to have waived its right to pursue any such damages. It shall be a condition to a Claimant's rights and a Builder's obligations under this Article that the Claimant fully and timely abide by the requirements and conditions set forth in this Article. To accommodate the Builders' right to repair and/or replace an Alleged Defect, the Builders hereby reserve the right for themselves to be notified of all such Alleged Defects and to enter onto the Condominium, Common Elements and Units to inspect, repair and/or replace such Alleged Defect(s) as set forth herein.

12.2 **Notice of Alleged Defect**. In the event that a Claimant discovers any Alleged Defect, Claimant shall within fifteen (15%) days of discovery of the Alleged Defect provide the Builder which constructed the Improvement which is the subject of the Alleged Defect with written notice of the Alleged Defect, and of the specific nature of such Alleged Defect ("Notice of Alleged Defect").

12.3 **Right to Enter, Inspect, Repair and/or Replace**. Within a reasonable time after the receipt by a Builder of a Notice of Alleged Defect, or the independent discovery of any Alleged Defect by a Builder, such Builder shall have the right, upon reasonable notice to Claimant and during normal business hours, to enter onto or into, as applicable, the Unit, Common Element or other part of the Condominium as may be necessary or appropriate for the purposes of inspecting and/or conducting testing and, if deemed necessary by the Builder,

repairing and/or replacing such Alleged Defect. In conducting such inspection, testing, repairs and/or replacements, Builder shall be entitled to take any actions as it shall deem reasonable and necessary under the circumstances to repair or correct any such Alleged Defect.

12.4 **No Additional Obligations; Irrevocability and Waiver of Right**. Nothing set forth in this Section shall be construed to impose any obligation on Builders to inspect, test, repair or replace any item or Alleged Defect for which Builders are not otherwise obligated to do so under Applicable Laws or by contract. Specifically, a Builder's obligation to repair and/or replace an Alleged Defect shall expire upon the expiration of any applicable warranty provided by Builder for such item, if any, or on any later applicable date which the Applicable Laws specify or recognize as the date(s) through which a contractor is responsible for such Alleged Defect. The right of Builders to enter, inspect, test, repair and/or replace reserved hereby shall be irrevocable and may not be waived or otherwise terminated except by a writing, in recordable form, executed and recorded by Builders.

12.5 **Tolling of Statutes of Limitations**. In no event shall any statutes of limitations be tolled during the period in which a Builder conducts any inspection or testing of any Alleged Defects.

12.6 **Binding Arbitration**. In the event of a dispute between or among a Builder, its contractors, subcontractors or brokers or their agents or employees, on the one hand, and any Unit Owner or the Association, on the other hand, regarding any controversy or claim between the parties, including any claim based on contract, tort, statute or any other theory of liability arising out of or relating to the rights or duties of the parties under this Declaration, the design or construction of the Condominium, any Unit, any Common Element or any part of the Condominium or an Alleged Defect, the matter shall be resolved by binding arbitration conducted in accordance with the requirements, terms and provisions set forth in this Section 12.6.

12.6.1 Initiation of Arbitration. The arbitration shall be initiated by either party delivering to the other a Notice of Intention to Arbitrate as provided for in the American Arbitration Association ("AAA") Commercial Arbitration Rules, as amended from time to time (the "AAA Rules").

12.6.2 Condition to Initiation of Arbitration. In the event a dispute arises regarding an Alleged Defect and the Claimant is the Association, the Association must provide written notice to all Members prior to initiation of any proceeding or arbitration against a Builder which notice shall (at a minimum) include (i) a description of the Alleged Defect; (ii) a description of the Builder's position related to such Alleged Defect and any attempts of the affected Builder to correct such Alleged Defect and the opportunities provided to the affected Builder to correct such Alleged Defect; (iii) a certification from an engineer licensed in the State of Arizona, confirming its opinion of the existence of such Alleged Defect and a resume of such engineer; (iv) the estimated cost to repair such Alleged Defect; (v) the name and professional background of the attorney retained by the Association to pursue the claim against the Builder and a description of the relationship between such attorney and member(s) of the Board of Directors, if any; (vi) a thorough description of the fee arrangement or proposed fee arrangement between such attorney and the Association; (vii) the estimated attorneys' fees and expert fees and

costs necessary to pursue the claim against Builder(s) and the source of the funds which will be used to pay such fees and expenses; (viii) the estimated time necessary to conclude the action against Builder; and (ix) an affirmative statement from the Board of Directors that the action is in the best interests of the Association and its Members. In the event the Association recovers any funds from Declarant(s) (or any other Person) to repair an Alleged Defect, any excess funds remaining after repair of such Alleged Defect shall be paid into the Association's reserve fund.

12.6.3 Governing Procedures. The arbitration shall be conducted in accordance with the AAA Rules and A.R.S. Section 12-1501 *et. seq.* In the event of a conflict between the AAA Rules and this Section, the provisions of this Section shall govern.

12.6.4 Appointment of Arbitrator. The parties shall appoint a single Arbitrator by mutual agreement. If the parties have not agreed within ten (10) days of the date of the Notice of Intention to Arbitrate on the selection of an arbitrator willing to serve, the AAA shall appoint a qualified Arbitrator to serve. Any arbitrator chosen in accordance with this Subsection is referred to in this Section as the "Arbitrator".

12.6.5 Qualifications of Arbitrator. The Arbitrator shall be neutral and impartial. The Arbitrator shall be fully active in such Arbitrator's occupation or profession, knowledgeable as to the subject matter involved in the dispute and experienced in arbitration proceedings. The foregoing shall not preclude otherwise qualified retired lawyers or judges.

12.6.6 Disclosure. Any candidate for the role of Arbitrator shall promptly disclose to the parties all actual or perceived conflicts of interest involving the dispute or the parties. No Arbitrator may serve if such person has a conflict of interest involving the subject matter of the dispute or the parties. If an Arbitrator resigns or becomes unwilling to continue to serve as an Arbitrator, a replacement shall be selected in accordance with the procedure set forth in Subsection 12.6.4 above.

12.6.7 Compensation. The Arbitrator shall be fully compensated for all time spent in connection with the arbitration proceedings in accordance with the Arbitrator's hourly rate, unless otherwise agreed to by the parties, for all time spent by the Arbitrator in connection with the arbitration proceeding. Pending the final award, the Arbitrator's compensation and expenses shall be advanced equally by the parties.

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

12.6.9 Management of the Arbitration. The Arbitrator shall actively manage the proceedings as the Arbitrator deems best so as to make the proceedings expeditious, economical and less burdensome than litigation.

12.6.10 Confidentiality. All papers, documents, briefs, written communication, testimony and transcripts as well as any and all arbitration decisions shall be confidential and not disclosed to anyone other than the Arbitrator, the parties and the parties attorneys and expert witnesses (where applicable to their testimony), except that, upon the prior written consent of all parties, such information may be divulged to additional third parties. All third parties shall agree in writing to keep such information confidential.

12.6.11 Hearings. Hearings may be held at any place within the State of Arizona designated by the Arbitrator and, in the case of particular witnesses not subject to subpoena at the usual hearing site, at a place where such witnesses can be compelled to attend.

12.6.12 Final Award. The Arbitrator shall promptly, within sixty (60) days of the conclusion of the proceedings or such longer period as the parties mutually agree, determine the claims of the parties and render a final award in writing. The Arbitrator may award the prevailing party in the proceeding all or a part of such party's reasonable attorneys' fees and expert witness fees, taking into account the final result of arbitration, the conduct of the parties and their counsel in the course of the arbitration and other relevant factors. The Arbitrator shall have absolutely no ability or authority to award any damages of any kind except for the actual cost to repair any defect for which a Builder is found to be responsible and which such Builder fails to correct. Accordingly, except for the actual damages referred to in the preceding sentence, the Arbitrator shall not award indirect, consequential, special, punitive or other damages. The Arbitrator shall assess the costs of the proceedings (including, without limitation, the fees of the Arbitrator) against the non-prevailing party.

12.6.13 Statute of Limitations. All statutes of limitation applicable to claims which are subject to binding arbitration pursuant to this Section shall apply to the commencement of arbitration proceedings under this Section. If arbitration proceedings are not initiated within the applicable period, the claim shall forever be barred.

12.7 **Approval of Legal Proceedings**. The Association shall not incur attorneys' fees or other legal expenses in connection with any legal proceedings without the written approval of Unit Owners holding more than two-thirds (2/3) of the total votes in the Association, excluding the vote of any Unit Owner who would be a defendant in such proceedings. The Association must finance any such legal proceeding with monies that are specifically collected for same and may not borrow money or use working capital or reserve funds or other monies collected for specific Association obligations other than legal fees. In the event that the Association commences any legal proceedings, all Unit Owners must notify prospective purchasers of the existence of such legal proceedings and must provide such prospective purchasers with a copy of any applicable notice provided by the Association in accordance with Section 12.6.2 of this Declaration. This Section shall not apply to legal proceedings initiated by the Association to collect any unpaid Assessments levied pursuant to this Declaration or to enforce against any Unit Owners (other than Declarant or a Builder) any covenants, conditions, restrictions or easements contained in this Declaration.

12.8 **Repurchase Option for Alleged Defect Claims**. Notwithstanding anything in this Declaration to the contrary, in the event any Unit Owner, either directly or through the Association, shall commence an action against a Builder in connection with any Alleged Defects in such Unit Owner's Unit, the Builder (or any assignee of such Builder) that constructed and/or sold such Unit shall have the option (but not the obligation) to purchase such Unit on the following terms and conditions:

12.8.1 The purchase price shall be an amount equal to the sum of the following less any sums paid to such Unit Owners under any homeowner's warranty in connection with the Alleged Defect:

(i) The purchase price paid to the Builder by the original Unit Owner which purchased the Unit from a Builder;

(ii) The value of any documented Improvements made to the Unit by third-party contractors or decorators that added an ascertainable value to the Unit;

(iii) The Unit Owner's reasonable moving costs; and

(iv) Any reasonable and customary closing costs, including loan fees and/or "points" incurred by the Unit Owner in connection with the purchase of another primary residence within ninety (90) days after the closing of the repurchase provided for herein.

12.8.2 Close of escrow shall not occur later than forty-five (45) days after written notice from Builder to the Unit Owner of Builder's intent to exercise the option herein.

12.8.3 Title to the Unit shall be conveyed to the applicable Builder free and clear of all monetary liens and encumbrances other than non-delinquent real estate taxes.

12.8.4 All closing costs in connection with the repurchase shall be paid by the applicable Builder.

12.8.5 Exercise of the repurchase option as provided hereinabove shall constitute full and final satisfaction of all claims relating to the subject Unit, including claims relating to the Alleged Defect. The Unit Owner (or Association, as applicable) shall promptly execute and deliver any notice of dismissal or other document necessary or appropriate to evidence such satisfaction.

12.9 **As-Built Conditions**. Various engineering and architectural plans pertaining to the Condominium, including, but not limited to, the Plat, subdivision maps, grading plans, plot plans, improvement plans and building plans (collectively, the "Plans"), contain dimensions regarding certain aspects of the Units, Common Elements and other parts and aspects of the Condominium. By accepting a deed to a Unit, each Unit Owner shall be deemed to have acknowledged and agreed that (a) if there is a discrepancy between the Plans and the actual as-built conditions of any Unit, Common Element or any other Improvement within the Condominium, the as-built conditions will control and be deemed to be accepted as-is by the Unit Owner; (b) the usable or buildable area, location and configuration of the Unit, Common Elements and any other Improvements located within the Condominium may deviate from the

Plans or from any other display or configuration related thereto; (c) the location, size, height and composition of all walls and fences to be constructed on or as part of a Unit or adjacent thereto shall be determined by Builders in their sole and absolute discretion. Despite the Plans or any other materials that may exist, Builders shall be deemed to have made no representations, warranties or assurances with respect to any such matters or with respect to the size, height, location or composition of any wall or fence to be constructed on or adjacent to any Units; and (d) each Unit Owner waives the right to make any demands of or claims against Builders as a result of any discrepancies between the Plans and any actual as-built conditions of any Unit.

12.10 **Limitation on Declarant's and Builders' Liability**. Notwithstanding anything to the contrary herein, it is expressly agreed, and each Unit Owner, by accepting title to a Unit and becoming a Unit Owner, and each other person, by acquiring any interest in the Condominium, acknowledges and agrees, that neither Declarant nor Builders (including, but not limited to, any assignee of the interest of Declarant or a Builder) nor any partner, shareholder, officer, director, employee or affiliate of Declarant or a Builder shall have any personal liability to the Association, or to any Unit Owner, Member or other person, arising under or in connection with this Declaration or resulting from any action or failure to act with respect to this Declaration, the Association or the Committee except, in the case of Declarant and Builders (or their assignees), to the extent of their respective interests in the Condominium; and, in the event of a judgment against any such parties no execution or other action shall be sought or brought thereon against any other assets, nor be a lien upon such other assets, of the judgment debtor. Neither Declarant nor the Association shall be liable for any theft, vandalism, disturbance, accident, unauthorized entrance or other similar occurrence or breach of the peace or security which may occur or take place within the Condominium.

ARTICLE 13
GENERAL

13.1 **Enforcement**. The Association, or any Unit Owner, shall have the right to enforce by any proceeding, at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of the Condominium Documents. Failure by the Association or by any Unit Owner to enforce any covenant or restriction contained in the Condominium Documents shall in no event be deemed a waiver of the right to do so thereafter.

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

13.3 **Duration**. The covenants and restrictions of this Declaration, as amended from time to time, shall run with and bind the Condominium in perpetuity unless the Condominium is terminated as provided in Section 13.4.

13.4 **Termination of Condominium**. Except in the case of a taking of all the Units by eminent domain, the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. An

agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners.

13.5 **Amendment.**

13.5.1 Except in cases of amendments that may be executed by a Declarant in the exercise of its Development Rights or under A.R.S. Section 33-1220 of the Condominium Act, by the Association under A.R.S. Section 33-1206 or A.R.S. Section 33-1216(D) of the Condominium Act, or by certain Unit Owners under A.R.S. Sections 33-1218(B), 33-1222, 33-1223 or 33-1228(B) of the Condominium Act, the Declaration, including the Condominium Plat, may be amended only by a vote of the Unit Owners to which at least sixty-seven percent (67%) of the votes in the Association are allocated (which must include, in the event the amendment would change provisions of this Declaration or the Condominium Plat relating to the Commercial Unit [as opposed to those relating generally to all Residential Units], the affirmative vote of the Owner(s) holding all votes assigned to the Commercial Unit (including, if applicable, any further Units created by a subdivision of the Commercial Unit).

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

13.5.3 An amendment to the Declaration shall not terminate or decrease any unexpired Development Right, Special Declarant Right or Period of Declarant Control unless the Declarant approves the amendment in writing. In addition, any amendment to this Declaration adopted during the Period of Declarant Control must be approved in writing by Declarant, and no amendment to Article 12 shall be effective unless Declarant approves the amendment in writing even if Declarant no longer owns any Unit at the time of such Amendment.

13.5.4 During the Period of Declarant Control, Declarant shall have the right to unilaterally, without the consent of any other Unit Owner, amend the Condominium Plat, the Declaration and any of the other Condominium Documents to (i) comply with the Condominium Act or any other applicable law if the amendment does not adversely affect the rights of any Unit Owner, (ii) correct any error or inconsistency in the Declaration if the amendment does not adversely affect the rights of any Unit Owner or (iii) comply with the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments including, without limitation, the Veterans Administration, the Federal Housing Administration, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

13.5.5 Any amendment adopted by the Unit Owners pursuant to Subsection 13.5.1 of this Declaration shall be signed by the President or Vice President of the Association and shall be Recorded. Any such amendment shall certify that the amendment has been approved as required by this Section. Any amendment made by Declarant pursuant to

Subsection 13.5.4 of this Declaration or the Condominium Act shall be executed by Declarant and shall be Recorded.

13.5.6 Until Declarant no longer owns any portion of the Property, prior written approval by the Declarant is required for any amendment to this Declaration which would impair or diminish the Declarant's rights to complete the development of the Condominium as Declarant deems appropriate or to sell or lease Units therein in accordance with this Declaration. In addition, notwithstanding any other provisions in this Declaration, until such time as Declarant no longer owns any Units, the following actions, before being undertaken by the Association, must first be approved in writing by Declarant: (a) any amendment or action requiring the approval of First Mortgagees pursuant to this Declaration; (b) the annexation to the Condominium of real property; (c) the levy of any assessment for the construction of new facilities not constructed on the Common Elements by Declarant; and (d) any significant reduction of the Association's maintenance of the Common Elements or other services of the Association.

13.5.7 Notwithstanding anything to the contrary in this Section 13.5 or elsewhere in this Declaration, no amendment to this Declaration that would alter any provisions hereof relating to maintenance shall be effective unless and until such amendment receives the written consent of the City Attorney's Office of the City of Tempe.

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

13.7 **Notices**. All notices, demands, statements or other communications required to be given to or served on a Unit Owner under this Declaration shall be in writing and shall be deemed to have been duly given and served if delivered personally or sent by United States mail, postage prepaid, return receipt requested, addressed to the Unit Owner, at the address which the Unit Owner shall designate in writing and file with the Association, or if no such address is designated, at the address of the Unit of such Unit Owner. A Unit Owner may change address on file with the Association for receipt of notices by delivering a written notice of change of address to the Association pursuant to this Section. A notice given by mail, whether regular, certified or registered, shall be deemed to have been received by the Person to whom the notice was addressed on the earlier of the date the notice is actually received or three (3) days after the notice is mailed. If a Unit is owned by more than one person, notice to one of the Unit Owners shall constitute notice to all Unit Owners of the same Unit. Each Unit Owner shall file his correct mailing address with the Association and shall promptly notify the Association in writing of any subsequent change of address.

13.8 **Binding Effect**. By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof. In addition, each such Person by so doing thereby acknowledges that the Condominium Documents set forth a general scheme for the improvement and development of the real property covered thereby and hereby evidences his interest that all the restrictions, conditions, covenants, rules and regulations contained in the Condominium Documents shall run

with the land and be binding on all subsequent and future Unit Owners, grantees, purchasers, assignees and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Condominium Documents shall be mutually beneficial, prohibitive and enforceable by the various subsequent and future Unit Owners. Declarant, its successors, assigns and grantees, covenants and agrees that the Units and the membership in the Association and the other rights created by the Condominium Documents shall not be separated or separately conveyed, and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

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

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

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

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

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

13.14 **Guests and Tenants**. Each Unit Owner shall be responsible for compliance by his agents, tenants, guests, invitees, licensees and their respective servants, agents and employees with the provisions of the Condominium Documents. A Unit Owner's failure to insure compliance by such Person shall be grounds for the same action available to the Association or any other Unit Owner by reason of such Unit Owner's own noncompliance.

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

13.16 **Number of Days**. In computing the number of days for purposes of any provision of the Condominium Documents, all days shall be counted, including Saturdays,

Sundays and holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday, then the next day shall be deemed to be the next day which is not a Saturday, Sunday or holiday.

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

13.18 **Declarant's Right to Use Similar Name**. The Association hereby irrevocably consents to the use by any other nonprofit corporation which may be formed or incorporated by Declarant of a corporate name which is the same or deceptively similar to the name of the Association, provided one or more words are added to the name of such other corporation to make the name of the Association distinguishable from the name of such other corporation. Within five (5) days after being requested to do so by Declarant, the Association shall sign such letters, documents or other writings as may be required the Arizona Corporation Commission in order for any other nonprofit corporation formed or incorporated by Declarant to use a corporate name which is the same or deceptively similar to the name of the Association.

13.19 **Development and Special Declarant Rights**. Notwithstanding anything to the contrary within the Condominium Documents, Declarant hereby expressly reserves the right, but not the obligation, to exercise the Development Rights and the Special Declarant Rights.

13.20 **Disclaimer Regarding Gated Entrances**. The Declarant may construct access gates at the entrances to the Condominium in order to limit access and provide more privacy for the Unit Owners and the other residents and occupants of the Units. The access gate shall be part of the Common Elements and shall be maintained, repaired and replaced by the Association. The Association shall have the right, but not the obligation, to provide guard service for the Condominium at such times and upon such terms as are approved by the Board. Each Unit Owner and other resident or occupant of a Unit acknowledges and agrees that neither any access gate nor any guard service that may be provided by the Association guarantees the safety or security of the Unit Owners and other occupants of the Condominium or their guests or guarantees that no unauthorized person will gain access to the Condominium. Each Unit Owner and resident, for themselves and their families, invitees and licensees, acknowledge that the gated entrances may restrict or delay entry into the Condominium by the police, fire department,

ambulances and other emergency vehicles or personnel. Each Unit Owner and resident, for itself and its families, invitees and licensees, agrees to assume the risk that the gated entrances will restrict or delay entry to the Condominium by emergency vehicles and personnel. Neither the Declarant Parties, the Association nor any director, officer, agent or employee of the Association shall be liable to any Unit Owner, resident or its family, invitees or licensees for any claims or damages resulting, directly or indirectly, from the construction, existence or maintenance of the gated entrances. Each Unit Owner and resident hereby releases the Declarant Parties and the Association from any and all claims, actions, suits, demands, causes of action, losses, damages or liabilities related to or arising in connection with any nuisance, inconvenience, disturbance, injury or damage resulting from the gated entrances.

13.21 **Required Consent of Unit Owners for Legal Action**. Notwithstanding anything to the contrary contained in this Declaration, any action or claim instituted by the Association against any one or more of the Declarant Parties, relating to or arising out of the Condominium, the Declaration or any other Condominium Documents, the use or condition of the Condominium or the design or construction of or any condition on or affecting the Condominium, including, but not limited to, construction defects, surveys, soils conditions, grading, specifications, installation of Improvements (including, but not limited to, Units) or disputes which allege negligence or other tortious conduct, breach of contract or breach of implied or express warranties as to the condition of the Condominium or any Improvements, shall have first been approved by Unit Owners representing seventy-five percent (75%) of the votes in the Association who are voting in person or by proxy at a meeting duly called for such purpose.

13.21.1 Notice to Unit Owners.

(i) Prior to obtaining the consent of the Unit Owners in accordance with Section 13.23 the Association must provide written notice to all Unit Owners which notice shall (at a minimum) include (1) a description of the nature of any action or claim (the "Claim"), (2) a description of the attempts of the Declarant to correct such Claim and the opportunities provided to the Declarant to correct such Claim, (3) a certification from an engineer licensed in the State of Arizona that such Claim is valid along with a description of the scope of work necessary to cure such Claim and a resume of such engineer, (4) the estimated cost to repair such Claim, (5) the name and professional background of the attorney proposed to be retained by the Association to pursue the Claim against the Declarant and a description of the relationship between such attorney and member(s) of the Board (if any), (6) a description of the fee arrangement between such attorney and the Association, (7) the estimated attorneys' fees and expert fees and costs necessary to pursue the Claim against the Declarant and the source of the funds which will be used to pay such fees and expenses, (8) the estimated time necessary to conclude the action against the Declarant, and (9) an affirmative statement from the Board that it has determined that the action is in the best interest of the Association and its Members.

(ii) In the event the Association recovers any funds from the Declarant (or any other person or entity) to repair a Claim, any excess funds remaining after repair of such Claim shall be paid into the Association's reserve fund.

13.21.2 Notification to Prospective Purchasers. In the event that the Association commences any action or claim, all Unit Owners must notify prospective purchasers of such action or claim and must provide such prospective purchasers with a copy of the notice received from the Association in accordance with Subsection 13.22.1.

13.22 **Effect of Declaration**. The Declarant makes no warranties or representations, express or implied, as to the binding effect or enforceability of all or any portion of this Declaration, or as to the compliance of any of these provisions with public laws, ordinances and regulations applicable thereto.

13.23 **No Representations or Warranties**. No representations or warranties of any kind, express or implied, have been given or made by the Declarant or its agents, consultants or employees in connection with the Condominium, or any portion thereof, its physical condition, zoning, compliance with applicable laws, fitness for intended use, or in connection with the subdivision, sale, operation, maintenance, costs of maintenance, taxes or regulation thereof, except as specifically and expressly set forth in this Declaration.

13.24 **Right to Configure Project**. To the extent permitted by law, the Declarant shall have the right, at any time, to change the design, size and configuration, or make any other changes as it deems appropriate, of the Condominium. There is no guarantee that the Condominium will be developed as originally planned.

13.25 **Indemnification**. The Association will indemnify each and every officer and director of the Association and each and every member of any committee appointed by the Board (including, for purposes of this Section 13.27, former officers and directors of the Association and former members of committees appointed by the Board) (collectively, "Association Officials" and individually an "Association Official") against any and all expenses, including attorneys' fees, reasonably incurred by or imposed upon an Association Official in connection with any action, suit or other proceeding (including settlement of any suit or proceeding, if approved by the Board serving at the time of such settlement) to which he or she may be a party by reason of being or having been an Association Official, except for his or her own individual willful misfeasance, malfeasance, misconduct or bad faith. No Association Official will have any personal liability with respect to any contract or other commitment made by them or action taken by them, in good faith, on behalf of the Association (except indirectly to the extent that such Association Official may also be a Member of the Association and therefore subject to Assessments hereunder to fund a liability of the Association), and the Association will indemnify and forever hold each such Association Official free and harmless from and against any and all liability to others on account of any such contract, commitment or action. Any right to indemnification provided for herein is not exclusive of any other rights to which any Association Official may be entitled. If the Board deems it appropriate, in its sole discretion, the Association may advance funds to or for the benefit of any Association Official who may be entitled to indemnification hereunder to enable such Association Official to meet on-going costs and expenses of defending himself or herself in any action or proceeding brought against such Association Official by reason of his or her being, or having been, an Association Official. In the event it is ultimately determined that an Association Official to whom, or for whose benefit, funds were advanced pursuant to the preceding sentence does not qualify for indemnification pursuant to this Section 13.27 or otherwise under the Articles, Bylaws, Rules or applicable law,

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

13.26 **No Partition**. No Person acquiring any interest in the Property or any part thereof will have a right to, nor may any person seek, any judicial partition of the Common Elements, nor will any Unit Owner sell, convey, transfer, assign, hypothecate or otherwise alienate all or any of such Unit Owner's interest in the Common Elements or any funds or other assets of the Association except in connection with the sale, conveyance or hypothecation of such Unit Owner's Unit (and only appurtenant thereto), or except as otherwise expressly permitted herein. This Section must not be construed to prohibit the Board from acquiring and disposing of tangible personal property nor from acquiring or disposing of title to real property which may or may not be subject to this Declaration.

13.27 **References to this Declaration in Deeds**. Deeds to and instruments affecting any Unit or any other part of the Condominium may contain the covenants, conditions and restrictions herein set forth by reference to this Declaration, but whether or not any such reference is made in any deed or instrument, each and all of the provisions of this Declaration are and will be binding upon the grantee-Unit Owner or other Person claiming through any instrument and his, her or its heirs, executors, administrators, successors and assigns.

13.28 **Laws, Ordinances and Regulations**.

13.28.1 The covenants, conditions and restrictions set forth in this Declaration and the provisions requiring Unit Owners and other Persons to obtain the approval of the Board or any committee appointed by the Board with respect to certain actions are independent of the obligation of the Owners and other Persons to comply with all applicable laws, ordinances and regulations, and compliance with this Declaration will not relieve a Unit Owner or any other Person from the obligation also to comply with all applicable laws, ordinances and regulations.

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

13.28.3 If and to the extent applicable Arizona law requires or mandates specific procedures for the enforcement, interpretation or application of this Declaration, that conflict with provisions in this Declaration, such mandated or required procedures shall be followed and this Declaration shall be deemed modified or amended in such regard, but to the minimum extent reasonably necessary to give effect to such required or mandated procedure.

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

DORSEY PLACE CONDOMINIUMS, L.L.C.,
an Arizona limited liability company

By: Gardner Capital Partners, L.P., an Arizona limited partnership, a Member

By: Gardner Financial Corporation, an Arizona corporation,
its General Partner

Douglas D. Gardner
President

By: ACHEN CAPITAL PARTNERS, L.P., an Arizona limited partnership, a Member

By: Achen Financial Corporation, its General Partner

Sanders T. Achen
President

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STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 14th day of May, 2007, by Douglas D. Gardner, President of Gardner Financial Corporation, an Arizona corporation, the general partner of Gardner Capital Partners, L.P., an Arizona limited partnership, a Member of Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, as duly authorized, for and on behalf of the company.

Notary Public

My Commission Expires:
May 7, 2009

OFFICIAL SEAL
KERRY RODERICK
NOTARY PUBLIC – ARIZONA
MARICOPA COUNTY
My Comm. Expires May 7, 2009

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 14th day of May 2007, by Sanders T. Achen, President of Achen Financial Corporation, an Arizona corporation, the general partner of Achen Capital Partners, L.P., an Arizona limited partnership, a Member of Dorsey Place Condominiums, L.L.C. as a Member of Dorsey Place Condominiums, L.L.C., an Arizona limited liability company, as duly authorized, for and on behalf of the company.

Notary Public

My Commission Expires:
May 7, 2009

OFFICIAL SEAL
KERRY RODERICK
NOTARY PUBLIC – ARIZONA
MARICOPA COUNTY
My Comm. Expires May 7, 2009

APPROVED AS TO FORM:

CITY ATTORNEY FOR CITY OF TEMPE, ARIZONA

By: _____
Name: CYNTHIA Y. McCOY
Title: ASST CITY ATTORNEY

DEVELOPMENT SERVICES MANAGER FOR THE CITY OF TEMPE

By: _____
Name: CHRISTOPHER J. ANAKAOIAN
Title: DEVELOPMENT SERVICES MANAGER

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[SIGNATURE PAGE APPROVING AS TO FORM]

EXHIBIT "A"

Legal Description of the Property Submitted to Condominium

THAT PART OF THE NORTHWEST QUARTER OF SECTION 23, TOWNSHIP 1 NORTH, RANGE 4 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTH QUARTER CORNER OF SECTION 23;

THENCE NORTH 89' 54` 28" WEST ALONG THE NORTH LINE OF SAID NORTHWEST QUARTER, A DISTANCE OF 52.93 FEET; THENCE SOUTH 0' 05` 32" WEST, A DISTANCE OF 55.00 FEET TO THE SOUTH RIGHT OF WAY LINE OF UNIVERSITY DRIVE AND THE POINT OF BEGINNING;

THENCE SOUTH 45' 56` 37" EAST, A DISTANCE OF 28.28 FEET TO A POINT ON THE WEST RIGHT OF WAY OF DORSEY LANE;

THENCE SOUTH 00' 01` 53" WEST, A DISTANCE OF 230.02 FEET;

THENCE NORTH 89' 54` 28" WEST; A DISTANCE OF 342.25 FEET;

THENCE NORTH 00' 05` 32" EAST, A DISTANCE OF 250.00 FEET TO SAID SOUTH RIGHT OF WAY LINE OF UNIVERSITY DRIVE;

THENCE SOUTH 89' 54` 28" EAST, A DISTANCE OF 322.00 FEET TO THE POINT OF BEGINNING.

EXHIBIT 2

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES
20190248170 04/09/2019 01:09
ELECTRONIC RECORDING

DORSEYCTA-14-1-1--
henrya

When recorded, return to:

Michael A. Schern
1640 S. Stapley Dr., Suite 132
Mesa, AZ 85204
Tel: (480) 632-1929

CONDOMINIUM TERMINATION AGREEMENT

This Condominium Termination Agreement (the "**Agreement**") is entered into on April 9th, 2019, by and between DORSEY PLACE CONDOMINIUM ASSOCIATION, an Arizona nonprofit corporation ("**Association**"), and PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company ("**PFP**"), and all the Owners (defined below).

RECITALS

WHEREAS, Association is a condominium association organized to manage the condominium known as DORSEY PLACE CONDOMINIUMS (the "**Condominium**"), including the management of common elements and enforcement of that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, in the Official Records of Maricopa County, Arizona (the "**Declaration**").

WHEREAS, the Condominium is depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records of Maricopa County, Arizona and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 1246 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona (the "**Plat**"). All property described in the Plat and subject to the Declaration is referred to herein as the "**Project**."

WHEREAS, pursuant to the Arizona Condominium Act, at A.R.S. § 33-1228(A), a condominium may be terminated by agreement of Unit owners (the Unit owners of Units within the Condominium are referred to herein collectively as "**Owners**," and individually as "**Owner**") of Units to which at least eighty percent **(80%)** of the votes in the Association are allocated, or any larger percentage the Declaration specifies.

WHEREAS, the Declaration specifies that the agreement of at least ninety percent (**90%**) of the Owners is required to terminate the Condominium.

WHEREAS, the Owners of Units to which at least ninety percent of the votes in the Association are allocated have agreed to terminate the Condominium as evidenced by the written ratification of this Agreement by such Unit owners attached hereto as **Exhibit A** and incorporated herein by this reference.

WHEREAS, Association is agreeing on behalf of the Owners to a sale of all portions of and interest in the Project not already owned by PFP, to PFP, upon termination of the Condominium (such property to be sold is referred to herein as "**Purchased Property**" and is described on **Exhibit B** attached hereto and incorporated herein by this reference.

WHEREAS, all capitalized terms not otherwise defined herein shall have the same meaning as provided in the Declaration.

AGREEMENT TERMS AND CONDITIONS

In light of the foregoing, and for valuable consideration, the receipt of which is hereby acknowledged, the Association, PFP, and Owners agree as follows:

1. Recitals. The foregoing recitals, which the parties to this Agreement represent and warrant are true and correct, are incorporated by this reference into these Agreement Terms and Conditions.

2. Effective upon Recording. This Agreement is effective immediately upon being recorded in the official records of the county recorder of Maricopa County, Arizona.

3. Effect of Termination of Condominium. Upon termination of the Condominium, the Declaration and Plat are of no further force and effect upon recording of this Agreement and at such time the Project will not be subject to any plat.

4. Title to the Project; Power of Association. Upon termination of the Condominium, title to the Purchased Property vests in the Association as trustee for the holders of all interest in the Units. Thereafter, the Association has all powers necessary and appropriate to effect the sale described in this Agreement.

5. Sale of the Purchased Property. All interest in the Purchased Property shall be sold by the Association to PFP promptly following termination of the Condominium, as described herein and for the consideration set forth below.

a. Determination of the Respective Interests of Unit Owners.

i. *Fair Market Value Determination.* An independent appraiser, K&T Appraisals, Inc., chosen by the Association has valued the Project. The appraiser's determination of fair market value ("**Association's Appraisal**") report will be distributed to the Owners for review and shall become final as to each respective Unit if not disapproved as set forth herein below.

ii. *Owner Disapproval.* In the event an Owner disapproves of the Association's Appraisal of such Owner's Unit, such Owner shall obtain a second independent appraisal of the fair market value of such Owner's Unit ("Owner's Appraisal") at such Owner's expense and provide the Association with a copy of the Owner's Appraisal report within sixty (60) days from the date the Association's Appraisal was originally distributed to the Owners for review. If the Owner's Appraisal amount differs from the Association's Appraisal amount by:

1. five percent (5%) or less, the higher determination of fair market value shall be final and binding as to such Unit.

2. more than five percent (5%), the Association's Appraisal of the Unit shall be final and binding as to such Unit; provided, however, that if Owner submits the issue (referred to herein as an "**Arbitrable Issue**") to arbitration in accordance with the terms set forth herein below, then the fair market value determined by the arbitrator shall be final and binding as to such Unit.

iii. *Arbitration.* Arbitrable Issues shall be resolved by final and binding arbitration as set forth herein.

1. No later than the seventieth (70^{th}) day after the Association's Appraisal was originally distributed to the Owners for review (the "**Submission Deadline**"), the Owner shall submit the Arbitrable Issue to arbitration by delivering a notice of arbitration to the Association setting out the nature of the Arbitrable Issue and the relief requested.

2. Within ten (10) days of the receipt of the notice of arbitration, the Association shall deliver to the Owner its answer, which shall indicate whether the Association will contest the Owner's Appraisal.

3. The tribunal shall consist of one arbitrator, appointed as follows: the appraiser who authored the Owner's Appraisal and the appraiser who authored the Association's Appraisal shall, within seven (7) days of delivery of the answer, act together to appoint a third independent appraiser who shall act as the arbitrator.

4. The arbitrator shall decide the procedures to be followed in the arbitration after consultation with the Owner and the Association.

5. All fees and costs of the arbitrator shall be paid by the Association.

6. The fair market value determined by the arbitrator shall be final and binding as to such Unit. Failure of the Owner to submit the Arbitrable Issue to arbitration by the Submission Deadline shall result in the Association's Appraisal of the Unit being final and binding as to such Unit.

b. Purchase Price. PFP agrees to buy and the Association and Owners agree to sell to PFP the Purchased Property for the aggregate fair market value of the Purchased Property pursuant to Section 5(a) above Price in cash or cash equivalent to be paid on or before the later of the following to occur: (i) thirty days after the appraiser's determination of fair market value becomes final; or (ii) within thirty days after the recording of this Agreement.

c. Proceeds. All proceeds of the sale of the Project, together with the assets of the Association, will be held by the Association as trustee for the Owners and holders of liens on the Units as their interests may appear.

6. Escrow. The parties to this Agreement authorize Commonwealth Land Title Insurance Company, located at 2390 E. Camelback Rd., Suite 230, Phoenix, Arizona 85016, to act as "**Escrow Agent**" to receive funds and other items and, subject to clearance, disburse them in accordance with the terms of this Agreement. Escrow Agent will deposit all funds received in a non-interest bearing escrow account. If Escrow Agent receives conflicting demands or has a good faith doubt as to Escrow Agent's duties or liabilities under this Agreement, he/she may (a) hold the subject matter of the escrow until the Association and PFP mutually agree to its disbursement or until issuance of a court order or decision of arbitrator determining the Association's and PFP's rights regarding the escrow or (b) deposit the subject matter of the escrow with the clerk of the superior court having jurisdiction over the dispute. Upon notifying the parties of such action, Escrow Agent will be released from all liability except for the duty to account for items previously delivered out of escrow. The parties agree that Escrow Agent will not be liable to any person for misdelivery to the Association or PFP of escrowed items, unless the misdelivery is due to Escrow Agent's willful breach of this Agreement or gross negligence.

7. Distribution of Sale Proceeds and Satisfaction of Liens. The Association shall distribute the proceeds of sale of the Purchased Property pursuant to the following terms and in the following order of priority:

a. The Owner of each Unit that is a portion of the Purchased Property will be paid the net sum of the following amounts: (i) the Fair Market Value of his respective Unit as set forth in the Schedule of Values incorporated into the Agreement as **Exhibit C** hereto, as fair market value for such Owner's respective Unit and that Owner's proportional share on the Common Elements and assets of the Association; plus (ii) any additional amount as may be required to be paid pursuant to A.R.S. § 33-1228(G)(1); less (iii) any amount required to satisfy liens encumbering such Owner's Unit.

b. Any liens that encumber a Unit shall be paid by the Association to the extent, and nothing more, that the Owner of that particular Unit was entitled to sale proceeds described above in subsection a of this Section 7. The Association shall not be responsible for any deficiency that may exist due to a lack of proceeds available to an Owner. PFP shall pay any such deficiency then existing after the Association has distributed sale proceeds and that is required to satisfy all liens encumbering any portion of the Project. Each Owner for which PFP paid a deficiency to satisfy

lien(s) encumbering that Owner's Unit shall be personally obligated to reimburse PFP for such deficiency paid.

c. To the extent that after reasonable efforts to locate an Owner, that Owner cannot be located in order to distribute to him or her proceeds, the Escrow Agent is directed to comply with the Revised Arizona Unclaimed Property Act (A.R.S. § 44-301, *et seq*.) for deposit of those proceeds according to Arizona law.

8. Power of Attorney. Upon termination of the Condominium, Matthew Quinn shall be the attorney-in-fact for each Owner with the power to execute any and all documents necessary or appropriate to effectuate the terms of this Agreement.

9. Dissolution of Association. After termination of the Condominium and upon final distribution of sale proceeds, the Association's board of directors shall dissolve the Association by delivering to the Arizona Corporation Commission for filing articles of dissolution pursuant to A.R.S. § 10-11401 and 10-11403.

10. Deadline for Recording. This Agreement is void after August 1, 2019 unless it is recorded before that date.

11. Governing Law. This Agreement shall be governed by the laws of the State of Arizona. The parties irrevocably agree that the courts of the State of Arizona in Maricopa County, Arizona shall have exclusive venue and jurisdiction over the parties with respect to any dispute between the parties related to this Agreement.

12. Attorneys' Fees. If any action is brought by any party with respect to its rights under this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, consultant fees and all other court costs from the non-prevailing party, whether or not taxable by statute.

13. Captions. Any paragraph titles or captions contained in this Agreement are for convenience of reference only and shall not be deemed a part of this Agreement.

14. Terms. Common nouns and pronouns shall be deemed to refer to the masculine, feminine, neuter, singular and plural, as the identity of the person or entity may in the context require.

15. Severability. If any provision of this Agreement shall be held invalid or unenforceable, it shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

16. Complete Agreement. This Agreement, together with the exhibits attached hereto, constitutes the complete and exclusive statement of the agreement between the parties concerning this matter. This Agreement supersedes all prior written and oral statements and no representation, statement, condition or warranty not contained in this Agreement shall be binding on the parties or have any force or effect whatsoever. No amendment to this Agreement shall be binding unless in writing and executed by each of the parties.

17. Counterparts. This Agreement may be executed simultaneously or in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

----------SIGNATURES FOLLOW----------

IN WITNESS WHEREOF, the undersigned execute this Agreement this 9th day of April 2019.

DORSEY PLACE CONDOMINIUM ASSOCIATION,
an Arizona nonprofit corporation

By: _____
Matthew Quinn, President

State of Arizona)
) *ss.*
County of Maricopa)

See Attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ____ day of April 2019, by Matthew Quinn, the President of Dorsey Place Condominium Association, an Arizona nonprofit corporation, for and on behalf of the corporation.

My Commission Expires: _____ Notary Public

Client: PFP Dorsey Investments, LLC
By: Pathfinder Partners Realty Ventures VII, LLC, Co-Manager
By: Pathfinder Partners, LP, Manager
By: Pathfinder Management and Operations Company, LLC, General Partner

By: _____
Name: Manager
Title: Lorne Polger

State of Arizona)
) *ss.*
County of Maricopa)

See Attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ___ day of April 2019, by _____, _____ of PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company.

My Commission Expires: _____ Notary Public

20190248170

CALIFORNIA JURAT WITH AFFIANT STATEMENT **GOVERNMENT CODE § 8202**

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–6 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego

Subscribed and sworn to ~~(or affirmed)~~ before me on this 9th day of April, 2019,
Date *Month* *Year*
by
(1) Matthew Quinn
(and (2) _____),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person~~(s)~~ who appeared before me.

AMANDA KAY SNYDER
Notary Public - California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

20190248170

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State of California
County of San Diego

Subscribed and sworn to (~~or affirmed~~) before me on this 9th day of April, 2019, by
(1) Lorne Polger
(~~and (2)~~), *Name(s) of Signer(s)*

proved to me on the basis of satisfactory evidence to be the person(~~s~~) who appeared before me.

AMANDA KAY SNYDER
Notary Public – California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

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Title or Type of Document: _____ Document Date: _____

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20190248170

Exhibit A

RATIFICATION OF CONDOMINIUM TERMINATION AGREEMENT

PFP DORSEY INVESTMENTS, LLC, a Delaware limited company, and Owner of the following real property that is part of the Condominium:

Unit: 102, Unit: 103, Unit: 104, Unit: 105, Unit: 107, Unit: 108,
Unit: 109, Unit: 110, Unit: 111, Unit: 112, Unit: 113, Unit: 114,
Unit: 115, Unit: 116, Unit: 117, Unit: 118, Unit: 119, Unit: 120,
Unit: 121, Unit: 201, Unit: 202, Unit: 203, Unit: 204, Unit: 205,
Unit: 206, Unit: 207, Unit: 208, Unit: 209, Unit: 210, Unit: 211,
Unit: 212, Unit: 213, Unit: 214, Unit: 215, Unit: 216, Unit: 217,
Unit: 218, Unit: 219, Unit: 220, Unit: 221, Unit: 222, Unit: 223,
Unit: 224, Unit: 225, Unit: 301, Unit: 302, Unit: 303, Unit: 304,
Unit: 305, Unit: 306, Unit: 308, Unit: 309, Unit: 311, Unit: 312,
Unit: 313, Unit: 314, Unit: 315, Unit: 316, Unit: 317, Unit: 318,
Unit: 319, Unit: 320, Unit: 321, Unit: 322, Unit: 323, Unit: 324,
Unit: 325, Unit: 402, Unit: 403, Unit: 404, Unit: 405, Unit: 406,
Unit: 407, Unit: 408, Unit: 409, Unit: 411, Unit: 412, Unit: 413,
Unit: 414, Unit: 415, Unit: 416, Unit: 417, Unit: 418, Unit: 419,
Unit: 420, Unit: 421, Unit: 422, Unit: 423, Unit: 424, Unit: 425,

of DORSEY PLACE CONDOMINIUMS, a Condominium as created by that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, and as depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records, and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 1246 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona;

Together with each an undivided Interest in and to the General Common Elements as set forth in said Declaration and Plat,

does hereby agree to, and does ratify, that certain Condominium Termination Agreement entered into on April 9th, 2019 by and between Dorsey Place Condominium Association, an Arizona nonprofit corporation, and PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company, and all the Owners of Units within the Condominium.

20190248170

IN WITNESS WHEREOF, the undersigned Owner has executed and acknowledged this instrument.

Client: PFP Dorsey Investments, LLC
By: Pathfinder Partners Realty Ventures VII, LLC, Co-Manager
By: Pathfinder Partners, LP, Manager
By: Pathfinder Management and Operations Company, LLC, General Partner

By: _____
Name: Manager
Title: Lorne Polger

State of Arizona)
) ss.
County of Maricopa)

See attached

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this ___ day of April 2019, by _____, _____ of PFP DORSEY INVESTMENTS, LLC, a Delaware limited liability company.

My Commission Expires: _____ Notary Public

20190248170

CALIFORNIA JURAT WITH AFFIANT STATEMENT **GOVERNMENT CODE § 8202**

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–6 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego

Subscribed and sworn to ~~(or affirmed)~~ before me on this 9th day of April, 2019.
Date *Month* *Year*
by
(1) Lorne Polger
(and ~~(2)~~),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person~~(s)~~ who appeared before me.

AMANDA KAY SNYDER
Notary Public - California
San Diego County
Commission # 2216831
My Comm. Expires Oct 31, 2021

Signature Amanda Kay Snyder
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

Exhibit B

(The "Purchased Property" - property not owned by PFP and to be purchased upon condominium termination)

Unit: 106, Unit: 307, Unit: 310, Unit: 410, Unit: 401, Unit: 101

of DORSEY PLACE CONDOMINIUMS, a Condominium as created by that certain Declaration of Condominium for Dorsey Place Condominiums recorded on August 15, 2007 as Document No. 2007-0921387, in the Official Records, and as amended by that First Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on September 3, 2009 as Document No. 2009-0825688, in the Official Records, and as amended by that Second Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on February 29, 2012 as Document No. 2012-0168217, in the Official Records, and as amended by that Third Amendment to Declaration of Condominium for Dorsey Place Condominiums recorded on March 2, 2018 as Document No. 2018-0161234, and as depicted and described in that certain plat recorded in Book 938 of Maps, Page 7 and as Document No. 2007-0856826 in the Official Records, and further depicted and described in that certain replat of commercial space and a portion of common element of the Condominium recorded in Book 1246 of Maps, Page 16 and as Document No. 2015-0740949 in the Official Records of Maricopa County, Arizona;

Together with each an undivided Interest in and to the General Common Elements as set forth in said Declaration and Plat,

20190248170

Exhibit C

Schedule of Values

Unit No.	Appraisal	HOA Assets	Total Fair Market Value
106	$ 234,000	$ 145	$ 234,145
307	$ 244,000	$ 145	$ 244,145
310	$ 244,000	$ 145	$ 244,145
410	$ 244,000	$ 145	$ 244,145
401	$ 244,000	$ 145	$ 244,145
101	$ 244,000	$ 145	$ 244,145

Clerk of the Superior Court
*** Electronically Filed ***
12/18/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-055353 12/15/2020

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

JIE CAO, et al. JOHN DOUGLAS WILENCHIK

v.

LORNE POLGER, et al.

STEPHANIE K GINTERT
NICHOLAS C NOGAMI
EDITH I RUDDER
ROSS P MEYER
JUDGE DANIEL MARTIN

MINUTE ENTRY

East Court Building – Courtroom 412

1:33 p.m. This is the time set for a virtual Oral Argument regarding Defendant PFP Dorsey Investments LLC's Motion to Dismiss Plaintiffs' Second Amended Complaint and Defendant Dorsey Place Condominium Association's Motion to Dismiss, or in the Alternative, Motion for More Definite Statement, both filed on August 13, 2020. Plaintiffs are represented by counsel, Ross P. Meyer. Defendant PFP Dorsey Investments LLC is represented by counsel, Stephanie K. Gintert. Defendant Dorsey Place Condominium Association is represented by counsel, Nicholas C. Nogami and Edith I. Rudder. Defendants' client representative, Jennifer Barry is present. This matter proceeds via the Court Connect – Teams platform.

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

Arguments are presented to the Court.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-055353 12/15/2020

IT IS ORDERED taking these matters under advisement.

2:05 p.m. Matter concludes.

LATER:

Having considered the positions of the parties, and for the reasons advanced by Defendants in their motions and reply briefs,

IT IS ORDERED granting Defendant PFP Dorsey Investments, LLC's motion to dismiss, with prejudice.

IT IS FURTHER ORDERED granting Defendant Dorsey Place Condominium Association's motion to dismiss, with prejudice.