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Picacho Mountain  
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Las Cruces, NM 88007  
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**FIRST AMENDED AND RESTATED  
DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS  
FOR  
PICACHO MOUNTAIN**

February 20, 2007

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FIRST AMENDED AND RESTATED  
DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS  
FOR  
PICACHO MOUNTAIN

THIS AMENDED AND RESTATED DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR PICACHO MOUNTAIN is made this \_\_\_\_\_ day of \_\_\_\_\_, 2007, by Picacho Mountain, L.P., a New Mexico Limited Partnership (“Declarant”).

RECITALS

WHEREAS, THE DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR PICACHO MOUNTAIN was recorded on February 13, 2007, at Book 788, Page 270-331, of the Records of Dona Ana County, New Mexico, by Picacho Mountain, L.P., a New Mexico Limited Partnership (“Declarant”);

WHEREAS, pursuant to Article XVI, Section 16.1 of the Declaration, until conveyance of a Lot or Parcel to a Class “A” Member other than a Builder, Declarant may unilaterally amend this Declaration for any purpose;

WHEREAS, no Lots or Parcels have yet been conveyed to a Class “A” Member;

NOW, THEREFORE, Declarant hereby wishes to amend and restate the Declaration in its entirety, as set forth below.

**ARTICLE I**

**CREATION OF THE COMMUNITY**

**1.1. Purpose and Intent.**

Declarant, as owner of the real property described in Exhibit “A,” intends by Recording this Declaration to create a general plan of development for the planned community known as Picacho Mountain. This Declaration provides a flexible and reasonable procedure for the future expansion of the Picacho Mountain Community to include additional real property as Declarant deems appropriate and provides for the overall development, administration, maintenance, and preservation of the real property now and hereafter comprising the Picacho Mountain Community. An integral part of the development plan is the creation of Picacho Mountain Homeowners Association, Inc., an association comprised of all owners of Lots and Parcels in the Picacho Mountain Community, to own, operate, and/or maintain various common areas and community

improvements, and to administer and enforce this Declaration and the other Governing Documents.

### **1.2. Binding Effect.**

All property described in Exhibit "A," and any additional property which is subjected to this Declaration in the future by Recording of one or more Supplemental Declarations, shall be owned, conveyed, and used subject to all of the provisions of this Declaration, which shall run with the title to such property. This Declaration shall be binding upon all Persons having any right, title, or interest in any portion of the Picacho Mountain Community, their heirs, successors, successors-in-title, and assigns.

Unless otherwise provided by New Mexico law, this Declaration shall run with the land and have perpetual duration. This Declaration may be terminated only by a Recorded instrument signed by Owners of at least 80% of the Lots and Parcels and the approval of the Declarant, so long as Declarant has any rights as set forth in this Declaration, and by otherwise complying with all city, county, or state requirements. In the event of termination, provision shall be made for the continued maintenance of the Common Area. Nothing in this Section shall be construed to permit termination of any easement created in this Declaration without the consent of the holder of such easement.

This Declaration shall be enforceable by Declarant, the Association, any Owner, and their respective legal representatives, heirs, successors, and assigns, by any means available at law or in equity. If any provision of this Declaration is determined by judgment or court order to be invalid, or invalid as applied in a particular instance, such determination shall not affect the validity of other provisions or applications.

### **1.3. Governing Documents.**

The Picacho Mountain Community Governing Documents consist of the following as they may be amended:

Declaration (recorded): creates obligations and easements which are binding upon the Association and all present and future owners of Lots;

Supplemental Declaration (recorded): adds property to the Picacho Mountain Community; *may* impose additional obligations or restrictions on such property;

Articles of Incorporation (filed with New Mexico Public Regulation Commission): establishes the Association as a nonprofit corporation under New Mexico law;

Bylaws (the Board of Directors adopts): governs the Association's internal affairs, such as voting rights, elections, meetings, officers, etc.;

Design Guidelines (Declarant adopts): establish architectural standards and guidelines for improvements and modifications to Lots and Parcels, including structures, landscaping, and other items on Lots and Parcels (includes standards and guidelines pertaining to all of Picacho Mountain);

Use Restrictions (initial set attached as Exhibit "C"): govern use of property, activities, and conduct within the Picacho Mountain Community;

Board Resolutions and Rules (Board adopts): establish rules, policies, and procedures for internal governance and Association activities, regulate operation and use of Common Area.

The Governing Documents may be supplemented by additional covenants, restrictions and easements applicable to particular Neighborhood Areas within the Picacho Mountain Community by the recording of a Supplemental Declaration. In such case, if there is a conflict between any of the Governing Documents and any such additional covenants or restrictions, or the governing documents or policies of such Neighborhood Area, the more restrictive document shall control. The Association may administer and enforce any such covenants, restrictions, or other instruments applicable to a Neighborhood Area.

The Governing Documents apply to all Owners and occupants of Lots, as well as their respective tenants, guests, and invitees. Any lease on a Lot shall provide that the tenant and all occupants of the leased Lot are bound by and obligated to comply with the Governing Documents.

## ARTICLE II CONCEPTS AND DEFINITIONS

The terms used in the Governing Documents shall generally be given their natural, commonly accepted definitions unless otherwise specified. Capitalized terms shall be defined as set forth below.

“Area of Common Responsibility”: The Common Area, together with such other areas, if any, for which the Association has or assumes responsibility pursuant to the terms of this Declaration, any Supplemental Declaration, or other applicable covenants, contracts, or agreements.

“Articles of Incorporation” or “Articles”: The Articles of Incorporation of Picacho Mountain Homeowners Association, Inc., as filed with the New Mexico Public Regulation Commission, as may be amended.

“Association”: Picacho Mountain Homeowners Association, Inc., a New Mexico nonprofit corporation, its successors or assigns.

“Base Assessment”: Assessments levied on all Lots subject to assessment under Article VIII to fund Common Expenses for the general benefit of all Lots.

“Neighborhood Area”: A group of Lots designated as a Neighborhood Area in a Supplemental Declaration. A Neighborhood Area may be comprised of more than one housing type and may include noncontiguous parcels of property.

“Neighborhood Assessment”: Assessments levied against a Neighborhood Area or particular Lots for expenses incurred or to be incurred by the Association for the purposes described in Section 9.2..

“Board of Directors” or “Board”: The body responsible for administration of the Association, selected as provided in the Bylaws and serving the same role as the board of directors under New Mexico corporate law.

“Builder”: Any Person licensed with the State of New Mexico who purchases one or more Lots or Parcels within the Properties for further subdivision, development, or construction of Dwelling Unit(s) in the ordinary course of its business.

“Bylaws”: The Bylaws of Picacho Mountain Homeowners Association, Inc., as they may be amended.

“Class “B” Control Period”: The period during which the Class “B” Member is entitled to appoint a majority of the Board members. The Class “B” Control Period shall terminate upon the first to occur of the following:

(a) Two years after 100% of the Lots and Parcels planned for development under the Master Plans for the Picacho Mountain Community have been sold and are owned by Class “A” Members;

(b) December 31, 2030; provided, in the event that Declarant annexes additional property pursuant to Section 10.1 at any time after December 31, 2025, the above date shall be extended for additional five year periods for each additional 500 acres, or fraction thereof, of property annexed; or

(c) when, in its discretion, the Class “B” Member so determines. The Class “B” Member may choose to terminate some of its rights as a Class “B” Member by relinquishing control of those areas in writing prior to one of the other termination dates specified above. Declarant’s relinquishment of some, but not all, of its rights as a Class “B” Member will not terminate the remainder of Declarant’s rights as a Class “B” Member until one of the above events occurs.

“Common Area”: All real and personal property, including easements, which the Association owns, leases, or otherwise holds possessory or use rights in for the common use and enjoyment of Owners, including such property as may be designated as Common Area by Declarant from time to time. Portions of the Common Area may be designated in a Supplemental Declaration as being “Limited Common Area” for the benefit of one or more, but less than all, Owners or Neighborhood Areas.

“Common Expenses”: The actual and estimated expenses incurred, or anticipated to be incurred, by the Association for the general benefit of the Owners, including any reasonable reserve, as the Board may find necessary and appropriate pursuant to the Governing Documents.

“Declarant”: Picacho Mountain, L.P., a New Mexico Limited Partnership, or any successor, successor-in-title, or assign who takes title to any portion of the property described in Exhibits “A” or “B” for the purpose of development and/or sale and who is designated as Declarant in a Recorded instrument executed by the immediately preceding Declarant.

“Design Guidelines”: The architectural, design, and construction guidelines and review procedures pertaining to the Properties, adopted and administered pursuant to Article IV, as they may be amended.

“Dwelling Unit”: Any building or structure or portion of a building or structure situated upon a Lot and which is intended for use and occupancy as an attached or detached residence for a single family.



“Governing Documents”: A collective term referring to the various documents described in Section 1.3, as each may be amended from time to time.

“Lifestyle Enrichment Committee” or “LEC”: The committee established to review plans and specifications for the construction or modification of improvements and to supervise compliance with, and otherwise administer and assist with enforcement of, the Design Guidelines and procedures described in Article IV. The LEC also may be assigned responsibility for enforcement of Use Restrictions and rules.

“Lot”: A portion of the Properties, whether improved or unimproved, which may be independently owned and conveyed and on which a Dwelling Unit is intended for development, use, and occupancy. The term shall refer to the land, if any, which is part of the Lot as well as any improvements, including any Dwelling Unit, thereon. The boundaries of each Lot shall be delineated on a Plat.

Prior to Recordation of a subdivision Plat, a parcel of vacant land on which improvements are under construction shall be deemed to contain the number of Lots designated for residential use for such parcel on the applicable preliminary plat, or Declarant’s site plan, whichever is more current. Until a preliminary plat or site plan has been approved, such parcel shall contain the number of Lots set by Declarant in conformance with the Master Plans.

“Master Plans”: The master land use plans for the development of the Picacho Mountain residential community as of the date of Recording this Declaration and as they may be amended, updated, or supplemented from time to time. The Master Plans include all of the property described in Exhibit “A” and all or any portion of the property described in Exhibit “B.” The Master Plans may include Plats and plans approved by Dona Ana County, New Mexico, or other applicable governmental authorities. Inclusion of property on the Master Plans shall not, under any circumstances, obligate Declarant to subject such property to this Declaration, nor shall the omission of property described in Exhibit “B” from the Master Plans as of the date of Recording this Declaration bar its later submission to this Declaration as provided in Article X.

“Member”: A Person who is a member of the Association pursuant to Section 7.2.

“Mortgage”: A mortgage, a deed of trust, a deed to secure debt, or any other form of security instrument affecting title to any Lot or Parcel. A “Mortgagee” shall refer to a beneficiary or holder of a Mortgage.

“Owner”: One or more Persons who hold the record title to any Lot or Parcel, but excluding any Person holding an interest merely as security for the performance of an obligation. If a Lot or Parcel is sold under a Recorded contract of sale, and the contract specifically so provides, the purchaser (rather than the fee owner) will be considered the Owner.

“Parcel”: An area of real property within the Picacho Mountain Community that is designated by a Supplemental Declaration to be a Parcel. A Parcel shall not include a Lot, any Common Area, or any Exempt Property.

“Person”: A human being, a corporation, a partnership, a trustee, or any other legal entity.

“Plat”: A Recorded survey for all or any portion of the Properties, as amended and supplemented.

“Properties” or “Picacho Mountain Community”: The real property described in Exhibit “A,” together with such additional property as is made subject to this Declaration in accordance with Article X.

“Record,” “Recording,” or “Recorded”: To file, the filing, or filed of record in the Office of the County Recorder of Dona Ana County, New Mexico, or such other place which is designated as the official location for recording deeds, plats, and similar documents affecting title to real estate.

“Supplemental Declaration” A Recorded instrument which subjects additional property to this Declaration pursuant to Article X.

“Use Restrictions”: The initial use restrictions, rules, and regulations set forth in Exhibit “C,” as they may be supplemented, modified, and repealed pursuant to Article III.

“Visible From Neighboring Property”: With respect to any given object, such object is or would be visible to a person six (6) feet tall standing on any part of neighboring property. Neighboring Property shall include a Lot, Parcel, Common Area, or street, located in any direction from the Lot or Parcel in question, that is either immediately adjacent to the Lot or Parcel or is located in the general vicinity of the Lot or Parcel (such that an item located on the Lot or Parcel could be visible from the nearby Lot, Parcel, Common Area, or street).

## ARTICLE III

### USE AND CONDUCT

#### 3.1. Framework for Regulation.

The Governing Documents establish, as part of the general plan of development for the Properties, a framework of affirmative and negative covenants, easements, and restrictions governing the Properties. Within that framework, the Board and the Members must have the ability to respond to unforeseen problems and changes in circumstances, conditions, needs, desires, trends, and technology. Therefore, this Article establishes procedures for modifying and expanding the initial Use Restrictions set forth in Exhibit “C.” This Article is not intended to apply to or govern Board promulgated rules and regulations relating to the use and operation of the Common Area which the Board may adopt by resolution pursuant to its general powers and authority.

#### 3.2. Owners’ Acknowledgment and Notice to Purchasers.

All Owners are given notice that use of their Lots or Parcels and the Common Area is limited by the Use Restrictions. Each Owner, by acceptance of a deed, acknowledges and agrees that the use and enjoyment and marketability of his or her Lot or Parcel can be affected by this provision, that the Use Restrictions may change from time to time as provided under Section 3.3 and that such changes may not be reflected in a Recorded instrument. All purchasers of Lots or Parcels are on notice that the Association may have adopted changes.

### **3.3. Rule Making Authority.**

(a) Subject to the terms of this Article and the Board's duty to exercise business judgment and reasonableness on behalf of the Association and its Members, the Board may modify, cancel, limit, create exceptions to, or expand the Use Restrictions. To do so the Board shall send notice to all Owners at least five business days prior to the Board meeting at which such action is to be considered. For this purpose, notice may be sent to each Owner by: U.S. mail; electronic telecommunication (*i.e.*, fax, "e-mail", use of the Association's intranet or any other reasonable method of electronic communications whereby the Association can contact all Owners) or publication in the community newsletter delivered or mailed to each Owner, provided that such notice is clearly identified under a separate headline in the newsletter. Members shall have a reasonable opportunity to be heard at the Board meeting prior to such action being taken.

Such action shall become effective, after compliance with Section 3.3(c), unless the Class "B" Member, if any, disapproves, or unless Class "A" Members representing a majority of the total votes in the Association disapprove. During the Class "B" Control Period, such change must be signed by the Class "B" Member before the change becomes effective. The Board shall have no obligation to call a meeting to consider disapproval by the Class "A" Members except upon receipt of a petition of the Members as required for special meetings in the Bylaws. Said petition must be delivered to the Board within thirty (30) days of the Board's action. Upon receipt of such petition, the proposed action shall not become effective until after such meeting is held, and then subject to the outcome of such meeting.

(b) Alternatively, the Class "A" Members representing a majority of the total votes in the Association, at a meeting duly called for such purpose, may adopt provisions which modify, cancel, limit, create exceptions to, or expand the Use Restrictions then in effect. Such action shall require the approval of the Class "B" Member, if any.

(c) Prior to any action taken under this Section becoming effective, the Board shall, in any manner permitted in Section 3.3(a), send a copy of the new or modified Use Restrictions to each Owner. The effective date shall be not less than 30 days following distribution to Owners.

The Association shall provide, without cost, a single copy of the Use Restrictions then in effect to any requesting Member or Mortgagee. The Association may charge a reasonable fee for additional copies.

(d) No action taken under this Article shall have the effect of modifying, repealing, or expanding the Design Guidelines or any provision of this Declaration other than the Use Restrictions. In the event of a conflict between the Design Guidelines and the Use Restrictions, the Design Guidelines shall control.

(e) To change Use Restrictions recorded in a Supplemental Declaration, the Association is only required to provide notice to the Class "A" Members governed by the Supplemental Declaration and the Class "B" Member, if any. Such action shall become effective, after compliance with Section 3.3(c), unless the Class "B" Member, if any, disapproves, or unless Class "A" Members representing a majority of the total votes governed by the Supplemental Declaration disapprove. During the Class "B" Control

Period, such change must be signed by the Class “B” Member before the change becomes effective. The Board shall have no obligation to call a meeting to consider disapproval by the Class “A” Members except upon receipt of a petition signed by at least twenty-five percent (25%) of the Members governed by the Supplemental Declaration. Said petition must be delivered to the Board within thirty (30) days of the Board’s action. Upon receipt of such petition, the proposed action shall not become effective until after such meeting is held, and then subject to the outcome of such meeting.

**3.4. Protection of Owners and Others.**

Except as may be specifically set forth in this Declaration (either initially or by amendment) or in the initial Use Restrictions set forth in Exhibit “C,” all Association actions must comply with the following:

(a) Similar Treatment. Similarly situated Owners shall be treated similarly; provided, the Use Restrictions and rules may vary by Neighborhood Area.

(b) Displays. The rights of Owners to display religious and holiday signs, symbols, and decorations inside their Dwelling Units of the kinds normally displayed in dwellings located in single-family residential communities shall not be abridged, except that the Association may adopt time, place, and manner restrictions with respect to such displays visible from or located outside the Dwelling Unit.

(c) Activities Within Dwelling Units. The Association shall not interfere with the activities carried on within the confines of Dwelling Units, except it may prohibit activities not normally associated with property restricted to residential use, and it may restrict or prohibit any activities that create monetary costs for the Association or other Owners, that create a danger to the health or safety of occupants of other Lots or Parcels, that generate excessive noise or traffic, that create unsightly conditions visible outside the Dwelling Unit, or that create an unreasonable source of annoyance.

(d) Alienation. The Association shall not prohibit leasing or transfer of any Lot or Parcel, or require consent of the Association or Board for leasing or transfer of any Lot or Parcel; provided, the Association or the Board may require a minimum lease term of up to 90 days.

(e) Abridging Existing Rights. The Association may not require an Owner to dispose of personal property that was in or on a Lot or Parcel prior to the adoption of such rule if such personal property was in compliance with all rules previously in force. This exemption shall apply only during the period of such Owner’s ownership of the Lot or Parcel and shall not apply to subsequent Owners who take title to the Lot or Parcel after adoption of the rule.

(f) Reasonable Rights To Develop. No action by the Association or Board shall impede Declarant’s right to develop the Properties in accordance with the Master Plans and rights reserved to Declarant in this Declaration.

The limitations in this Section shall only limit rulemaking authority exercised under Section 3.3; they shall not apply to amendments to this Declaration adopted in accordance with Article XVI.

**ARTICLE IV**  
**DESIGN AND LANDSCAPING**

**4.1: General**

No structure or thing shall be placed, erected, installed, or posted on the Properties and no improvements or other work (including staking, clearing, excavation, grading, and other site work, exterior alterations of existing improvements, or planting or removal of landscaping) shall take place within the Properties, except pursuant to approval in compliance with this Article and the Design Guidelines.

No approval shall be required to repaint the exterior of a structure in accordance with the originally approved color scheme or to rebuild in accordance with originally approved plans and specifications. Any Owner of a Lot may remodel, paint, or redecorate the interior of his or her Dwelling Unit without approval so long as such modifications are not visible from outside of the Dwelling Unit. Furthermore, modifications to the interior of screened porches, patios, and similar portions of a Dwelling Unit visible from outside the structure shall be subject to approval.

All Dwelling Units shall be designed by and built in accordance with the plans and specifications of a licensed architect or similarly licensed building designer unless otherwise approved by Declarant or its designee in its sole discretion.

This Article shall not apply to the activities of Declarant or the Association.

**4.2. Design Review.**

(a) By Declarant: New Construction. Declarant shall have exclusive authority to administer and enforce architectural controls and to review and act upon all applications for original construction within the Properties. This right shall continue until 100% of the Lots and Parcels planned for development under the Master Plans have been conveyed to Class "A" Members, unless earlier terminated in a written instrument executed and Recorded by Declarant. In reviewing and acting upon any request for approval, Declarant or its designee acts solely in Declarant's interest and shall owe no duty to any other Person.

Declarant may, in its sole discretion, designate one or more Persons from time to time to act on its behalf in reviewing applications hereunder.

Declarant may from time to time, but shall not be obligated to, delegate or assign all or a portion of its reserved rights under this Article to any other Person or committee, including the Lifestyle Enrichment Committee. Any such delegation shall be in writing, specifying the scope of responsibilities delegated, and shall be subject to (i) Declarant's right to revoke such delegation at any time and reassume jurisdiction over the matters previously delegated; and (ii) Declarant's right to veto any decision which Declarant determines, in its sole discretion, to be inappropriate or inadvisable for any reason. So long as Declarant has any rights under this Article, the jurisdiction of other entities shall be limited to such matters as Declarant specifically delegates.

(b) Lifestyle Enrichment Committee: Modifications. At such time as Declarant deems appropriate, at its sole discretion, Declarant shall establish the LEC, which shall consist of at least three Persons. Prior to the establishment of the LEC,

Declarant shall carry out the functions of the LEC. Prior to the termination of the Class "B" Control Period, Declarant shall appoint the members of the LEC. After the termination of Class "B" Control Period, members of the LEC shall be appointed and shall serve at the discretion of the Board.

The LEC shall have exclusive jurisdiction over modifications, additions, or alterations made on or to existing structures located on Lots or Parcels or on or to Lots containing Dwelling Units (including, without limitation, the initial landscaping on a Lot). Subject to Declarant's rights under Section 4.2(a), the LEC also may be assigned jurisdiction over original construction within the Properties. The Association also may assign to the LEC responsibility for monitoring compliance with and enforcement of Use Restrictions and Board promulgated rules.

Prior to the termination of the Class "B" Control Period, the LEC shall notify Declarant of any action to be taken under this Article. During such time, Declarant shall have the right, in its sole and absolute discretion, to veto any action taken by the LEC; provided, Declarant's right to veto must be exercised within 10 business days of its receipt of notice of action taken by the LEC. The party submitting the Plans for approval shall not be notified of the LEC's approval or disapproval until after Declarant's right to veto has been exercised or has expired.

During the Class "B" Control Period, the Declarant, and thereafter, the Board, may create and appoint such subcommittees of the LEC as deemed appropriate. Such subcommittees may be established to preside over particular areas of review (*e.g.*, landscape plans) and shall be governed by such procedures as may be established by the entity appointing the subcommittee. Any action of any subcommittee shall be subject to the review and approval of the LEC and Declarant, during the Class "B" Control Period. Notwithstanding the above, neither the LEC nor Declarant shall be obligated to review all actions of any subcommittees, and the failure to take action in any instance shall not be a waiver of the right of the LEC or Declarant to act in the future.

(c) Reviewer; Fees; Assistance. For purposes of this Article, and throughout the Declaration and Design Guidelines, the entity having jurisdiction in a particular case shall be referred to as the "Reviewer." The Reviewer may establish and charge reasonable fees for review of applications hereunder and may require such fees to be paid in full prior to review of any application. Such fees may include the reasonable costs incurred in having any application reviewed by architects, engineers, or other professionals. Declarant and the Association may employ architects, engineers, or other Persons as deemed necessary to perform the review. The Board may include the compensation of such Persons in the Association's annual operating budget.

#### **4.3. Guidelines and Procedures.**

(a) Design Guidelines. Declarant may prepare Design Guidelines containing general provisions applicable to all of Picacho Mountain and all of the Properties, respectively, as well as specific provisions which vary within the Picacho Mountain Community.

The Design Guidelines are intended to provide guidance to Owners and Builders regarding matters of particular concern to the Reviewer in considering applications. The

Design Guidelines are not the exclusive basis for decisions of the Reviewer, and compliance with the Design Guidelines does not guarantee approval of any application

In addition to guidelines for review of architectural submissions, the Design Guidelines may also include guidelines for construction activities, including, but not limited to, hours of construction, parking requirements, noise restrictions, and cleanup requirements. Such guidelines, if adopted, will become part of this Declaration as if fully set forth herein. The Guidelines may also establish the amount of construction deposit to be deposited by the Owner with the Association before construction can begin, and in no case shall the construction deposit exceed five percent (5%) of the gross sale price of the Lot. The Association may use funds from the construction deposit to remedy any violations of the Owner, including, but not limited to, violations of any of the construction guidelines.

Declarant shall have sole and full authority to amend the Design Guidelines specific to the Properties during the Class "B" Control Period, notwithstanding a delegation of reviewing authority, unless Declarant also delegates the power to amend. Upon termination of Declarant's right to amend, the LEC shall have the authority to amend the Design Guidelines specific to the Properties with the Board's consent. Any amendments to the Design Guidelines shall be prospective only and shall not require modifications to or removal of structures previously approved once the approved construction or modification has commenced. All Members must be given notice of any proposed amendment to the Design Guidelines, and Members shall have twenty one (21) days after being given notice to provide comments relevant to such proposed amendment. Members may request a face-to-face meeting to present comments pertinent to such proposed amendment, and no reasonable request for such a meeting will be denied. Proposed amendments will become effective on the 22<sup>nd</sup> day after notice of proposed amendment is given. Notice is deemed to be given on the day that such notice is deposited with the United States Postal Service. There shall be no other limitation on the scope of amendments to the Design Guidelines, and such amendments may remove requirements previously imposed or otherwise make the Design Guidelines more or less restrictive.

The Reviewer shall make the Design Guidelines available to Owners and Builders who seek to engage in development or construction within the Properties.

(b) Procedures. Except as otherwise specifically provided in the Design Guidelines, no activities shall commence on any portion of the Properties until an application for approval has been submitted to and approved by the Reviewer. Such application shall be in the form required by the Reviewer and shall include information required under the Design Guidelines, such as plans and specifications showing site layout, structural design, exterior elevations, exterior materials and colors, landscaping, drainage, exterior lighting, irrigation, and other features of proposed construction, as applicable. The Design Guidelines and the Reviewer may require the submission of such additional information as may be reasonably necessary to consider any application.

In reviewing each submission, the Reviewer may consider any factors it deems relevant, including, without limitation, harmony of external design with surrounding structures and environment. Decisions may be based on purely aesthetic considerations.

Each Owner acknowledges that determination as to such matters is purely subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements. The Reviewer shall have the sole discretion to make final, conclusive, and binding determinations on matters of aesthetic judgment and such determinations shall not be subject to review so long as made in good faith and in accordance with the procedures set forth herein. The Owners of Lots adjoining any Lot on which an Owner is requesting a variance must be notified of proposed variance and be provided seven calendar days to provide comments to the Reviewer. Notice is deemed to be given when notice is deposited with the United States Postal Service.

The Reviewer shall make a determination on each application after receipt of a completed application and all information required by the Reviewer. The Reviewer may permit or require that an application for approval be submitted or considered in stages, in which case, a final decision shall not be required until after the final, required submission stage. The Reviewer may (i) approve the application, with or without conditions; (ii) approve a portion of the application and disapprove other portions; or (iii) disapprove the application.

Reviewer approval shall not constitute approval of or waiver of approvals or reviews by Dona Ana County or any other municipality or governmental agency or entity having jurisdiction over architectural or construction matters.

The Reviewer shall notify the applicant in writing of the final determination on any application within 60 days after its receipt of a completed application and all requested information. In the event that the Reviewer fails to respond in a timely manner, approval shall be deemed to have been given, subject to Declarant's right to veto pursuant to Section 4.2. However, no approval shall be deemed to have been given to an application that violates any provision of the Declaration. Furthermore, no approval, whether expressly granted or deemed granted, shall be inconsistent with the Design Guidelines unless a written variance has been granted pursuant to Section 4.5.

Notice shall be deemed to have been given at the time the envelope containing the response is deposited with the U. S. Postal Service. Personal delivery of such written notice shall, however, be sufficient and shall be deemed to have been given at the time of delivery to the applicant.

As part of any approval, the Reviewer may require that construction commence in accordance with approved plans within a specified time period. If construction does not commence within the required period, such approval shall be deemed withdrawn and it shall be necessary for the Owner to reapply for approval before commencing any activities. Once construction is commenced, it shall be diligently pursued to completion. All work shall be completed within fourteen (14) months of commencement of pad site dirt work unless otherwise specified in the notice of approval or the Design Guidelines, or unless the Reviewer grants an extension in writing, which it shall not be obligated to do. If approved work is not completed within the required time, it shall be considered nonconforming and shall be subject to enforcement action by the Association, Declarant, or any aggrieved Owner.

Notwithstanding the above, landscaping shall be installed, as approved, in the front yard of a Lot, and on any portion of a Lot that is required to be landscaped that is



visible from a street, other Lots or Parcels, or the Common Area, within fourteen (14) months from the start of work on pad site dirt work. The Reviewer's decision as to which portions of a Lot are affected by this requirement shall be final.

The Reviewer may, by resolution, exempt certain activities from the application and approval requirements of this Article, provided such activities are undertaken in strict compliance with the requirements of such resolution. For example, Builders may submit and receive pre-approval of landscaping or other plans for general application. Such pre-approved plans shall not require resubmission prior to use on a particular Lot.

#### **4.4. No Waiver of Future Approvals.**

Each Owner acknowledges that the Persons reviewing applications under this Article will change from time to time and that opinions on aesthetic matters, as well as interpretation and application of the Design Guidelines, may vary accordingly. In addition, each Owner acknowledges that it may not always be possible to identify objectionable features until work is completed, in which case it may be unreasonable to require changes to the improvements involved, but the Reviewer may refuse to approve similar proposals in the future. Approval of applications or plans, or in connection with any other matter requiring approval, shall not constitute binding precedent in any other matter nor an estoppel or waiver of the right to withhold approval as to any similar applications, plans, or other matters subsequently or additionally submitted for approval.

#### **4.5. Variances.**

The Reviewer may authorize variances from compliance with any of its guidelines and procedures when circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations require. Such variances may only be granted, however, when unique circumstances dictate and no variance shall (a) be effective unless in writing; (b) be contrary to this Declaration; or (c) prevent the Reviewer from denying a variance in other circumstances. For purposes of this Section, the inability to obtain approval of any governmental agency, the issuance of any permit, or the terms of any financing shall not be considered a hardship warranting a variance. Notwithstanding the above, the Reviewer may not authorize variances without the written consent of Declarant during the Class "B" Control Period.

#### **4.6. Limitation of Liability.**

The standards and procedures in this Article are intended as a mechanism for maintaining and enhancing the overall aesthetics of the Properties; they do not create any duty to any Person. The Reviewer shall not bear any responsibility for ensuring (a) structural integrity or soundness of approved construction or modifications; (b) compliance with building codes and other governmental requirements; (c) that all Dwelling Units are of comparable quality, value, size, or design; or (d) that improvements will be aesthetically pleasing or otherwise acceptable to other Owners. Declarant, the Association, the Board, any committee, or any member of any of the foregoing shall not be held liable for any claim whatsoever arising out of construction on or modifications to any Lot or Parcel. In all matters, the Reviewer shall be defended and indemnified by the Association as provided in Section 8.7..

#### **4.7. Enforcement.**

Any construction, alteration, or other work done in violation of this Article or the Design Guidelines shall be deemed to be nonconforming. Furthermore, Declarant, or the Association, shall have the authority to require any Owner or Owner's agents or contractors to cease and desist in constructing or altering any improvements on any Lot or Parcel, where such actions have not first been reviewed and approved, or constitute a violation of this Declaration, the Design Guidelines, or Rules and Regulations. Upon written request from the Association or Declarant, Owners shall, at their own cost and expense and within such reasonable time frame as set forth in such written notice, cure the nonconformance to the satisfaction of the requester or restore the Lot or Parcel to substantially the same condition as existed prior to the nonconforming work. Should an Owner fail to remove and restore as required, the Association, Declarant, or their designees shall have the right, but not the obligation, to enter the Lot or Parcel, remove the violation, and restore the property to substantially the same condition as previously existed. All costs, together with the interest at the rate established by the Board (not to exceed the maximum rate then allowed by law), may be assessed against the Lot or Parcel and collected as a Special Assessment.

Declarant, the Association, or any of their agents and assigns, including, but not limited to, the Lifestyle Enrichment Committee, shall have the right, but not the obligation, to enter upon any Lot or Parcel to determine if violations of the Declaration, the Design Guidelines, or Rules and Regulations exist. In so doing, neither Declarant, nor the Association, nor their agents or assigns, shall be subject to any liability for trespass, other tort or damages in connection with, or arising from, such entry. Written notice of violations may be delivered to the Owner or any agent or contractor of the Owner with apparent authority to accept same and notice shall be binding on the Owner as if actually delivered to the Owner.

All approvals granted hereunder shall be deemed conditioned upon completion of all elements of the approved work and all work previously approved with respect to the same Lot or Parcel, unless approval to modify any application has been obtained. In the event that any Person fails to commence and diligently pursue to completion all approved work by the deadline set forth in the approval, Declarant, or the Association, shall be authorized, after notice to the Owner of the Lot or Parcel and an opportunity to be heard, to enter upon the Lot or Parcel and remove or complete any incomplete work and to assess all costs incurred against the Lot or Parcel and the Owner thereof as a Special Assessment unless otherwise prohibited in this Declaration.

All acts by any contractor, subcontractor, agent, employee, or invitee of an Owner shall be deemed as an act done by or on behalf of such Owner. Any contractor, subcontractor, agent, employee, or other invitee of an Owner who fails to comply with the terms and provisions of this Article and the Design Guidelines may be excluded from the Properties, after being provided with notice and an opportunity to be heard. In such event, neither Declarant nor the Association, their officers and directors, shall be held liable to any Person for exercising the rights granted by this paragraph.

In addition to the foregoing, the Association and Declarant shall have the authority and standing, but not the obligation, to pursue all legal and equitable remedies available to enforce the provisions of this Article and the decisions of the Reviewer.

## ARTICLE V

### LAND USE CLASSIFICATIONS

#### 5.1 Establishment of Land Use Classifications.

Declarant shall establish the Land Use Classifications for all Lots and Parcels within the Properties. Except for the property set forth in Exhibit A, such Land Use Classifications shall be established in the Supplemental Declaration recorded against the Lots or Parcels. The Land Use Classification for the property set forth in Exhibit A shall be Single Family Residential Use.

The contemplated Land Use Classifications are as follows:

- (a) Single Family Residential Use.
- (b) Cluster Residential Use.
- (c) Condominium Use.
- (d) Commercial Office Use, including by not limited to, office buildings and business parks.
- (e) Apartment Development Use.

Declarant may establish additional Land Use Classifications in a Supplemental Declaration, and may establish the membership and voting rights associated with the Land Use Classifications, to the extent not set forth in this Declaration.

5.2 Change of Land Use Classifications. The Land Use Classifications established for Lots and Parcels may only be changed as follows:

(a) Declarant may change the Land Use Classifications of any group of Lots or Parcel prior to the conveyance to a subsequent Owner, or, after such conveyance, with the written consent of the Owner(s).

(b) Upon (a) request by an Owner of a Lot or Parcel for a change of Land Use Classification, (b) approval by Declarant during the Class "B" Control Period (c) adoption of a resolution by the Board stating that in the Board's opinion the then present Land Use Classification of a certain Lot or Parcel is no longer in the best interests of the Owners and Residents, or that an additional Land Use Classification of a certain Lot or Parcel would be beneficial to the Owners, and (d) the approval of such resolution by a majority of the votes of the members present in person or by absentee ballot at a meeting duly called for such purpose, the Board shall have the power and right to change the Land Use Classification of that Lot or Parcel and establish rules and regulations and guidelines that may be necessary or advisable for the change of the Land Use Classification and any construction that may occur thereon; provided, however, that such new Land Use Classification (i) shall not be adverse to the interests of the Owners, and (ii) shall be consistent with any deed restrictions and zoning regulations restricting or limiting the use of the land.

## ARTICLE VI

## **MAINTENANCE AND REPAIR**

### **6.1. Maintenance of Lots and Parcels.**

(a) Each Owner shall maintain his or her Lot or Parcel, including all improvements located thereon. Such maintenance shall be performed in a manner consistent with the Governing Documents and all applicable covenants, unless some or all of such maintenance responsibility is otherwise assumed by or assigned to (and accepted by) the Association.

(b) Due to the desire to maintain the natural beauty of the land, many drainage areas exist throughout the Properties. Many of these drainage areas are located on Lots or Parcels. Some of these drainage areas exist in their natural condition and some of them have been improved to assist with the flow of water through the Properties. Natural drainage areas located on Lots or Parcels are herein identified as "Drainage Easements". Drainage areas located on Lots or Parcels that have been improved by Declarant or the Association are herein identified as "Drainage Channels". Owners of Lots and Parcels are required to maintain all Drainage Easements located on their Lots or Parcels. Such maintenance shall require all work that is necessary to make sure that the Drainage Easements are not blocked and are properly flowing water in accordance with the original drainage of the Properties. The Association shall maintain all Drainage Channels located on Lots and Parcels, and shall have an easement to enter the Lot or Parcel to perform all required maintenance on the Drainage Channels. Furthermore, the Declarant reserves a blanket easement on, over and under the ground within the Properties, including all Lots and Parcels, to correct drainage of surface waters and install additional erosion controls on the Lots or Parcels to maintain reasonable standards of health, safety and appearance and shall be entitled to remove trees or vegetation, without liability for replacement or damages, as may be necessary to provide adequate drainage for any portion of the Property. Such right shall pass to the Association upon termination of the Class "B" Control Period. However, nothing herein shall be interpreted to impose a duty upon the Association to correct or maintain any drainage areas upon the Lots or Parcels except to maintain the Drainage Channels.

(c) In addition to any other enforcement rights, if an Owner fails to perform properly his maintenance responsibility, the Association may perform such maintenance responsibilities and assess all costs incurred in accordance with Section 9.5. The Association shall afford the Owner reasonable notice and an opportunity to cure the problem prior to entry, except when entry is required due to an emergency situation. Any such entry by the Association or any of its agents shall not be deemed a trespass, and the Association shall not be liable for any damage created thereby.

### **6.2 Maintenance of Property within Neighborhood Areas.**

If set forth in a Supplemental Declaration, the Owners within each Neighborhood Area shall be responsible for paying, through Neighborhood Assessments, the costs of operating, maintaining, and insuring certain portions of the Area of Common Responsibility within or adjacent to such Neighborhood Area. This may include, without limitation, the costs of maintaining any signage, entry features, right-of-way, and landscaping between the Neighborhood Area and adjacent public roads, private streets within the Neighborhood Area, regardless of ownership and regardless of the fact that

such maintenance may be performed by the Association; provided, however, all Neighborhood Areas which are similarly situated shall be treated the same.

If a separate community association (“sub-association”) is formed for any Neighborhood Area, such sub-association shall maintain its common property and any other property for which it has maintenance responsibility in a manner consistent with the Governing Documents.

The Association shall assume maintenance responsibility for property within any Neighborhood Area, if required by Supplemental Declaration or because, in the opinion of the Board, the level and quality of service then being provided is not consistent with the community. All costs of maintenance pursuant to this paragraph shall be assessed as a Neighborhood Assessment against only the Lots or Parcels within the Neighborhood Area to which the services are provided. The provision of services in accordance with this Section shall not constitute discrimination within a class.

### **6.3. Responsibility for Repair and Replacement.**

Unless otherwise specifically provided in the Governing Documents or in other instruments creating and assigning maintenance responsibility, responsibility for maintenance shall include responsibility for repair and replacement.

By taking title to a Lot or Parcel, each Owner covenants and agrees to carry property insurance for the full replacement cost of all insurable improvements on his or her Lot or Parcel, less a reasonable deductible, unless either the sub-association (if any) for the Neighborhood Area in which the Lot or Parcel is located or the Association carries such insurance (which they may, but are not obligated to do hereunder). If the Association assumes responsibility for obtaining any insurance coverage on behalf of Owners, the premiums for such insurance shall be levied as a Neighborhood Assessment against the Lot or Parcel and the Owner.

Each Owner further covenants and agrees that in the event of damage to or destruction of structures on or comprising his Lot or Parcel, the Owner shall promptly repair or reconstruct in a manner consistent with the original construction or such other plans and specifications as are approved in accordance with Article IV. In the event that such repair and reconstruction cannot be promptly undertaken, the Owner shall clear the Lot or Parcel and maintain it in a neat and attractive condition and shall present a timetable for repair and reconstruction to the Board within 90 days of the damaging or destructive event. The Owner shall pay any costs which are not covered by insurance proceeds.

This Section shall also apply to any sub-association responsible for common property within the Neighborhood Area in the same manner as if a sub-association was an Owner and the common property was a Lot or Parcel. Additional Recorded covenants applicable to any Neighborhood Area may establish requirements for insurance and more stringent standards for rebuilding or reconstructing structures on the Lots or Parcels within such Neighborhood Area and for clearing and maintaining the Lots or Parcels in the event the structures are not rebuilt or reconstructed.

## **ARTICLE VII**

## ASSOCIATION GOVERNANCE

### 7.1. Function of the Association.

The Association shall be the entity responsible for management, maintenance, operation, and control of the Area of Common Responsibility. The Association also has the right, but not the obligation, to enforce the Governing Documents. The Association shall perform its functions in accordance with the Governing Documents and New Mexico law.

### 7.2. Membership.

Every Owner shall be a Member of the Association. Membership and voting rights shall be established as follows:

(a) For Land Use Classifications of Single Family Residential, Cluster Residential, and Residential Condominium, there shall be one (1) membership per Lot.

(b) For other Land Use Classifications, the calculation and number of memberships shall be determined in the Supplemental Declaration recorded against the property.

If a Lot or Parcel is owned by more than one Person, all co-Owners shall share the privileges of membership, subject to reasonable Board regulation and the restrictions on voting set forth in Section 7.3(c) and in the Bylaws, and all such co-Owners shall be jointly and severally obligated to perform the responsibilities of Owners. The membership rights of an Owner which is not a natural person may be exercised by any officer, director, partner, or trustee, or by the individual designated from time to time by the Owner in a written instrument provided to the Secretary of the Association.

### 7.3. Voting.

The Association shall have two classes of membership, Class "A" and Class "B."

(a) Class "A". Class "A" Members shall be all Owners except the Class "B" Member, if any. Class "A" Members shall have votes equal to their membership rights as set forth in this Declaration or a Recorded Supplemental Declaration. No vote shall be exercised for any property which is exempt from assessment under Section 9.9.

(b) Class "B". The sole Class "B" Member shall be Declarant. The Class "B" Member shall not vote on Association matters but may appoint a majority of the members of the Board of Directors during the Class "B" Control Period, as specified in the Bylaws. Additional rights of the Class "B" Member are specified in the relevant sections of the Governing Documents.

Upon termination of the Class "B" Control Period, as set forth in Article II, Declarant shall be a Class "A" Member entitled to Class "A" votes based on Class "A" Membership rights established in this Declaration or a Recorded Supplemental Declaration.

(c) Exercise of Voting Rights. If there is more than one Owner of a Lot or Parcel, the vote for such Lot shall be exercised as the co-Owners determine among themselves and advise the Secretary of the Association in writing prior to the vote being taken. If no such written notice is given to the Association, but only one co-Owner casts

votes, the Association may accept the co-Owner's votes on behalf of the Owner. Absent such advice and in the event that more than one such co-Owner casts a vote, the vote(s) of the Lot or Parcel shall be suspended and shall not be included in the final vote tally on the matter being voted upon.

**7.4. Neighborhood Areas.**

By Supplemental Declaration, Declarant may assign property to a specific Neighborhood Area (by name or other identifying designation). Lots or Parcels within a particular Neighborhood Area may be subject to covenants in addition to those set forth in this Declaration and, if required by law or otherwise approved by Declarant, the Owners within the Neighborhood Area may be members of a sub-association in addition to the Association. So long as it has the right to subject additional property to this Declaration pursuant to Section 10.1, Declarant may unilaterally amend this Declaration or any Supplemental Declaration to create Neighborhood Areas or redesignate Neighborhood Area boundaries. However, two or more existing Neighborhood Areas shall not be combined without the consent of Owners of a majority of the Lots or Parcels in the affected Neighborhood Areas.

If required by the Supplemental Declaration designating the Neighborhood Area, the Association shall provide services to such Neighborhood Area which it does not provide to all Lots and Parcels and Owners within the Picacho Mountain Community. For example, without limitation, the Association may maintain an entry feature or a landscaped park or island serving only such Neighborhood Area. The cost of such services, which may include a reasonable administrative charge in such amount as the Board deems appropriate, shall be assessed against the Lots within such Neighborhood Area as a Neighborhood Assessment. Any specific requirements with respect to preparing a budget for such Neighborhood Assessments shall be set forth in the Supplemental Declaration.

**ARTICLE VIII**

**ASSOCIATION POWERS AND RESPONSIBILITIES**

**8.1. Acceptance and Control of Association Property.**

(a) The Association, through action of the Board, may acquire, hold, lease (as lessor or lessee), operate, and dispose of tangible and intangible personal property and real property. The Association may enter into leases, licenses, or operating agreements for portions of the Common Area, for such consideration or no consideration as the Board deems appropriate, to permit use of such portions of the Common Area by third parties, for the provision of goods or services for the general benefit or convenience of Owners and other residents of the Picacho Mountain Community.

(b) Declarant and its designees may convey to the Association for no monetary consideration, and, in such case, the Association shall accept, personal property and fee title, leasehold, or other property interests in any real property, improved or unimproved, described in Exhibits "A" or "B". Upon Declarant's written request, the Association shall reconvey to Declarant any unimproved portions of the Common Area originally conveyed to the Association for no consideration, to the extent conveyed by Declarant in error or needed by Declarant to make minor adjustments in property lines.

(c) The Association shall be responsible for management, operation, and control of the Common Area, subject to any covenants and restrictions set forth in the deed or other instrument transferring such property to the Association. Without the necessity of complying with the procedures set out in Article III, the Board may adopt such reasonable rules regulating use of the Common Area as it deems appropriate.

**8.2. Maintenance of Area of Common Responsibility.**

(a) The Association shall maintain Area of Common Responsibility, which may include, but need not be limited to:

- (i) all portions of and structures situated upon the Common Area;
- (ii) landscaping within public rights-of-way within or abutting the Properties;
- (iii) such portions of any additional property, including areas designated as open space, included within Area of Common Responsibility as may be dictated by this Declaration, any Supplemental Declaration, any Plat of any portion of the Properties, or any contract, covenant, or agreement for maintenance thereof entered into by, or for the benefit of, the Association;
- (iv) all Drainage Channels, whether located on the Common Areas, Lots, or Parcels; and
- (v) any property and facilities Declarant owns and makes available, on a temporary or permanent basis, for the primary use and enjoyment of the Association and its Members. Such property and facilities must be identified by written notice from Declarant to the Association and shall remain a part of the Area of Common Responsibility and shall be maintained by the Association until such time as Declarant revokes such privilege of use and enjoyment by written notice to the Association.

The Association may maintain other property which it does not own, including, without limitation, property dedicated to the public, if the Board of Directors determines that such maintenance is necessary or desirable for the Association.

The Association shall not be liable for any damage or injury occurring on, or arising out of the condition of, property which it does not own except to the extent that it has been negligent in the performance of its maintenance responsibilities.

(b) The Association shall maintain the Common Area facilities and equipment in continuous operation, except for any periods necessary, as determined in the sole discretion of the Board, to perform required maintenance or repairs, unless Class "A" Members representing 75% of the votes in the Association and the Class "B" Member, if any, agree in writing to discontinue such operation.

Except as provided above, the Area of Common Responsibility shall not be reduced by amendment of this Declaration or any other means except with the prior written approval of Declarant during the Class "B" Control Period.

(c) The costs associated with maintenance, repair, and replacement of the Area of Common Responsibility shall be a Common Expense; provided, the Association may seek reimbursement from the owner(s) of, or other Persons responsible for, certain



portions of the Area of Common Responsibility pursuant to this Declaration, a Supplemental Declaration, or other Recorded covenants or agreements with the owner(s) thereof.

### 8.3. Insurance.

(a) Required Coverage. The Association, acting through its Board or its duly authorized agent, shall obtain and continue in effect the following types of insurance, if reasonably available, or if not reasonably available, the most nearly equivalent coverage as is reasonably available:

(i) Blanket property insurance covering “risks of direct physical loss” on a “special form” basis (or comparable coverage by whatever name denominated) for all insurable improvements within the Area of Common Responsibility to the extent that the Association has assumed responsibility in the event of a casualty, regardless of ownership. If such coverage is not generally available at reasonable cost, then “broad form” coverage may be substituted. All property insurance policies obtained by the Association shall have policy limits sufficient to cover the full replacement cost of the insured improvements under current building ordinances and codes, subject to insurance deductibles;

(ii) Commercial general liability insurance on the Area of Common Responsibility, insuring the Association and its Members for damage or injury caused by the negligence of the Association or any of its Members, employees, agents, or contractors while acting on its behalf. If generally available at reasonable cost, such coverage (including primary and any umbrella coverage) shall have a limit of at least \$2,000,000.00 per occurrence with respect to bodily injury, personal injury, and property damage;

(iii) Workers compensation insurance and employers liability insurance, if and to the extent required by law;

(iv) Directors and officers liability coverage;

(v) Commercial crime insurance, including fidelity insurance covering all Persons responsible for handling Association funds in an amount determined in the Board’s business judgment but not less than an amount equal to one-quarter of the annual Base Assessments on all Lots and Parcels presently subject to the Declaration plus reserves on hand. Fidelity insurance policies shall contain a waiver of all defenses based upon the exclusion of Persons serving without compensation; and

(vi) Such additional insurance as the Board, in its business judgment, determines advisable.

In addition, the Association shall, if so specified in a Supplemental Declaration, obtain and maintain property insurance on the insurable improvements on the Lots or Parcels within such Neighborhood Area which insurance shall comply with the requirements of Section 8.3(a)(i). Any such policies shall provide for a certificate of insurance to be furnished upon request to the Owner of each Lot or Parcel insured.

Premiums for all insurance on the Area of Common Responsibility shall be Common Expenses, unless otherwise specified in a Supplemental Declaration or when

the Board reasonably determines that other treatment of the premiums is more appropriate.

(b) Policy Requirements. The policies may contain a reasonable deductible and the amount thereof shall not be subtracted from the face amount of the policy in determining whether the policy limits satisfy the requirements of Section 8.3(a). In the event of an insured loss, the deductible shall be charged to the Owners in the same manner as the premiums for the applicable insurance coverage. However, if the Board reasonably determines, after notice and an opportunity to be heard, that the loss is the result of the negligence or willful misconduct of one or more Owners, their guests, invitees, or lessees, then the Board may assess the full amount of such deductible against such Owner(s) and their Lots or Parcels as a Neighborhood Assessment.

(c) Restoring Damaged Improvements. In the event of damage to or destruction of Common Area or other property which the Association is obligated to insure, the Board or its duly authorized agent shall file and adjust all insurance claims and obtain reliable and detailed estimates of the cost of repairing or restoring the property to substantially the condition in which it existed prior to the damage, allowing for changes or improvements necessitated by changes in applicable building codes.

Damaged improvements on the Common Area shall be repaired or reconstructed unless the Class "A" Members representing at least 80% of the total votes in the Association, and Declarant, if any, decide within 60 days after the loss not to repair or reconstruct.

If either the insurance proceeds or estimates of the loss, or both, are not available to the Association within such 60-day period, then the period shall be extended until such funds or information are available. However, such extension shall not exceed 60 additional days. No Mortgagee shall have the right to participate in the determination of whether the damage or destruction to the Common Area shall be repaired or reconstructed.

If a decision is made not to restore the damaged improvements, and no alternative improvements are authorized, the affected property shall be cleared of all debris and ruins and thereafter shall be maintained by the Association in a neat and attractive condition.

Any insurance proceeds remaining after paying the costs of repair or reconstruction, or after such settlement as is necessary and appropriate, shall be retained by the Association for the benefit of its Members and placed in the Association's reserve fund.

If insurance proceeds are insufficient to cover the costs of repair or reconstruction, the Board may levy Special Assessments to cover the shortfall against those Owners responsible for the premiums for the applicable insurance coverage under Section 8.3(a).

#### **8.4. Compliance and Enforcement**

(a) The Board may impose sanctions for violation of the Governing Documents after providing the Owner with notice and the opportunity to be heard. Such sanctions may include, without limitation, those otherwise specifically set forth in the Governing Documents, and:

- (i) imposing reasonable monetary fines, which shall constitute a lien upon the violator's Lot or Parcel;
- (ii) suspending an Owner's right to vote;
- (iii) suspending any Person's right to use the Common Area; provided, however, nothing herein shall authorize the Board to limit ingress or egress to or from a Lot or Parcel;
- (iv) suspending any services provided by the Association;
- (v) exercising self-help or taking action to abate any violation of the Governing Documents on a Lot or Parcel in non-emergency situations;
- (vi) without liability to any Person, precluding any contractor, subcontractor, agent, employee, or other invitee of an Owner who fails to comply with the terms and provisions of Article IV and the Design Guidelines from continuing or performing any further activities in the Properties; and
- (vii) levying Specific Assessments to cover costs incurred by the Association to bring a Lot or Parcel into compliance with the Governing Documents.

(b) In addition, the Board may take the following enforcement procedures to ensure compliance with the Governing Documents without providing the Owner with notice and the opportunity to be heard:

- (i) exercising self-help or taking action to abate any violation on the Common Area or in any emergency situation (specifically including, but not limited to, the towing of vehicles that are in violation of parking rules); and
- (ii) bringing suit at law or in equity to enjoin any violation or to recover monetary damages or both.

All remedies set forth in the Governing Documents shall be cumulative of any remedies available at law or in equity.

The decision to pursue enforcement action in any particular case shall be left to the Board's discretion, except that the Board shall not be arbitrary or capricious in taking enforcement action. Without limiting the generality of the foregoing sentence, the Board may determine that, under the circumstances of a particular case:

- (i) the Association's position is not strong enough to justify taking any or further action;
- (ii) the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with applicable law;
- (iii) although a technical violation may exist or may have occurred, it is not of such a material nature as to be objectionable to a reasonable person or to justify expending the Association's resources; or
- (iv) that it is not in the Association's best interests, based upon hardship, expense, or other reasonable criteria, to pursue enforcement action.

Such a decision shall not be construed a waiver of the right of the Association to enforce such provision at a later time under other circumstances or preclude the Association from enforcing any other covenant, restriction, or rule.

The Association, by contract or other agreement, may enforce applicable city and county ordinances, if applicable, and permit Dona Ana County or other governmental authorities to enforce ordinances within the Properties for the benefit of the Association and its Members.

**8.5. Attorney's Fees.**

In the event the Board employs an attorney or attorneys for collection of any assessment, whether by suit or otherwise, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, or for any other purpose in connection with the breach of this Declaration, Articles of Incorporation, Bylaws, Design Guidelines, or any Rules and Regulations of the Association, whether or not a lawsuit is filed, each Owner agrees to pay reasonable attorneys' fees and costs thereby incurred, and all other expenses incurred by the Association, in addition to any other amounts due from the owner or any other relief or remedy obtained against said owner. Said amounts shall be considered an assessment against the Owner's Lot or Parcel, subject to an assessment lien, and collectible in the same manner as assessments.

In the event of a default in payment of any such assessment when due, in which case the assessment shall be deemed delinquent, and in addition to any other remedies herein or by law provided, the Board may enforce each such obligation in any manner provided by law or in equity, or without any limitation of the foregoing, by either or both of the following procedures (and the exercise by the Association of one or more of the remedies set forth below shall not prevent the Association from exercising any other remedy available):

(a) The Board may bring a suit at law against each owner to enforce each such assessment obligation. Each owner agrees that any judgment rendered in any such action shall include all attorney's fees and costs incurred by the Association, as set forth above, plus all court costs and necessary expenses and accounting fees incurred by the Association, plus interest on the amount of said assessment at the maximum legal rate allowed by law from the date the assessment becomes delinquent until paid in full.

(b) The Board may foreclose the assessment lien against the Lot in accordance with the then prevailing New Mexico law relating to the foreclosure of realty mortgages (including the right to recover any deficiency), and the Lot may be redeemed after foreclosure sale as provided by law. Each owner agrees that any judgment rendered in any such action shall include all attorney's fees and costs incurred by the Association, as set forth above, plus all court costs, title search fees, interest, and all other costs and expenses to the extent permitted by law, and such costs and expenses shall be added to the lien.

**8.6. Implied Rights; Board Authority.**

The Association may exercise any right or privilege given to it expressly by the Governing Documents or reasonably implied from or reasonably necessary to effectuate any such right or privilege. Except as otherwise specifically provided in the Governing Documents or by law, all rights and powers of the Association may be exercised by the Board without a vote of the membership.

**8.7. Indemnification of Officers, Directors, and Others.**

(a) The Association shall indemnify every officer, director, and committee member against all damages and expenses, including counsel fees, reasonably incurred in connection with any action, suit, or other proceeding (including settlement of any suit or proceeding, if approved by the then Board of Directors) to which he or she may be a party by reason of being or having been an officer, director, or committee member, except that such obligation to indemnify shall be limited to those actions for which the Association may indemnify its officers, directors and committee members under New Mexico law.

(b) The officers, directors, and committee members shall not be liable for any mistake of judgment, negligent or otherwise, except for their own individual willful misfeasance, malfeasance, misconduct, or bad faith. The officers and directors shall have no personal liability with respect to any contract or other commitment made or action taken in good faith on behalf of the Association (except to the extent that such officers or directors may also be Members of the Association).

**8.8. Safety and Security.**

Each Owner and occupant of a Lot or Parcel, and their respective guests and invitees, shall be responsible for their own personal safety and the security of their property in the Picacho Mountain Community. The Association may, but shall not be obligated to, maintain or support certain activities within the Properties designed to enhance the level of safety or security which each person provides for himself and his property. The Association and Declarant shall not any way be considered insurers or guarantors of safety or security within the Properties, nor shall they be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

No representation or warranty is made that any systems or measures, including any mechanism or system for limiting access to the Properties, including manned entry gates, cannot be compromised or circumvented, nor that any such systems or security measures undertaken will in all cases prevent loss or provide the detection or protection for which the system is designed or intended. Each Owner acknowledges, understands, and shall be responsible for informing its tenants and all occupants of its Lot or Parcel that the Association, its Board and committees, and Declarant are not insurers or guarantors of security or safety and that each Person within the Properties assumes all risks of personal injury and loss or damage to property, including Lots and Parcels and the contents thereof, resulting from acts of third parties.

Perimeter walls and fences are erected for aesthetic purposes only. No representation or warranty is made that such walls and fences are installed to, or will in

any way, enhance safety or security within the Properties. No perimeter wall is planned to encompass all of the Picacho Mountain Community.

**8.9. Provision of Services.**

The Association may provide, or provide for, services and facilities for all or any of the Members and their Lots or Parcels, and shall be authorized to enter into and terminate contracts or agreements with other entities, including Declarant, to provide such services and facilities. The Board may charge use or service fees for any such services and facilities provided, or may include the costs thereof in the Association's budget as a Common Expense and assess it as part of the Base Assessment if provided to all Lots and Parcels. By way of example, such services and facilities might include landscape maintenance, trash collection, pest control service, cable television service, security, caretaker, transportation, fire protection, utilities, recycling, any services required by Dona Ana County or other applicable governmental authorities, and similar services and facilities.

Nothing in this Section shall be construed as a representation by Declarant or the Association as to what, if any, services shall be provided. In addition, the Board shall be permitted to modify or cancel existing contracts for services in its discretion, unless the provision of such services is otherwise required by the Governing Documents. Non-use of services provided to all Lots and Parcels as a Common Expense shall not exempt any Owner from the obligation to pay assessments for such services.

In any contracts or agreements with third parties for the provision of services within the Properties, the Association may assign to the service provider the right to bill Owners directly and to pursue all legal or equitable remedies otherwise available to the Association in the collection of such bills. Any charge billed directly to an Owner in accordance with such a contract between the Association and the service provider shall be a charge and continuing lien in favor of the service provider against each Owner's Lot or Parcel, enforceable by the service provider or the Association (as per the agreement between the Association and the service provider) in the manner provided for the enforcement of liens for assessments in Article IX.

**8.10. Change of Use of Common Area.**

During Class "B" Control Period, without the approval or consent of the Members, and thereafter, with the approval of Owners holding a majority of the votes cast on the issue at a meeting held for such purpose, the Board shall have the power and right to change the use of portions of the Common Area. Any such change shall be made by Board resolution stating that: (a) the present use is no longer in the best interest of the Owners or the new use is for the benefit of the Owners, (c) the new use is consistent with any deed restrictions and zoning regulations restricting or limiting the use of the Common Area, and (d) the new use is consistent with the then effective Master Plans.

**8.11. View Impairment.**

Neither Declarant, nor the Association, makes any guarantee or representation that any view over and across the Lots, Parcels, or any open space within Picacho Mountain will be preserved without impairment. Any express or implied easements for view purposes or for the passage of light and air are hereby expressly disclaimed.

**8.12. Relationship with Governmental and Tax-Exempt Organizations.**

The Association may create, enter into agreements or contracts with, or grant exclusive and/or non-exclusive easements over the Common Area to state or local governments, public utility providers, and non-profit, tax-exempt organizations for the benefit of the Properties, the Association, its Members, and occupants. The Association may contribute money, real property (including Common Area), personal property, or services to any such entity. Any such contribution shall be a Common Expense of the Association and included as a line item in the Association's annual budget.

For the purposes of this Section, a "tax-exempt organization" shall mean an entity which is exempt from federal income taxes under the Internal Revenue Code ("Code"), such as, but not limited to, entities which are exempt from federal income taxes under Sections 501(c)(3) or 501(c)(4), as the Code may be amended from time to time.

**ARTICLE IX**

**ASSOCIATION FINANCES**

**9.1. Budgeting and Allocating Common Expenses.**

The Association shall levy Base Assessments against all Lots and Parcels. Each Lot or Parcel shall be assessed one Base Assessment per Membership, as such Memberships are determined in this Declaration or a Supplemental Declaration. At least 30 days before the beginning of each fiscal year, the Board shall prepare a budget of the estimated Common Expenses for the coming year, including any contributions to be made to a reserve fund pursuant to Section 9.3. The budget also shall reflect the sources and estimated amounts of funds to cover such expenses, which may include any surplus to be applied from prior years, any income expected from sources other than assessments levied against the Lots and Parcels, and the amount to be generated through the levy of Base Assessments and Special Assessments against the Lots and Parcels, including Lots and Parcels reasonably anticipated to be subject to assessment during the fiscal year.

The Board shall send a notice of the amount of the Base Assessment to be levied pursuant to such budget to each Owner at least 30 days prior to the effective date of such budget. The budget shall not be subject to Owner approval and there shall be no obligation to send each Owner a copy of the budget or call a meeting for the purpose of considering the budget. If, however, the Board wishes to increase the amount of the Base Assessment by more than twenty percent (20%) over the prior fiscal year's Base Assessment, the Board must submit the proposed increase to the Members and hold a meeting of the Members in accordance with the requirements of the Bylaws to vote on such increase. Such increase will not become effective unless approved by a majority of the Members who are voting on the matter at a meeting duly called for such purpose.

If the Board fails for any reason to determine the budget for any year, then the budget most recently in effect shall continue in effect until a new budget is determined.

The Board may revise the budget and adjust the Base Assessment from time to time during the year, subject to the notice requirements set forth above. In addition, if such revised budget would increase the Base Assessment by more than twenty percent

(20%) over the prior fiscal year's Base Assessment, the Board must submit the proposed increase to the Members and obtain their approval, as set forth above.

The purpose of the Base Assessments is to fund the Common Expenses. The Common Expenses include, but are not limited to, the following:

- (a) Maintenance, repair and replacement of all of the Common Areas, including all improvements located thereon, all other Areas of Common Responsibility, and all other areas that the Association is obligated to maintain, including the establishment of a reserve;
- (b) Administrative costs and fees of the Association, including, but not limited to, management and office costs, insurance, hiring of experts for the Association, such as attorneys and accountants, and other general association expenses;
- (c) Costs of operation of all Areas of Common Responsibility, including hiring of personnel as determined by the Board to properly operate them, and any and/or all amenities located thereon;
- (d) Costs incurred for collection of assessments and other amounts due under the Declaration, and for enforcement of provisions of the Governing Documents;
- (e) Costs for joint services provided to all Members, whether or not Members use such services. Such services include, but are not limited to, the providing of internet access to all of the Lots and Parcels. The Association may provide additional services to all Members by providing the Members with notice of such services. After such notice is provided, the cost of such services shall become a Common Expense, and collected as part of the Base Assessment. Each Owner is obligated to pay these costs as part of the Common Expenses, whether or not the Owner uses such services; and
- (f) Any other expenses that the Board determines to benefit the health, safety or welfare of the Members, or which the Board determines to be in the best interest of the Association.

**9.2. Budgeting and Allocating Expenses for Neighborhood Areas.**

The Association is hereby authorized to levy Neighborhood Assessments against Lots or Parcels in a Neighborhood Area pursuant to and in accordance with the provisions of any Supplemental Declaration recorded against the Neighborhood Area.

**9.3. Budgeting for Reserves.**

The Board shall prepare and review periodically a reserve budget for the Area of Common Responsibility. Such budget shall take into account the number and nature of replaceable assets, the expected life of each asset, and the expected repair or replacement cost. If the Board elects, in the exercise of its business judgment, to fund reserves, the Board shall include in the Common Expense budget adopted pursuant to Section 9.1 a capital contribution to fund reserves in an amount sufficient to meet the projected need with respect both to amount and timing by annual contributions over the budget period. So long as the Board exercises business judgment in determining the necessity of a reserve fund, and an adequate amount of reserves, the amount of the reserve fund shall be considered adequate. Funds collected for Reserves shall be maintained in an interest bearing account separate from accounts used for operational funds.



The Board may adopt resolutions regarding the expenditure of reserve funds, including policies designating the nature of assets for which reserve funds may be expended. Such policies may differ for general Association purposes and for each Neighborhood Area. During the Class "B" Control Period, neither the Association nor the Board shall adopt, modify, limit, or expand such policies without Declarant's prior written consent.

**9.4. Special Assessments.**

In addition to other authorized assessments, the Association may levy Special Assessments to cover unbudgeted Common Expenses or expenses in excess of those budgeted. A Special Assessment for Common Expenses shall be levied against the entire membership. A Special Assessment for expenses that the Association incurs for the benefit of a specific Neighborhood based on a Supplemental Declaration shall be assessed only against the Owners within the affected Neighborhood. Special Assessments shall be payable in such manner and at such times as determined by the Board, and may be payable in installments extending beyond the fiscal year in which the Special Assessment is approved. However, any Special Assessment that applies to the entire membership and exceeds ten percent (10%) of the Base Assessment for the same year shall require the approval of a majority of the Members who are voting on the matter at a meeting duly called for such purpose in accordance with the requirements of the Bylaws.

**9.5. Specific Assessments**

In addition to assessments levied against all Owners within a Neighborhood Area pursuant to a Supplemental Declaration, the Association shall have the power to levy Neighborhood Assessments against a particular Lot or Parcel as follows:

(a) to cover the costs, including overhead and administrative costs, of providing specific services to Lots or Parcels upon request of an Owner pursuant to any menu of special services which may be offered by the Association. Specific Assessments for special services may be levied in advance of the provision of the requested service; and,

(b) to cover costs incurred in bringing the Lot or Parcel into compliance with the Governing Documents or costs incurred as a consequence of the conduct of the Owner or occupants of the Lot or Parcel, their agents, contractors, employees, licensees, invitees, or guests.

**9.6. Commencement of Payment Obligation; Time of Payment.**

The obligation to pay assessments shall commence as to each Lot or Parcel on the first day of the month following: (a) the month in which the Lot or Parcel is made subject to this Declaration, or (b) the month in which the Board first determines a budget and levies assessments pursuant to this Article, whichever is later. **However, until the earlier of (a) twelve months after a Lot or Parcel is conveyed to a Builder, or (b) a certificate of occupancy is issued for the Dwelling Unit on the Lot or structure on the Parcel, such Lot or Parcel shall be assessed only 50% of the full Base Assessment rate and only 50% of any Special Assessment levied during such period.** The first annual Base Assessment levied on each Lot and Parcel shall be adjusted according to the

number of months remaining in the fiscal year at the time assessments commence on the Lot or Parcel.

Assessments shall be paid in such manner and on such dates as the Board may establish. The Board may require advance payment of assessments at closing of the transfer of title to a Lot or Parcel and impose special requirements for Owners with a history of delinquent payment. The Board may require assessments to be paid in quarterly or monthly installments. Unless the Board otherwise provides, the Base Assessment shall be due and payable in advance on the first day of each fiscal year. If any Owner is delinquent in paying any assessments or other charges levied on his Lot or Parcel, the Board may require the outstanding balance on all assessments to be paid in full immediately.

**9.7. Obligation for Assessments.**

(a) Personal Obligation. Each Owner, by accepting a deed or entering into a Recorded contract of sale for any Lot or Parcel, is deemed to covenant and agree to pay all assessments authorized in the Governing Documents. All assessments, together with interest (computed from its due date at a maximum rate of 18% per annum or such higher rate as the Board may establish, subject to the limitations of New Mexico law), reasonable late charges as determined by Board resolution, costs, and reasonable attorneys' fees, shall be the personal obligation of each Owner and a lien upon each Lot or Parcel until paid in full. Upon a transfer of title to a Lot or Parcel, the grantee shall be jointly and severally liable for any assessments and other charges due at the time of conveyance.

The Board's failure to fix assessment amounts or rates or to deliver or mail each Owner an assessment notice shall not be deemed a waiver, modification, or a release of any Owner from the obligation to pay assessments. In such event, each Owner shall continue to pay Base Assessments on the same basis as during the last year for which an assessment was made, if any, until a new assessment is levied, at which time the Association may retroactively assess any shortfalls in collections.

No Owner may exempt himself from liability for assessments by non-use of Common Area, abandonment of his Lot or Parcel, non-use of facilities or property owned, operated, or maintained by the Association, or any other means. The obligation to pay assessments is a separate and independent covenant on the part of each Owner. No diminution or abatement of assessments or set-off shall be claimed or allowed for any alleged failure of the Association or Board to take some action or perform some function required of it, or for inconvenience or discomfort arising from the making of repairs or improvements, or from any other action it takes.

Upon written request from an Owner, Mortgagee, or other Person designated by the Owner, the Association shall furnish a statement setting forth the amount of any unpaid assessment against such Owner's Lot or Parcel. The Association may require the advance payment of a reasonable processing fee for the issuance of such statement.

(b) Declarant's Obligation.

(i) Payment of the "Shortage". During the Class "B" Control Period, and after the termination of the Class "B" Control Period, Declarant may elect to pay

assessments described in Section 9.7(b)(i) on each of its unsold Lots and Parcels that are presently subject to the Declaration or, alternatively, at its discretion, may choose to pay the “shortage” (i.e. operating deficit) for each fiscal year. Declarant’s election may be made separately with respect to Base Assessments and Neighborhood Assessments. Declarant may make this decision on an annual basis. A “shortage” shall exist if Income and Revenues (as defined below) for a particular fiscal year are less than Expenditures (as defined below) incurred for the same fiscal year. Unless Declarant otherwise notifies the Board in writing at least 60 days before the beginning of each fiscal year, Declarant shall be deemed to have elected to continue paying on the same basis as during the immediately preceding fiscal year. Income and Revenues and Expenditures are to be calculated using the accrual basis of accounting. If Declarant chooses to pay the “shortage” rather than pay the assessments for the Lots or Parcels in a particular year, in no event shall Declarant be obligated to pay more than Declarant would have paid had Declarant paid assessments for the Lots and Parcels for that year.”

(A) Income and Revenues are: the amount of all income and revenue of any kind earned by the Association during the subject fiscal year, including, but not limited to, assessments, use fees, subsidies (if any) provided by Declarant, Lifestyle Improvement Fees, transfer fees, and income from all other sources. For purposes of this Section, assessments for each Lot or Parcel are deemed earned on the annual anniversary date of the commencement of assessments with respect to such Lot or Parcel.

(B) Expenditures are: the amount of all actual operating expenses incurred, or obligated for, by the Association during the subject fiscal year, including without limitation (1) any reserve contributions for such year, as determined in the sole discretion of the Board, and (2) any budgeted or approved non-budgeted capital assets acquired during the fiscal year, but excluding (1) all non-cash expenses such as depreciation or amortization, (2) expenditures for or purchase of non-budgeted, non-approved items, and (3) all expenditures made from reserve funds. For purposes of this paragraph, “approved” shall mean prior written approval of Declarant.

(C) Any shortage in a particular fiscal year is to be offset by any surplus from a previous fiscal year. A surplus is achieved when, using an accrual basis of accounting, Income and Revenues for a particular fiscal year exceed Expenditures for the same fiscal year.

(iii) Subsidies/”In Kind” Contribution. The Association is specifically authorized to enter into subsidy contracts or contracts for “in kind” contribution of services, materials, or a combination of services and materials with Declarant or other entities for payment of Common Expenses. Declarant’s payment of assessments may be reduced or abated by the agreed value of any such services or materials provided by Declarant, in accordance with any such contract or agreement with the Association.

#### **9.8. Lien for Assessments.**

Subject to any limitations imposed by New Mexico law, all assessments and other charges of the Association authorized in this Article or elsewhere in this Declaration shall

constitute a lien against the Lot or Parcel against which they are levied from the time such assessments or charges become due until paid. The lien shall also secure payment of interest (subject to any limitations of New Mexico law), late charges, and costs of collection (including attorneys' fees, lien fees and administrative costs). Such lien shall be superior to all other liens, except the lien or charge of any Recorded first Mortgage (meaning a Recorded first Mortgage with first priority over other Mortgages) made in good faith and for value, and those deemed by New Mexico law to be superior. The lien created by this Article shall have priority over any lien for assessments asserted by any other community or property owners association. The Association may enforce such lien, when any assessment or other charge is delinquent, by suit, judgment, and foreclosure.

The Association may assign its lien rights to third parties, including service providers.

The Association may bid for the Lot or Parcel at the foreclosure sale and acquire, hold, lease, mortgage, and convey the Lot or Parcel. While a Lot or Parcel is owned by the Association following foreclosure: (a) no right to vote shall be exercised on its behalf; and (b) no assessment shall be levied on it. The Association may sue for unpaid assessments and other charges authorized hereunder without foreclosing or waiving the lien securing the same.

The sale or transfer of any Lot or Parcel shall not affect the assessment lien or relieve such Lot or Parcel from the lien for any subsequent assessments. However, the sale or transfer of any Lot or Parcel pursuant to foreclosure of the first Mortgage shall extinguish the lien as to any installments of such assessments due prior to the foreclosure. The subsequent Owner to the foreclosed Lot or Parcel shall not be personally liable for assessments on such Lot or Parcel due prior to such acquisition of title. Such unpaid assessments shall be deemed to be Common Expenses collectible from Owners of all Lots or Parcel subject to assessment, including such acquirer, its successors and assigns.

#### **9.9. Exempt Property.**

The following property shall be exempt from payment of Base Assessments and Special Assessments:

- (a) all Common Area and such portions of the Area of Common Responsibility which are not Lots or Parcels;
- (b) any property dedicated to and accepted by any governmental authority or public utility; and
- (c) property owned by a community or property owners association for the common use and enjoyment of its members, or owned by the members of a condominium association as tenants-in-common.

In addition, both Declarant and the Association shall have the right, but not the obligation, to grant exemptions to certain Persons qualifying for tax exempt status under Section 501(c) of the Internal Revenue Code so long as such Persons own property subject to this Declaration for purposes listed in Section 501(c).

#### **9.10. Lifestyle Improvement Fee.**

(a) Authority. As an additional funding source, the Association shall establish a fee to be collected upon each transfer of title to a Lot or Parcel. Such fee shall be charged to the grantor of the property, shall be payable to the Association at the closing of the transfer, and shall be secured by the Association's lien for assessments. Each Owner transferring a Lot or Parcel shall notify the Association (at its principal place of business) at least fourteen days prior to the scheduled transfer. Such notice shall include the name of the buyer, the date of title transfer, and other information the Board reasonably may require.

(b) Fee Limit. The initial amount of the Lifestyle Improvement Fee shall be ½% of the Gross Selling Price of the property. Thereafter, the Board shall have the sole discretion to specify the amount and method of determining the Lifestyle Improvement Fee; provided, the Lifestyle Improvement Fee shall not exceed 1% of the Gross Selling Price of the property. The fee may be based upon a sliding scale which varies in accordance with the "Gross Selling Price" of the property. The Gross Selling Price shall be the total cost to the purchaser of the property, excluding transfer taxes and title fees imposed by Dona Ana County, New Mexico, or other applicable governmental authority.

(c) Purpose. Lifestyle Improvement Fees shall be used for the following purposes as the Board deems beneficial to the general good and welfare of the Picacho Mountain Community:

(i) preservation and maintenance of natural areas, and sponsorship of educational programs and activities which contribute to the overall understanding, appreciation, and preservation of the natural environment within and surrounding the Picacho Mountain Community;

(ii) programs, services, and activities which serve to promote a sense of community within the Picacho Mountain Community, such as recreational leagues, cultural programs, educational programs, festivals and holiday celebrations and activities, and a community computer network;

(iii) social services, community outreach programs, and other charitable causes;

(iv) construction of additional capital improvements; and

(iv) Association reserve accounts."

(d) Exempt Transfers. Notwithstanding the above, no Lifestyle Improvement Fee shall be levied upon transfer of title to property:

(i) by or to Declarant;

(ii) by or to a licensed Builder holding title solely for purposes of development and resale;

(iii) by a co-owner to any Person who was a co-owner immediately prior to such transfer;

(iv) to the Owner's estate, surviving spouse, or heirs at law upon the death of the Owner;

(v) to an entity wholly owned by the grantor or to a family trust created by the grantor for the direct benefit of the grantor and his or her spouse and/or heirs at law; provided, upon any subsequent transfer of an ownership interest in such entity, the Lifestyle Improvement Fee shall become due; or

(vi) to an institutional lender as security for the performance of an obligation pursuant to a Mortgage.

## ARTICLE X

### EXPANSION OF THE COMMUNITY

#### 10.1. Expansion by Declarant.

Declarant may from time to time subject to the provisions of this Declaration all or any portion of the property described in Exhibit "B" by Recording a Supplemental Declaration describing the additional property to be subjected. A Supplemental Declaration Recorded pursuant to this Section shall not require the consent of any Person except the owner of such property, if other than Declarant.

Declarant's right to expand the community pursuant to this Section shall expire when all property described in Exhibit "B" has been subjected to this Declaration or 40 years after this Declaration is Recorded, whichever is earlier. Declarant may transfer or assign this right to any Person who is the developer of at least a portion of the real property described in Exhibits "A" or "B." Any such transfer shall be memorialized in a written, Recorded instrument executed by Declarant.

Nothing in this Declaration shall be construed to require Declarant or any successor to subject additional property to this Declaration or to develop any of the property described in Exhibit "B" in any manner whatsoever.

#### 10.2. Expansion by the Association.

The Association also may subject additional property to the provisions of this Declaration by Recording a Supplemental Declaration describing the additional property. Any such Supplemental Declaration shall require the affirmative vote of Members representing 67% of the Class "A" votes in the Association present in person or by proxy at a meeting duly called for such purpose, and the consent of the owner of the property. In addition, during the Class "B" Control Period, Declarant's consent is required. Any such Supplemental Declaration shall be signed by the President and Secretary of the Association, by the owner of the property and by Declarant, if Declarant's consent is required.

#### 10.3. Additional Covenants and Easements - Supplemental Declarations.

Declarant may subject any portion of the Properties to additional covenants and easements, including covenants obligating the Association to maintain and insure such property or provide services and authorizing the Association to recover its costs through Neighborhood Assessments. Such additional covenants and easements shall be set forth in a Supplemental Declaration referencing the property governed by the Supplemental Declaration. If the property is owned by someone other than Declarant, then the consent

of the Owner(s) shall be necessary and shall be evidenced by their execution of the Supplemental Declaration. Any such Supplemental Declaration may supplement, create exceptions to, or otherwise modify the terms of this Declaration as it applies to the subject property in order to reflect the different character and intended use of such property.

All Members shall be given notice of any proposed Supplemental Declarations and shall be given twenty one (21) days to provide comments. Notice shall be deemed to have been given when notice is placed in the United States Postal Service. Members may request a face-to-face meeting within 25 miles of the Picacho Mountain development during the last seven (7) days of the notice period, and such reasonable request will not be denied.

A Supplemental Declaration also may designate portions of the Common Area as "Limited Common Area" which is reserved for the exclusive or primary benefit of particular Owners. By way of illustration and not limitation, Limited Common Areas may include entry features, recreational facilities, landscaped medians and cul-de-sacs, and other portions of the Common Area.

**10.4. Effect of Filing Supplemental Declaration.**

Any Supplemental Declaration Recorded pursuant to this Article shall be effective upon Recording unless otherwise specified in such Supplemental Declaration. On the effective date of the Supplemental Declaration, all Lots or Parcels made subject to this Declaration shall have equal voting rights and an equal, pro rata share of liability for Base Assessments.

**ARTICLE XI**

**ADDITIONAL RIGHTS RESERVED TO DECLARANT**

**11.1. Withdrawal of Property.**

Declarant reserves the right to amend this Declaration so long as it has a right unilaterally to annex additional property pursuant to this Article, without prior notice and without the consent of any Person, for the purpose of removing property then owned by Declarant, its affiliates, or the Association from the coverage of this Declaration, to the extent originally included in error or as a result of any changes in Declarant's plans for the Properties. If the property so removed is owned by the Association, the Association shall convey such property to Declarant upon the request of Declarant. Notwithstanding the above, any withdrawal resulting from changes in Declarant's plans for development of the Properties shall not materially adversely affect the overall, uniform scheme of development for the Properties.

**11.2. Marketing and Sales Activities.**

Notwithstanding any provision in this Declaration, including Exhibit "C," to the contrary, Declarant and Builders, to the extent authorized by Declarant, may construct

and maintain upon portions of the Common Area, and other property owned by Declarant or such authorized Builder, such facilities, activities, improvements and personal property that, in the sole opinion of Declarant, may be reasonably required, convenient, or incidental to the construction or sale of Lots or Parcels. Such permitted facilities, activities, improvements and personal property shall include, without limitation, business offices, signs, flags (whether hung from flag poles or attached to a structure), model Lots, sales offices, holding or sponsoring special events, and exterior lighting features or displays. In addition, if reasonably required, convenient, or incidental to construction or sales activities, Declarant and Builders, to the extent authorized by Declarant, may park vehicles in areas other than garages or driveways, including on streets. Declarant and Builders, to the extent authorized by Declarant, shall have easements for access to and use of such facilities at no charge.

**11.3. Right To Develop.**

Declarant and its employees, agents, and designees shall have a right of access and use and an easement over and upon all of the Common Area for the purpose of making, constructing, and installing such improvements to the Common Area and to the property described on Exhibit "B" as it deems appropriate in its sole discretion.

Each Person acquiring an interest in the Properties acknowledges that the Picacho Mountain Community is a master planned community, the development of which is likely to extend over many years, and agrees not to protest, challenge, or otherwise object to (a) changes in uses or density of property outside the Neighborhood Area in which such Person holds an interest, or (b) changes in the Master Plans as it relates to property outside the Neighborhood Area in which such Person holds an interest.

**11.4. Right To Designate Sites for Governmental and Public Interests.**

During the Class "B" Control Period, Declarant may designate sites within the Properties for government, education, or religious activities and interests, including without limitation, fire, police, and utility facilities, schools and educational facilities, houses of worship, parks, and other public facilities. The sites may include Common Area, in which case the Association shall take whatever action is required with respect to such site to permit such use, including dedication or conveyance of the site, if so directed, by Declarant.

**11.5. Right To Approve Additional Covenants.**

No Person shall Record any declaration of covenants, conditions, and restrictions, or declaration of condominium or similar instrument affecting any portion of the Properties without Declarant's review and written consent, during the Class "B" Control Period and, thereafter, the Association's review and written consent. Such written consent shall be evidenced by the signing of the Recorded instrument. Any instrument Recorded without such written consent shall be void and of no force and effect unless subsequently approved by written consent signed by Declarant and Recorded, or, after the Class "B" Control Period, signed by the President of the Association and Recorded.

**11.6. Right To Transfer or Assign Declarant Rights.**

Any or all of the special rights and obligations of Declarant set forth in this Declaration or the Bylaws may be transferred in whole or in part to other Persons;



provided, the transfer shall not reduce an obligation or enlarge a right beyond that which Declarant has under this Declaration or the Bylaws. No such transfer or assignment shall be effective unless it is in a written, Recorded instrument signed by Declarant. The foregoing sentence shall not preclude Declarant from permitting other Persons to exercise, on a one-time or limited basis, any right reserved to Declarant in this Declaration where Declarant does not intend to transfer such right in its entirety, and in such case it shall not be necessary to Record any written assignment unless necessary to evidence Declarant's consent to such exercise.

**11.7. Easement to Inspect and Right to Correct.**

Declarant reserves for itself and others it may designate the right, but not the obligation, to inspect, monitor, test, redesign, and correct any structure; improvement, or condition which may exist on any portion of the Properties, including Lots and Parcels, and a perpetual non-exclusive easement of access throughout the Properties to the extent reasonably necessary to exercise such right. Except in an emergency, entry onto a Lot or Parcel shall be only after reasonable notice to the Owner and no entry into a dwelling shall be permitted without the consent of the Owner.

**11.8. Right to Notice of Design or Construction Claims.**

No Person shall retain an expert for the purpose of inspecting the design or construction of any structures or improvements within the Properties in connection with or in anticipation of any potential or pending claim, demand, or litigation involving such design or construction unless Declarant and any Builder involved in the design or construction have been first notified in writing and given an opportunity to meet with the Owner to discuss the Owner's concerns and conduct their own inspection.

**11.9. Exclusive Rights To Use Name of Development.**

No Person shall use the name "Picacho Mountain" or any derivative of such name in any printed or promotional material without Declarant's prior written consent. However, Owners may use the name "Picacho Mountain" in printed or promotional matter where such term is used solely to specify that particular property is located within "Picacho Mountain" and the Association shall be entitled to use the words "Picacho Mountain" in its name.

**11.10. Declarant Trademarks.**

Any use by the Association of names, marks, or symbols of Declarant or Community Builders International ("CBI"), or any of their affiliates (collectively "Declarant Trademarks") shall inure to the benefit of Declarant and CBI, and shall be subject to Declarant and CBI's periodic review for quality control. The Association shall enter into license agreements with the holder of the Declarant Trademarks, terminable with or without cause and in a form specified by the holder of the Declarant Trademarks, in its sole discretion, with respect to permissive use of certain Declarant Trademarks. The Association shall not use any Declarant Trademark without the prior written consent of the holder of the Declarant Trademark.

**11.11. Equal Treatment.**

During the Class "B" Control Period, neither the Association nor any other entity shall, without the prior written consent of Declarant, adopt any policy, rule, or procedure that:

(a) limits the access of Declarant, its successors, assigns, and/or affiliates or their personnel and/or guests, including visitors, to the Common Areas of the Association or to any property owned by any of them;

(b) limits or prevents Declarant, its successors, assigns, and/or affiliates or their personnel from advertising marketing, or using the Association or its Common Areas or any property owned by any of them in promotional materials;

(c) limits or prevents purchasers of new residential housing constructed by Declarant, its successors, assigns, and/or affiliates in the Picacho Mountain Community from becoming members of the Association or enjoying full use of its Common Areas, subject to the membership provisions of this Declaration and the Bylaws;

(d) discriminates against or singles out any group of Members or prospective Members or Declarant [this provision shall expressly prohibit the establishment of a fee structure (*i.e.*, assessments, Special Assessments and other mandatory fees or charges other than Neighborhood Assessments, chartered club dues, and use fees) that discriminates against or singles out any group of Members or Declarant, but shall not prohibit the establishment of Neighborhood Assessments];

(e) impacts the ability of Declarant, its successors, assigns, and/or affiliates to carry out to completion its development plans and related construction activities for the Picacho Mountain Community, as such plans are expressed in the Master Plans, as such may be amended and updated from time to time. Policies, rules, or procedures affecting the provisions of existing easements established by Declarant and limiting the establishment by Declarant of easements necessary to complete the Picacho Mountain Community shall be expressly included in this provision. Easements that may be established by Declarant shall include but shall not be limited to easements for development, construction, and landscaping activities and utilities; or

(f) impacts the ability of Declarant, its successors, assigns, and/or affiliates to develop and conduct customer service programs and activities in a customary and reasonable manner.

Neither the Association nor any other entity shall exercise its authority over the Common Areas (including, but not limited to, any gated entrances and other means of access to the Properties or the Exhibit "B" property) to interfere with the rights of Declarant set forth in this Declaration or to impede access to any portion of the Properties or the Exhibit "B" property over the streets and other Common Areas within the Properties.

**11.12. Right To Use Common Area for Special Events.**

During the Class "B" Control Period," Declarant shall have the right to use all Common Area to sponsor special events for charitable, philanthropic, political, or marketing purposes as determined by Declarant in its sole discretion. Any such event shall be subject to the following conditions:

(a) the availability of the facilities at the time a request is submitted to the Association;

(b) Declarant shall pay all costs and expenses incurred and shall indemnify the Association against any loss or damage resulting from the special event; and

(c) Declarant shall return the facilities and personal property owned by the Association and used in conjunction with the special event, to the Association in the same condition as existed prior to the special events.

Declarant shall have the right to assign the rights contained in this Section 11.12 to charitable organizations or foundations selected by Declarant. Declarant's right to use the Common Area for special events shall be enforceable by injunction, by any other remedy in law or equity, and by the terms of this Declaration.

**11.13. Termination of Rights.**

The rights contained in this Article shall terminate upon the earlier of (a) 40 years from the date this Declaration is Recorded, or (b) Recording by Declarant of a written statement that all sales activity has ceased. Thereafter, Declarant may continue to use the Common Areas for the purposes stated in this Article only pursuant to a rental or lease agreement between Declarant and the Association which provides for rental payments based on the fair market rental value of any such portion of the Common Areas. This **Article XI** shall not be amended without the written consent of Declarant during the Class "B" Control Period.

**ARTICLE XII  
EASEMENTS**

**12.1. Easements in Common Area.**

Declarant grants to each Owner a non-exclusive right and easement of use, access, and enjoyment in and to the Common Area, subject to:

(a) the Governing Documents;

(b) any restrictions or limitations contained in any deed conveying such property to the Association;

(c) the Board's right to:

(i) adopt rules regulating the use and enjoyment of the Common Area, including rules limiting the number of guests who may use the Common Area;

(ii) suspend the right of an Owner to use facilities within the Common Area:

(A) for any period during which any charge against such Owner's Lot or Parcel remains delinquent; and

(B) for a period not to exceed 30 days for a single violation or for a longer period in the case of any continuing violation, of the Governing Documents after providing the Owner with notice and the opportunity to be heard;

(iii) dedicate or transfer all or any part of the Common Area, subject to such approval requirements as may be set forth in this Declaration;

(iv) rent or lease any portion of any clubhouse or other recreational facilities within the Common Area on a short-term basis to any Person approved by the Board for such Person's exclusive use;

(v) permit use by Persons other than Owners, their families, lessees, and guests upon payment of admission charges, membership fees, or other use fees established by the Board;

(vi) mortgage, pledge, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred; and

(vii) create, enter into agreements with, and grant easements to tax-exempt organizations under Section 8.12.

(e) the rights of certain Owners to the exclusive use of those portions of the Common Area designated "Limited Common Areas," as described in a Supplemental Declaration;

(f) the Association's right to require Members, Owners, and/or their guests to present activity or use privilege cards, as may be issued by the Association, for access and use of amenities or facilities within the Properties; and

Any Owner may extend his or her right of use and enjoyment to the members of his or her family, lessees, social invitees, and occupants of his Lot or Parcel, as applicable, subject to reasonable regulation by the Board. An Owner who leases his Lot or Parcel in its entirety shall be deemed to have assigned all such rights to the lessee of such Lot or Parcel for the period of the lease.

### **12.2. Easements of Encroachment.**

Declarant grants reciprocal appurtenant easements of encroachment, and for maintenance and use of any permitted encroachment, between each Lot or Parcel and any adjacent Common Area, between adjacent Lots and Parcels, between adjacent Parcels, and between adjacent Lots due to the unintentional placement or settling or shifting of the improvements constructed, reconstructed, or altered thereon (in accordance with the terms of these restrictions) to a distance of not more than three feet, as measured from any point on the common boundary along a line perpendicular to such boundary. However, in no event shall an easement for encroachment exist if such encroachment occurred due to willful and knowing conduct on the part of, or with the knowledge and consent of, the Person claiming the benefit of such easement.

### **12.3. Easements for Utilities and Development.**

(a) Installation and Maintenance. Declarant reserves for itself, during the Class "B" Control Period, and grants to the Association, and all utility providers designated by

Declarant, perpetual non-exclusive easements throughout all of the Properties (but not through a structure) to the extent reasonably necessary for the purpose of:

(i) installing utilities and infrastructure to serve the Properties and other portions of Picacho Mountain, cable and other systems for sending and receiving data and/or other electronic signals, security and similar systems, walkways, pathways and trails, drainage systems, street lights, and signage on property which Declarant owns or within the Common Area, public rights-of-way or easements located on Lots or Parcels reserved for such purpose on Recorded plats;

(ii) inspecting, maintaining, repairing and replacing the utilities, infrastructure and other improvements described in Section 12.3(a)(i); and

(iii) access to read utility meters.

Notwithstanding the above, Declarant reserves the right to deny access to any utility or service provider, to the extent permitted by law, or to condition such access on the payment of reasonable consideration.

(b) Specific Easements. Declarant also reserves for itself the non-exclusive right and power to grant and Record such specific easements as may be necessary, in the sole discretion of Declarant, in connection with the orderly development of any property described in Exhibits "A" and "B." The location of any such easement shall be subject to the written consent of the Owner of the burdened property, which approval shall not unreasonably be withheld, delayed, or conditioned.

(c) Construction within Easements. No structure may be constructed within an easement recorded against the Lot or Parcel. Furthermore, no trees shall be planted within a recorded easement on the Lot or Parcel.

(d) Minimal Interference. All work associated with the exercise of the easements described in subsections (a) and (b) of this Section shall be performed in such a manner as to minimize interference with the use and enjoyment of the burdened property. Upon completion of the work, the Person exercising the easement shall restore the property, to the extent reasonably possible, to its condition prior to the commencement of the work. However, the Person exercising the easement shall have no obligation of restoring any structures or trees located in the easement area. The exercise of these easements shall not extend to permitting entry into the structures on any Lot or Parcel, nor shall it unreasonably interfere with the use of any Lot or Parcel and, except in an emergency, entry onto any Lot or Parcel shall be made only after reasonable notice to the Owner or occupant of the Lot or Parcel.

#### **12.4. Easements To Serve Additional Property.**

Declarant hereby reserves for itself and its duly authorized agents, successors, assigns, and mortgagees, an easement over the Common Area for the purposes of enjoyment, use, access, and development of the property described in Exhibit "B," whether or not such property is made subject to this Declaration. This easement includes, but is not limited to, a right of ingress and egress over the Common Area for construction of roads and for connecting and installing utilities on such property.

Declarant agrees that it and its successors or assigns shall be responsible for any damage caused to the Common Area as a result of vehicular traffic connected with development of such property. Declarant further agrees that if the easement is exercised for permanent access to such property and such property or any portion thereof benefiting from such easement is not made subject to this Declaration, Declarant, its successors or assigns shall enter into a reasonable agreement with the Association to share the cost of any maintenance which the Association provides to or along any roadway providing access to such Property.

**12.5. Easements for Maintenance, Emergency, and Enforcement.**

Declarant grants to the Association easements over the Properties, including all Lots and Parcels, as reasonably necessary for the fulfillment of any rights or duties set forth in this Declaration. Such easements shall include the right, but not the obligation, to enter upon any Lot or Parcel for emergency, security, and safety reasons, to perform maintenance and to inspect for the purpose of ensuring compliance with and enforcing the Governing Documents. Such right may be exercised by the duly authorized agents and assignees of the Association, and all emergency personnel in the performance of their duties. Except in an emergency situation, entry shall be only during reasonable hours and after notice to the Owner.

Declarant grants to the Association an easement and the right to enter a Lot or Parcel to abate or remove, using such measures as may be reasonably necessary, any structure, thing or condition which violates the Governing Documents. All costs incurred, including reasonable attorney fees, shall be assessed against the violator as a Specific Assessment.

**12.6 Flyover Easement Serving Las Cruces International Airport.**

The Declarant hereby reserves to itself and for the benefit of the City of Las Cruces, New Mexico, Dona Ana County, New Mexico, the Las Cruces International Airport, and the general public at large, a perpetual easement for the free and unobstructed passage of aircraft and the unrestricted right of flight over and above the Properties above a height of thirty-five (35) feet from the surface of the Properties. In addition to all other required approvals by this Declaration for any construction or modifications to a Lot or Parcel, each Owner, by accepting title to a Lot or Parcel subject to this Declaration, agrees that no structure, landscape, tree, or improvement will be constructed or erected on any Lot or Parcel at a height in excess of thirty-five (35) feet above the elevation of the Lot or Parcel unless any structure, landscape, tree or improvement in excess of thirty-five (35) feet have first been approved by the Reviewer and any applicable governmental authorities. In addition, each Owner, by accepting title to any property subject to this Declaration, hereby waives and relinquishes any and all loss, liability, damage, actions, suits, proceedings, demands and claims (hereinafter collectively "Causes of Action") against Declarant, the City of Las Cruces, New Mexico, Dona Ana County, New Mexico, the Las Cruces International Airport and all organizations, entities and/or political subdivisions with responsibility for operating the same for any Causes of Action arising out of or relating in any way to the operation of aircraft over and above the Properties and the ingress and egress of such aircraft to and from the Las Cruces International Airport. By accepting any deed to any Lot, Parcel, or portion thereof, each Owner accepts such deed

with full knowledge of the foregoing easement, disclaimer and release, and the proximity of the Properties to the Las Cruces International Airport.

**12.7. Easements for Cross-Drainage.**

Every Lot, Parcel, and the Common Area shall be burdened with easements for natural drainage of storm water runoff from other portions of the Properties; provided, no Person shall alter the natural drainage on any Lot or Parcel to increase materially the drainage of storm water onto adjacent portions of the Properties without the consent of the Owner(s) of the affected property, the Board, and Declarant during the Class "B" Control Period. Furthermore, no structure, plant or material shall be placed or permitted to remain within any Drainage Easement or Drainage Channel, or anywhere else on any Lot or Parcel, that damages or interferes with the installation and/or maintenance of such Drainage Easements or Drainage Channels, or that may hinder or change drainage patterns or the direction or flow of the Drainage Channels or Drainage Easements.

**12.8. Rights to Stormwater Runoff, Effluent and Water Reclamation.**

Declarant hereby reserves for itself and its designees all rights to ground water, surface water, storm water runoff, and effluent located or produced within the Properties, and each Owner agrees, by acceptance of a deed to a Lot or Parcel, that Declarant shall retain all such rights. Such rights shall include the reservation of an easement over the Properties for access, and for installation and maintenance of facilities and equipment to capture and transport such water, runoff, and effluent. This Section may not be amended without the consent of Declarant and the rights created in this Section shall survive termination of this Declaration.

**ARTICLE XIII**

**MORTGAGEE PROVISIONS**

The following provisions are for the benefit of holders, insurers and guarantors, of first Mortgages on Lots or Parcels.

**13.1. Notices of Action.**

An institutional holder, insurer, or guarantor of a first Mortgage which provides a written request to the Association (such request to state the name and address of such holder, insurer, or guarantor and the street address of the Lot or Parcel to which its Mortgage relates, thereby becoming an "Eligible Holder"), will be entitled to timely written notice of:

(a) Any condemnation loss or any casualty loss which affects a material portion of the Properties or which affects any Lot or Parcel on which there is a first Mortgage held, insured, or guaranteed by such Eligible Holder,

(b) Any delinquency in the payment of assessments or charges owed by a Lot or Parcel subject to the Mortgage of such Eligible Holder, where such delinquency has continued for a period of 60 days, or any other violation of the Governing Documents relating to such Lot or Parcel which is not cured within 60 days; or

(c) Any lapse, cancellation, or material modification of any insurance policy maintained by the Association.

**13.2. No Priority.**

No provision of this Declaration or the Bylaws gives or shall be construed as giving any Owner or other party priority over any rights of the first Mortgagee of any Lot or Parcel in the case of distribution to such Owner of insurance proceeds or condemnation awards for losses to or a taking of the Common Area.

**13.3. Notice to Association.**

Upon request, each Owner shall be obligated to furnish to the Association the name and address of the holder of any Mortgage encumbering such Owner's Lot or Parcel.

**ARTICLE XIV**

**CHANGES IN OWNERSHIP OF LOTS AND PARCELS**

Any Owner, other than Declarant, desiring to sell or otherwise transfer title to his or her Lot or Parcel shall give the Association (at its principal place of business) written notice at least fourteen (14) days prior to the pending sale or transfer. The written notice shall include the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. Within ten (10) business days after receipt of such notice, the Association shall provide the purchaser with copies of the Governing Documents (which may be provided in electronic format), the amounts of any unpaid assessments, and any other information that the Board wishes to provide to the purchaser. The Association may charge the Owner a reasonable fee to pay for the costs incurred in preparing the documents.

The transferor shall continue to be jointly and severally responsible with the transferee for all obligations of the Owner of the Lot or Parcel, including assessment obligations, until the date upon which such notice is received by the Board, notwithstanding the transfer of title.

**ARTICLE XV**

**CHANGES IN COMMON AREA**

**15.1. Condemnation.**

Whenever any part of the Common Area shall be taken or conveyed under threat of condemnation by any authority having the power of eminent domain, the Board shall determine, in the exercise of its business judgment, whether each Owner shall be entitled to notice thereof. The Board may convey Common Area under threat of condemnation if approved by Declarant during the Class "B" Control Period.

The award made for such taking shall be payable to the Association as trustee for all Owners to be disbursed as follows:



If the taking involves a portion of the Common Area on which improvements have been constructed, the Association shall restore or replace such improvements on the remaining land included in the Common Area to the extent practicable, unless the Declarant, during the Class "B" Control Period, and at least 67% of the total Class "A" Members in the Association shall otherwise agree. Any such construction shall be in accordance with plans approved by the Board.

If the taking does not involve any improvements on the Common Area, or if a decision is made not to repair or restore, or if net funds remain after any such restoration or replacement is complete, then such award or net funds shall be disbursed to the Association and used for such purposes as the Board shall determine.

**15.2. Partition.**

Except as permitted in this Declaration, the Common Area shall remain undivided and no Person shall bring any action for partition of any portion of the Common Area without the written consent of all Owners and Mortgagees. This Section shall not prohibit the Board from acquiring and disposing of tangible personal property nor from acquiring and disposing of real property which may or may not be subject to this Declaration.

**15.3. Transfer or Dedication of Common Area.**

The Association may dedicate portions of the Common Area to Dona Ana County, New Mexico, or to any other local, state, or federal governmental or quasi-governmental entity.

**ARTICLE XVI**

**AMENDMENT OF DECLARATION**

**16.1. Corrective Amendments.**

In addition to specific amendment rights granted elsewhere in this Declaration, until conveyance of a Lot or Parcel to a Class "A" Member other than a Builder, Declarant may unilaterally amend this Declaration for any purpose. Thereafter, Declarant, or the Board with consent of the Declarant, may unilaterally amend this Declaration if such amendment is necessary (a) to bring any provision into compliance with any applicable governmental statute, rule, regulation, or judicial determination; (b) to enable any reputable title insurance company to issue title insurance coverage on the Lots or Parcels; (c) to enable any institutional or governmental lender, purchaser, insurer or guarantor of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to make, purchase, insure or guarantee mortgage loans on the Lots or Parcels; or (d) to satisfy the requirements of any local, state, or federal governmental agency. However, any such amendment shall not adversely affect the title to any specific Lot or Parcel unless the Owner shall consent in writing.

In addition, during the Class "B" Control Period, Declarant may unilaterally amend this Declaration for any other purpose, provided the amendment has no material adverse effect upon any right of any Owner.

**16.2. By Members.**

Except as otherwise specifically provided above and elsewhere in this Declaration, this Declaration may be amended only by the affirmative vote or written consent, or any combination thereof, of Members representing 67% of the Class “A” votes in the Association, and the consent of Declarant, during the Class “B” Control Period.

Notwithstanding the above, the percentage of votes necessary to amend a specific clause shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause.

**16.3. Validity and Effective Date.**

No amendment may remove, revoke, or modify any right or privilege of Declarant without the written consent of Declarant (or the assignee of such right or privilege).

If an Owner consents to any amendment to this Declaration or the Bylaws, it will be presumed conclusively that such Owner has the authority to consent, and no contrary provision in any Mortgage or contract between the Owner and a third party will affect the validity of such amendment.

Any amendment validly adopted by the Association shall be certified by the President or Secretary of the Association, and shall become effective upon Recording, unless a later effective date is specified in the amendment. Any procedural challenge to an amendment must be made within six months of its Recording or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

Nothing in this Article shall be construed to permit termination of any easement created in this Declaration or Supplemental Declaration without the consent of the holder of such easement.

**16.4. Exhibits.**

Exhibits “A” and “B” attached to this Declaration are incorporated by this reference and amendment of such exhibits shall be governed by this Article. Exhibit “C” is incorporated by this reference and may be amended pursuant to Sections 16.1 and 16.2, or as provided in Article III.

**ARTICLE XVII**

**GENERAL PROVISIONS**

**17.1 Owners’ Rights of Enforcement.**

In addition to the enforcement rights of Declarant and the Association as set forth in this Declaration, each Owner, at his own expense, shall have the right to enforce, by proceedings at law or in equity, all restrictions, covenants, conditions, reservations and all other provisions set out in this Declaration. In any such action, the prevailing party shall be entitled to recover his costs, including reasonable attorney’s fees.

**17.2 Interpretation.**

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

**17.3 Severability.**

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

**17.4 Change of Circumstances.**

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

**17.5 Declarant's Disclaimer of Representations.**

Anything to the contrary in this Declaration notwithstanding, Declarant makes not warranties or representations whatsoever that the plans presently envisioned for the complete development of the Picacho Mountain Community can or will be carried out, or that any land now owned or hereafter acquired by it is or will be subjected to this Declaration, or that any such land (whether or not it has been subjected to this Declaration) is or will be committed to or developed for a particular (or any) use, or that if such land is once used for a particular use, such use will continue in effect.

**17.6 Gender and Number.**

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

**17.7 Captions and Titles.**

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

**17.8 Notices.**

Any notice required to be sent to any Member or Owner under the provisions of this Declaration shall be deemed to have been properly sent when mailed, post-paid via the United States Postal Service to the last known address of the person who appears as Member or Owner on the records of the Association at the time of such mailing.

**EXHIBITS**

Exhibit "A" Land Initially Submitted

Exhibit "B" Land Subject to Annexation

Exhibit "C" Initial Use Restrictions

[SIGNATURES ON FOLLOWING PAGE]



**EXHIBIT A**  
**LAND INITIALLY SUBMITTED**

20 February, 2007

**LEGAL DESCRIPTION OF LAND INITIALLY SUBMITTED:**

TRACT 3A1, ENCHANTED DESERT SUBDIVISION, REPLAT NO.2 OF TRACT 3, BEING A REPLAT OF TRACT 3A, ENCHANTED DESERT SUBDIVISION, REPLAT NO.1 OF TRACT 3, DONA ANA COUNTY, NEW MEXICO, FILED IN THE OFFICE OF THE COUNTY CLERK OF SAID COUNTY ON JULY 21, 2005 IN PLAT BOOK 21 AT PAGE 275, OF PLAT RECORDS.

**EXHIBIT B**  
**LAND SUBJECT TO ANNEXATION**

20 February 2007

**LEGAL DESCRIPTION OF LAND SUBJECT TO ANNEXATION:**

TRACT 3A2A, TRACT 3A2B, AND TRACT 3A2C OF THE ENCHANTED DESERT SUBDIVISION REPLAT NO. 1 OF TRACT 3A2, BEING A REPLAT OF TRACT 3A2, ENCHANTED DESERT SUBDIVISION, REPLAT NO. 2 OF TRACT 3, AS RECORDED IN PLAT BOOK 21 PAGE 275, JULY 21, 2005, LOCATED IN PROJECTED SECTIONS 7 & 18, T.23S., R.1E., AND PROJECTED SECTIONS 12 & 13, T.23S., R.1W., N.M.P.M., WITHIN THE MESILLA CIVIC COLONY GRANT TRACT 2, WEST OF LAS CRUCES, DONA ANA COUNTY, NEW MEXICO

AND:

TRACT 2, ENCHANTED DESERT SUBDIVISION AS RECORDED IN PLAT RECORD BOOK 233, PAGES 472-478, AUGUST 18, 2000,

**EXHIBIT C**  
**INITIAL USE RESTRICTIONS**  
**OF**  
**PICACHO MOUNTAIN**

20 February 2007



## Initial Use Restrictions

### 1. Use Restrictions Applicable to All Lots and Parcels

**Section 1.1 Temporary and Other Structures.** No structure of a temporary character, trailer, mobile, modular or prefabricated home, tent, shack, barn, or any other temporary structure or building, including short-wave radio or other antennas shall be placed on any Lot or Parcel. The only structures that can be placed on any Lot are a Dwelling Unit and a shed, of a size and type approved by the Reviewer. Furthermore, no dwelling, garage or other structure appurtenant thereto, shall be moved upon any Lot from another location; except, however, that Declarant reserves the exclusive right to erect, place and maintain, and to permit builders to erect, place and maintain, such areas in and upon the Properties as in its sole discretion may be necessary or convenient during the period of and in connection with the sale of Lots or Parcels, construction and selling of Dwelling Units and constructing other improvements in the Properties. Such areas may include, but are not necessarily be limited to, a temporary office building, storage area, signs, portable toilet areas and sales office. Declarant and builders shall also have the temporary right to use a Dwelling Unit situated on a Lot as a temporary office or model home during the period of and in connection with construction and sales operations in the Properties, but in no event shall a builder have such right for a period in excess of one (1) year from the date of substantial completion of his last Dwelling Unit in the Properties.

**Section 1.2 Nuisance.** No noxious or offensive activity shall be carried on or permitted upon any Lot, Parcel, or upon the Common Areas, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood or to other Owners. The Board of Directors of the Association shall have the sole and exclusive discretion to determine what constitutes a nuisance or annoyance. No repair work, dismantling, or assembling of motor vehicles or other machinery or equipment shall be done or permitted on any street, driveway or any part of the Common Areas. Junk or junk yards of any kind or character shall not be permitted, nor shall accumulation of scrap, used materials, inoperative automobiles, or machinery, or other unsightly storage of personal property be permitted. The use or discharge of firearms, firecrackers, or other fireworks in the Properties is prohibited. No motor bikes, motorcycles, off-road vehicles, motor scooters, "go-carts", or other similar vehicles shall be permitted to be operated in the Properties if, in the sole judgment of the Board of Directors of the Association, such operation, by reason of noise or fumes emitted, or by reason of manner of use, shall constitute a nuisance.

**Section 1.3 Removal of Dirt.** The digging of dirt or the removal of any dirt from any Lot or Parcel is prohibited, except as necessary in conjunction with landscaping or construction of improvements thereon.

**Section 1.4 Garbage and Refuse Storage and Disposal.** All Lots, Parcels, and the Common Areas shall at all times be kept in a healthful, sanitary and attractive condition. No Lot, Parcel, or any part of the Common Areas shall be used or maintained

as a dumping ground for garbage, trash, junk or other waste matter. All trash, garbage, or waste matter shall be kept in adequate containers constructed of metal, plastic or masonry materials, with tight-fitting lids, which shall be maintained in a clean and sanitary condition and screened from public view. No Lot or Parcel shall be used for open storage of any materials whatsoever, which storage is visible from the street, except that new building materials used in the construction of improvements erected on any Lot or Parcel may be placed upon such Lot or Parcel at the time construction is commenced and may be maintained thereon for a reasonable time, so long as the construction progresses without unreasonable delay, until completion of the improvements, after which time these materials shall either be removed from the Lot or Parcel or stored in a suitable enclosure on the Lot or Parcel. No garbage, trash, debris, or other waste matter of any kind shall be burned on any Lot or Parcel.

**Section 1.5 Septic Tanks.** No privy, cesspool, or septic tank shall be placed or maintained upon or in any Lot or Parcel, or other portion of the Properties without express written consent of the Reviewer, or as allowed by the final plat.

**Section 1.6 Oil and Mining Operations.** No oil drilling or development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or in any Lot or Parcel, nor shall oil wells, tanks, tunnels, mineral excavations or shafts be permitted upon or in any Lot or Parcel. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, maintained or permitted upon any Lot or Parcel.

**Section 1.7 Upkeep by Owner.** All improvements on each Lot and Parcel must be kept in good repair. The Owner of each Lot or Parcel shall maintain paint, stucco, walls, driveways and other improvements in good condition. Owners are required to repair cracked or broken walls, to repaint cracked, peeling, or blistering paint, to recondition and repair driveways that are eroded, spalled, broken, or significantly stained (as determined by the Board), and to repair stucco that is peeling, cracked or unsightly. The Board of Directors shall be the final determiner as to whether a Lot or Parcel is being properly maintained.

**Section 1.8 Airport Consideration Restriction.** No use is permitted that may create electrical interference with navigational signals or radio communication between airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

**Section 1.9 Compliance with Laws.** At all times, each Owner shall comply with all applicable federal, state, county and municipal laws, ordinances, rules and regulations with respect to the use, occupancy, and condition of his Lot or Parcel and any improvements thereon.

**Section 1.10 Occupants Bound.** All provisions of the Governing Documents shall apply to all occupants, lessees, guests, and invitees of any Lot or Parcel. Every Owner shall cause all occupants of his or her Lot or Parcel to comply with the foregoing and shall be responsible for all violations and losses to the Common Area caused by such occupants.

**2. Use Restrictions Applicable to all Lots Classified as Single Family Residential.**

**Section 2.1 Residence Buildings and Garages.** No building or other structure shall be built, placed, constructed, reconstructed, or altered on any Lot other than a single family residence, and no structure shall be occupied or used until the exterior construction thereof is completed. Each single family residence situated on a Lot shall have an enclosed, attached or detached garage for not less than two (2) nor more than four (4) automobiles. No such detached garage shall have more than one (1) story. Space for parking one (1) RV may be incorporated into a garage in addition to the allocated automobile spaces, however, such space must be designed so that the additional height and size of the garage does not become a major design element of the Dwelling Unit as viewed from the street directly in front of the center of the Lot's street frontage. No carport shall be built, placed, constructed or reconstructed on any Lot. No garage shall ever be changed, altered, reconstructed or otherwise converted for any purpose inconsistent with the garaging of automobiles. All Owners, their families, residents, tenants and contract purchasers shall, to the greatest extent practicable, utilize such garages for the garaging of vehicles belonging to them.

**Section 2.2 Single Family Residential Use.** Each Lot (including land and improvements) shall be used and occupied for single family residential purposes only. As used herein the term "single family residential purposes" shall refer not only to the architectural design of the dwelling but also to the permitted number of inhabitants, which shall be limited to a single nuclear family, as defined below. No multifamily dwellings may be constructed on any portion of a Lot, and no building, out building or portion thereof shall be constructed for income property, such that tenants would occupy less than the entire Lot and improvements thereon. For purposes of these restrictions, a "single nuclear family" shall be defined as any of the following: (1) any number of persons related by blood, marriage or adoption, but only to the second generation, or (2) no more than two (2) persons who are not so related and living as a single household unit. This restriction does not preclude the construction of guest quarters, so long as said guest quarters is developed as a visual extension of the Dwelling Unit and is connected by design elements of the Dwelling Unit, landscaping and/or walls and is within the designated building pad area of the Lot. It is not the intent of Declarant to exclude from a Lot any individual who is authorized to remain by state or federal law. If it is found that this definition, or any other provision contained in this Declaration is in violation of any law, then this Section shall be interpreted to be as restrictive as possible to preserve as much of the original Section as allowed by law.

No Lot shall be used or occupied for any business, commercial, trade, or professional purpose, either apart from or in connection with the use thereof as a private residence, whether for profit or not, except that an Owner or occupant may conduct business activities that are merely incidental to the Owner's residential use within a dwelling so long as:

- (a) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the dwelling;
- (b) the business activity conforms to all zoning requirements and other restrictive covenants applicable to the Lot;
- (c) the business activity does not involve visitation of the dwelling or Lot by clients, customers, suppliers or other business invitees or door-to-door solicitation of residents within the Properties; and
- (d) the business activity is consistent with the residential character of the Properties and does not constitute a nuisance, hazardous or offensive use, or threaten the security or safety of other residents of the Properties, as determined in the sole discretion of the Board of Directors. A daycare area, home daycare area, church, nursery, preschool, beauty parlor, barbershop or other similar area are expressly prohibited.

**Section 2.3 Signs.** Except for signs, billboards or other advertising devices displayed by Declarant for so long as Declarant or any successors or assigns of Declarant to whom the rights of Declarant under **this Section 8.05** are expressly transferred, shall own any portion of the Properties, no sign of any kind, including but not limited to political and advertising signs, shall be displayed to the public view on any Lot or on the Common Areas, except:

- (a) Builders may display one (1) sign of an Architectural Review Committee approved design and material that is not more than six (6) square feet (for example, 2 feet by 3 feet is 6 square feet) on a Lot to advertise the Lot and any residential structure situated thereon for sale during the sales and/or construction period; and
- (b) Any Owner may display one (1) sign of an approved design and material as set forth in the Design Guidelines that is not more than six (6) square feet on a Lot improved with a Dwelling Unit to advertise the Lot and Dwelling Unit for sale or rent.

Declarant or its agent and the Association shall have the right to remove any sign not complying with the provisions of this section, and in so doing shall not be liable and are expressly relieved of any liability for trespass or other tort in connection therewith, or arising from such removal.

**Section 2.4 Animals.** No animals, livestock, or poultry of any kind shall be raised, bred, or kept on any Lot, except that dogs, cats or other common household pets (not to exceed three (3) adult animals) may be kept, but they shall not be bred or kept for commercial purposes. It is the purpose of these provisions to restrict the use of the property so that no Person shall quarter on the premises cows, horses, bees, hogs, pigs, sheep, goats, guinea fowls, ducks, chickens, roosters, geese, turkeys, skunks or any other animals that may interfere with the quiet enjoyment, health, or safety of the Picacho Mountain Community. Pets must be restrained or confined on the Owner's rear Lot inside a fenced area or within the house. It is the pet owner's responsibility to keep the Lot clean and free of pet debris. All animals must be properly tagged for identification.

Pets which are permitted to roam free, or, in the sole discretion of the Association, make objectionable noise, endanger the health or safety of, or constitute a nuisance or inconvenience to, the Owners or occupants of other Lots shall be removed upon the Board's request at the Owner's expense. If the Owner fails to honor such request, the Board may cause the pet to be removed at the Owner's expense.

The Board may adopt, by resolution, reasonable regulations designed to minimize damage and disturbance to other Owners and occupants, including rules requiring waste removal, leash controls, noise controls, and pet occupancy limits. The Board may also adopt rules which prohibit pets from certain Common Area locations. No pets shall be kept, bred, or maintained for any commercial purpose.

**Section 2.5 Access.** No driveways or roadways may be constructed on any Lot to provide access to any adjoining Lot or other portion of the Properties unless the express written consent of the Reviewer first shall have been obtained.

**Section 2.6 Parking.**

The term "vehicle" as used in this Section, shall include without limitation, automobiles, trucks, boats, trailers, motorcycles, campers, vans, and recreational vehicles.

No vehicle may be parked or left upon any portion of the Properties except in a garage, driveway, parking pad, street or other area designated by the Board. Vehicles are prohibited from parking on non-paved areas. No vehicle may be parked overnight on the street, except with prior permission from the Board in the form of a permit. The Board shall have the right to establish what hours are considered "overnight."

No person shall park any commercial vehicles, recreational vehicles, mobile homes, trailers, campers, boats or other watercraft, or other oversized vehicles, stored vehicles, and unlicensed vehicles or inoperable vehicles within the Properties other than in enclosed garages; provided, however, one boat may be temporarily kept or stored completely in a driveway or completely on a parking pad on a Lot for not more than four nights within each calendar month. This Section shall not apply to emergency vehicle repairs. "Commercial Vehicle" shall be defined as any vehicle that meets any one or more of the following criteria: any type of signage, design or lettering for advertising, vehicle classed by manufacturer's rating exceeding 1-ton, commercial utility racks

located on the vehicle, or work equipment stored on the vehicle that is visible from outside of the vehicle.

Notwithstanding the above, for purposes of cleaning, loading, unloading, and short term parking, recreational vehicles may be parked on the Properties for 72 hours per calendar month. Owners must obtain a recreational vehicle permit for such short term parking from the Association office.

**Section 2.7 Utilities.** Each Dwelling Unit situated on a Lot shall be connected to the water and sewer lines as soon as practicable after same are available at the Lot line.

**Section 2.8 Minimum Lot Area.** No Lot or Lots may be resubdivided into a greater number of Lots. Any number of Lots may, however, be subdivided into a lesser number of Lots so long as none of the resulting Lots is smaller than the smallest of the Lots resubdivided and the Owner of the Lots has obtained the prior approval of the Reviewer. For example, three Lots could be resubdivided into two Lots so long as both of the new Lots are larger than the smallest of the original three. If Lots are resubdivided into a lesser number of Lots, the Owner of the Lot shall pay assessments according to the number of Lots originally platted. For example, if three (3) Lots are resubdivided into two (2) Lots, each Owner of a subdivided Lot will pay assessments for 1 ½ Lots.

**Section 2.9 Prohibited Conditions.** The following conditions, structures, or activities are prohibited on any Lot:

- (a) Walls, dog runs, and animal pens of any kind on any Lot;
- (b) Detached garages. Garage doors shall remain closed at all times except when entering and exiting the garage;
- (c) Excessive exterior lighting on any Lot. The Board, in its sole discretion, shall determine whether any exterior lighting is excessive;
- (d) Storage (except in approved structures or containers) of furniture, fixtures, appliances, machinery, equipment or other goods and chattels not in active use on the Common Area or any portion of a Lot which, is visible from outside the Lot. Detached storage buildings and detached sheds are prohibited;
- (e) Above-ground pools, compost piles or containers, statues, and front yard fountains;
- (f) Outside clotheslines or other outside facilities for drying or airing clothes.

In any event, and notwithstanding the above list of prohibited conditions, any structure, improvement, or thing proposed for construction, erection, installation, or placement on a Lot requires prior Reviewer approval unless otherwise specifically exempt under the Design Guidelines.

**Section 2.10 Sight Distance at Intersections.** No fence, wall, hedge or shrub planting which obstructs sight lines at elevations between two (2) and six (6) feet above the roadways shall be placed or permitted to remain on any corner Lot within the

triangular area formed by the street boundary lines and a line connecting them at points twenty-five (25) feet from the intersection of the street boundary lines, or in the case of a rounded property corner, from the intersection of the street boundary lines extended. The same sight line limitations shall apply on any Lot within ten (10) feet from the intersection of a street boundary line with the edge of a driveway or alley pavement. No tree shall be permitted to remain within such distance of such intersections unless the foliage line is maintained at sufficient height to prevent obstruction of such sight lines.

**Section 2.11 Chimneys and Exterior Fireplaces.** All fireplace flues, smoke stacks, and spark arrestors shall be completely enclosed and concealed in finished chimneys of materials architecturally compatible with the principal finish material of the exterior walls of the dwelling. Manufactured fireplace flue caps are not acceptable finish materials. No material causing a foul, noxious, or objectionable odor may be burned. Material producing burning ash, flying embers, or other cause of spread of fire may not be burned. No material which produces an ash residue outside of the fireplace itself may be burned.

**Section 2.12 Window Treatment.** No aluminum foil, reflective film or similar treatment shall be placed on windows or glass doors. This does not preclude the use of architectural windows that have UV coatings or other special coatings and features so long as those features do not create glare, or coloration inconsistent with the approved color palette provided for the Neighborhood. All windows visible to the street, including garage windows, shall require window treatments.

**Section 2.13 Seasonal Decorations.** Outdoor seasonal decorations must be in working order, good repair, and shall not become a fire hazard or threaten public safety. Decorations will be set up and taken down in a timely manner as determined by the Association, but in any case not more than sixty (60) days prior to the holiday, and not more than thirty (30) days after. The Association may establish shorter time periods by its Rules and Regulations.

**Section 2.14 Grass and Weeds.** Yards and landscape areas shall be maintained in such a way that promotes the standards of the Association. Yards consisting of grass must consist of accepted grass types. A list of approved plants, grasses and trees shall be made a part of the Design Guidelines. Grass shall be kept less than 6 inches high. Other vegetation shall be properly trimmed and maintained, while keeping a natural desert landscape appearance, on any landscape visible to the street as viewed from directly in front of the center of the Dwelling Unit. If an Owner fails to properly maintain the Lot, the Association may, at its option, have the grass, weeds and vegetation cut, after providing the Owner with at least seven (7) days notice. The cost incurred by the Association shall be treated as a Specific Assessment against the Lot, collectible in the same manner as other Assessments.

**Section 2.15 Air-conditioning.** All air-conditioning apparatus must be installed on the ground, along the side or back of the Dwelling Unit, in a manner that conceals such apparatus. No air-conditioning apparatus shall be installed on the ground in front of

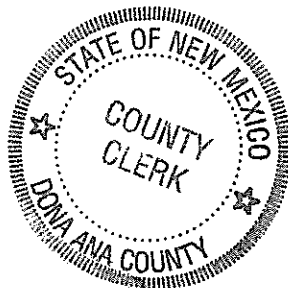
a Dwelling Unit. No air-conditioning apparatus or any evaporative cooler shall be attached to any wall or window of a Dwelling Unit. Any air conditioning apparatus or evaporative cooler must be concealed from public view as viewed from the street.

**Section 2.16 Airport Consideration Restriction.** No use is permitted that may create electrical interference with navigational signals or radio communication between airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

**Section 2.17 Flags and flagpoles.** Flagpoles may not exceed 20 feet in height, and must be set back, at least the height of the pole, including the pole topper, from any Lot line, wall, walking trail, sidewalk or public area. Flagpoles must match the color of the Dwelling Unit on the Lot, and must receive the prior written approval of the Reviewer before installation. Flag lighting may not be used. Only the United States Flag, and those of the State of New Mexico, Prisoner of War, and military service flags may be flown. No flag shall exceed three (3) feet by five (5) feet in size, and unless otherwise restricted, proper flag etiquette shall be observed as provided in the United States Flag Code/

**Section 2.18 Time-Sharing.** No Lot shall be made subject to any type of timesharing, fraction-sharing, or similar program whereby the right to exclusive use of the Lot rotates among members of the program on a fixed or floating time schedule over a period of years. However, Declarant hereby reserves the right for itself and its assigns to operate such a program.

**Section 2.19 Antennas and Satellite Dishes.** Unless governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, no antenna or other device for the transmission or reception of television, internet or radio signals or any other form of electromagnetic radiation or any associated equipment shall be erected, used or maintained outdoors on any Lot or Parcel or Common Area, whether attached to a building or structure or otherwise, so as to be Visible From Neighboring Property or the street, unless approved in writing by the Lifestyle Enrichment Committee. Any device governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, shall comply with the applicable antenna installation rules of the Association and shall be mounted, to the extent reasonably possible, so as to not be Visible From Neighboring Property or the street.



1498

State of New Mexico  
County of Dona Ana, ss  
RECEPTION NO. 60309  
I hereby certify that this  
instrument was filed for  
recording and duly recorded on  
FEB 20 2007  
at 2:53 o'clock PM  
Book 789 Page 1435-98  
of the Records of said County.  
Rita Torres, County Clerk  
BY: [Signature] DEPUTY



When recorded, please return to:

Picacho Mountain  
P.O. Box 1305  
Fairacres, NM 88033

I Hereby Certify That This Instrument Was Filed for  
Record On OCT 28, 2016 03:38:47 PM  
And Was Duly Recorded as Instrument # 1625054  
Of The Records Of Dona Ana County



Witness My Hand And Seal Of Office,  
Lynn J. Ellins, County Clerk, Dona Ana, NM

Deputy Gerardo Barrera

SUPPLEMENTAL DECLARATION  
TO FIRST AMENDED AND RESTATED  
DECLARATION OF COVENANTS, CONDITIONS  
AND RESTRICTIONS FOR  
PICACHO MOUNTAIN  
PHASE IIIA  
(The Willows)

This Supplemental Declaration to First Amended and Restated Declaration of Covenants, Conditions and Restrictions for Picacho Mountain Phase IIIA ("Supplemental Declaration") is made effective this 28<sup>th</sup> day of October 2016, by Picacho Mountain, LP, a New Mexico Limited Partnership ("Declarant").

A. Declarant is the developer of the master planned community located in Las Cruces, New Mexico, commonly known as Picacho Mountain (the "Development"); and

B. Declarant executed the First Amended and Restated Declaration of Covenants, Conditions and Restrictions for Picacho Mountain and recorded said document in the official records of Las Cruces, New Mexico, on February 20, 2007, at Book 789, Pages 1435-1498 (the "Declaration"); and

C. Pursuant to Article X of the Declaration, the Declarant may annex additional property into the Association by recording a Supplemental Declaration.

D. Declarant wishes to cause the additional property described on Exhibit "A" attached hereto (the "Tract") to become subject to the Declaration and to be developed in accordance with certain supplemental covenants, conditions and restrictions as set forth herein.

NOW, THEREFORE, Declarant hereby declares that the Tract shall be held, sold and conveyed subject to the following restrictions, covenants, conditions, terms and provisions:

1. Annexation. Pursuant to Article X of the Declaration, Declarant hereby declares that the Tract is and shall be subject to the terms and provisions of the Declaration. All capitalized terms that are not defined herein shall have the definitions set forth in the Declaration.

2. Land Use Classification. The Land Use Classification (as such term is used in Section 5.1 of the Declaration) for the real property within the Tract shall be single-family residential, and construction on such real property shall be limited to single-family dwelling units and related common areas. Notwithstanding the foregoing, however, Declarant reserves to itself, and its successors and assigns (including, without limitation, any homebuilder approved by the Declarant) the right to construct and install within the Tract one or more temporary sales trailers, temporary construction trailers, model homes (and related parking areas) and other improvements used in connection with the construction and sale of single-family dwellings within the Tract; provided that all such improvements shall be removed from the Tract or (in the case of a model home) converted to a single family dwelling unit promptly after the completion of all applicable construction and sales activity.

3. Calculation of Memberships. Each Owner shall be entitled to one membership per Lot owned.

4. Neighborhood Assessments. Pursuant to Section 7.4 of the Declaration, the Tract is designated as a Neighborhood Area, and shall be subject to one or more Neighborhood Assessments levied by the Association (the amount of which and commencement of payment will be established by the Association in accordance with the terms of the Declaration) with respect to relevant Neighborhood Expenses, including, without limitation, expenses incurred by the Association pursuant to Paragraphs 6(b) and 6(c) below.

5. Commencement of Assessments. The Lots are subject to all assessments, fees and other charges duly imposed pursuant to the Declaration. The obligation to pay such assessments, fees and other charges under the Declaration and the commencement of payment of same shall be in accordance with the terms set forth in the Declaration.

6. Maintenance by the Association.

(a) Maintenance of Common Areas. Following the Association's acceptance for maintenance of Common Area within the Tract, the Association shall maintain, repair and replace the landscaping and other improvements located within such Common Areas. The cost of such maintenance and repair (with the exception of those areas and items designated as Limited Common Areas) shall be a Common Expense, paid for out of the Base Assessments. If any damage to any landscaping or other improvements that the Association is obligated to maintain pursuant to this Paragraph 6(a) results from the negligence or willful misconduct or omission of an Owner or any tenant, invitee, agent, contractor, guest or family member of such Owner, then such Owner shall be liable to the Association for the cost incurred by the Association to repair such damage and shall pay such cost to the Association upon demand, and the Association may collect such cost from such Lot owner through a Specific Assessment.

(b) Maintenance of Limited Common Areas. The Declarant may establish specific areas and items that benefit only the Neighborhood Area as Limited Common Areas. It is anticipated that such Limited Common Areas shall include the gates and related mechanisms and utilities, as well as any other items that specifically benefit the

Tract. However, the roads and drainage areas shall be considered Common Areas, paid for out of the Base Assessments. Any areas and items designated as Limited Common Areas for the benefit of the Neighborhood Area shall be assessed only against the Owners of Lots within the Neighborhood Area. The Association shall establish a separate budget for those items considered to be Limited Common Areas for the benefit of the Tract, and shall keep a separate accounting of the Neighborhood Assessments collected to pay for such costs.

(c) Maintenance of Front Yard Landscaping. The Association shall maintain, the landscaping located in the Front Yard on the Lot. Such maintenance shall include repair and replacement, as the Board determines is desirable or necessary. The "Front Yard" shall be defined as all landscaped areas on the Lot located between the street and (1) the surface of the house facing the street and (2) any wall and/or gate running between the front and rear or side yard of the house, but excluding such portions of the above-defined area on the Lot that are enclosed by a fence or wall, arched opening, or other structure dividing the Lot. However, such maintenance shall not include maintenance, repair, or replacement of the irrigation system for such maintenance (including, but not limited to repair and replacement of irrigation lines and timers). Owners shall not interfere with the Association's maintenance of the Front Yard landscaping. Furthermore, Owners shall not install any landscaping within the Front Yard. The Declarant, or the LEC, as established pursuant to Section 4.2(b) of the Declaration, may establish Design Guidelines as to what items Owners may place within the Front Yard, if any, subject to prior approval by the Reviewer.

7. Maintenance by the Owners.

Each Owner shall be responsible for all maintenance, repair and replacement on the Lot that is not performed by the Association. In addition to all other maintenance of the Lot, each Owner shall be responsible for maintaining, repairing and replacing the entire irrigation system and related timers. As set forth in Section 6.1(c) of the Declaration, if an Owner fails to perform properly his maintenance responsibility, the Association may perform such maintenance responsibilities and assess all costs incurred in accordance with Section 9.5 of the Declaration. The Association shall afford the Owner reasonable notice and an opportunity to cure the problem prior to entry, except when entry is required due to an emergency situation. Any such entry by the Association or any of its agent shall not be deemed a trespass, and the Association shall not be liable for any damage created thereby.

8. Requirements for Irrigation System on each Lot. To ensure that the Association can properly perform its Front Yard landscaping responsibilities, the irrigation system for each Lot shall be established as follows:

(a) All irrigation lines on the Lot shall be connected to the Owner's water meter for the Lot.

(b) Each Owner shall have two landscaping timers: one for the Front Yard, and one for the remainder of the Lot.

(c) The irrigation timer for the Front Yard landscaping shall be located in a place that is accessible and always available to the Association and its agents.

(d) The Association and its agents shall program the irrigation timer for the Front Yard landscaping.

(e) Once programmed by the Association or its agents, Owners shall not change the programming for such timers.

(f) The irrigation system for the Front Yard shall be established with a shut-off valve, including a back-flow preventer, so that the irrigation system for the Front Yard can be separated from the remainder of the water system for the Lot.

(g) If the Association or its agents winterizes the irrigation system for the Front Yard, the Owner of the Lot shall not tamper or use the irrigation system so that it would no longer be winterized.

(h) An Owner shall not change the location of any irrigation timer without first obtaining the prior written approval of the Association.

(i) An Owner shall not replace any irrigation timer without first obtaining the prior written approval of the Association as to the type of timer to be used, so that the Association can maintain consistency among the timers used for Front Yard landscaping.

(j) If an Owner fails to make water available for the Front Yard landscaping, for any reason, the Association can take whatever steps it deems necessary or appropriate to be able to keep the Front Yard landscaping alive and thriving, and charge the Owner for the cost of taking such steps as a Specific Assessment, pursuant to Section 9.5 of the Declaration. Furthermore, if any of the Front Yard landscaping dies due to the lack of water, the Association may replace any of the landscaping material that has died and charge the Owner for the cost thereof as a Specific Assessment.

9. Requirements for Exterior Lighting on each Lot. To ensure that proper lighting exists for the front of each Dwelling Unit, the following requirements shall exist for lighting on each Lot:

(a) Each Lot shall contain the following lights, at a minimum:

(i) Exterior light fixture adjacent to the main entry of the Dwelling Unit.

(ii) Exterior light fixtures on either side of the garage door.

(iii) No less than three landscape lights in the Front Yard.

(b) Landscape light fixtures and garage light fixtures shall be wired to a photocell by a licensed contractor at the time of home construction. Owners shall maintain the photocell so that it is properly functioning at all times.

(c) Owners shall be responsible for promptly replacing any light bulbs that are no longer functioning. Bulb specifications shall be approved by the Reviewer at the time of initial construction. Replacement bulbs shall be the same lumens as the initial light bulbs.

(d) All exterior light fixtures shall be approved by the Reviewer and installed by a licensed contractor at the time of construction of the Dwelling Unit on the Lot.

(e) Any exterior light fixtures installed after initial construction of the Dwelling Unit must be approved by the Reviewer prior to installation.

10. Landscaping Requirements.

(a) All Front Yard landscaping and related irrigation must be installed by the Builder as part of the initial construction of a Dwelling Unit on a Lot, and must be approved by the Reviewer prior to installation.

(b) Landscaping of the remainder of the Lot must be completed within 60 days of receipt of the certificate of occupancy for the Lot, and must be approved by the Reviewer prior to installation.

(c) No tree or shrub may be planted within six feet of the rear property line of the Lot that, upon reaching maturity, is likely to obstruct the views on any other Lot. If a tree or shrub planted within six feet of the rear property line of the Lot obstructs the views on any other Lot in the future, the Association may require the Owner of the Lot to trim or remove the tree or shrub to not obstruct the views on other Lots.

11. Gates and Restriction on Liability of the Association and Declarant. Declarant intends to construct gated entrances leading into the Tract to limit access and to provide some privacy for Owners and occupants; however, there are no guarantees that gated entrances will provide security or safety to Owners, occupants, or tenants, or their respective guests and invitees. Additionally, it is not intended that the gates will be closed at all times. Rather, at least until construction is complete within the Tract, the intent is that the gates remain open during the day and are closed at night. However, Declarant may choose to vary the hours that the gates are open and closed during construction and, thereafter, the Association may choose to vary the hours that the gates are open and closed. The Association may also establish rules governing access. Furthermore, the gated entrances may restrict or delay entry into the Tract by the police, fire department, ambulances and other emergency vehicles or personnel.

By acquiring a Lot in the Tract, each Owner acknowledges the limitations relating to the gates, as set forth above, and that the gates may restrict or delay entry to an Owner's Lot. Neither Declarant, the Association, nor any director, officer, agent or employee of the Association shall be liable to any Owner, occupant, or tenant, or their respective guests and invitees, for any claims or damages resulting, directly or indirectly, from the construction, existence of maintenance of the gated entrances. If an Owner leases his

Lot, the Owner shall include the language of this provision in the lease, and the tenant shall agree to such language as a condition of the lease.

11. Interpretation. This Supplemental Declaration shall run with the land within the Tract, shall be binding on all parties having or acquiring any right, title, or interest in the Tract or any part thereof, and their respective heirs, successors and assigns, and shall be enforceable in accordance with and as a part of the Declaration. Furthermore, except for judicial construction, the Association shall have the exclusive right to construe and interpret the provisions of this Supplemental Declaration. In the absence of any adjudication to the contrary by a court of competent jurisdiction, the Association's construction or interpretation of the provisions hereof shall be final, conclusive, and binding as to all Persons and Properties benefited or bound by this Supplemental Declaration.

12. Incorporation of Declaration. The Declaration is expressly incorporated herein and made a part hereof by this reference. Unless otherwise defined herein, every capitalized term and expression used herein shall have the same meaning as set forth for such terms and expressions in the Declaration. In the event of any conflict between the terms of the Declaration and the terms of this Supplemental Declaration, the terms of the Declaration shall control.

13. Amendment. This Supplemental Declaration may be unilaterally amended by the Declarant as set forth in the Declaration. Furthermore, this Supplemental Declaration may be amended by the affirmative vote, or written consent, or any combination thereof, of Members representing 67% of the Class "A" votes subject to this Supplemental Declaration, and the consent of the Board of Directors of the Association. Furthermore, such amendment shall also require the consent of Declarant, during the Class "B" Control Period.

IN WITNESS WHEREOF, Declarant has executed the foregoing instrument as of the date first set forth above.

Picacho Mountain, L.P.,  
A New Mexico Limited Partnership,

By: Picacho Mountain Partners, L.L.C.  
General Partner, Picacho Mountain, L.P.

By:   
Karen Pofahl, Manager  
Picacho Mountain Partners, LLC

STATE OF NEW MEXICO

COUNTY OF DOÑA ANA

This instrument was acknowledged before me on October 28<sup>th</sup>, 2016, by Karen Pofahl as Manager of Picacho Mountain Partners, LLC, a New Mexico limited liability company, as General Partner of Picacho Mountain Limited Partnership a/k/a Picacho Mountain, L.P., a New Mexico limited partnership.

NZ

\_\_\_\_\_  
Notary Public

My Commission My Expires: July 11, 2018



OFFICIAL SEAL  
NATALIE ZAWADA

NOTARY PUBLIC State of New Mexico

My Commission Expires 07/11/2018

**Exhibit "A"**

PICACHO MOUNTAIN PHASE IIIA, legally described as THE WILLOWS AT PICACHO MOUNTAIN, according to the Plat filed on August 26, 2016 in Plat Record 24, Pages 138-141, in the records of Dona Ana County, New Mexico.