

# **ELK RIVER**

**AMENDED AND RESTATED  
DECLARATION OF COVENANTS AND RESTRICTIONS**

STATE OF NORTH CAROLINA

COUNTY OF AVERY

ELK RIVER  
AMENDED AND RESTATED  
DECLARATION OF COVENANTS  
AND RESTRICTIONS

THIS ELK RIVER AMENDED AND RESTATED DECLARATION OF COVENANTS AND RESTRICTIONS (the "Declaration") made and entered into as of \_\_\_\_ day of \_\_\_\_\_, 2009 by and among ELK RIVER PROPERTY OWNERS' ASSOCIATION, INC., a North Carolina nonprofit corporation, (the "Association") and ALL PROSPECTIVE PURCHASERS AND OWNERS of Lots and Units within the private residential community known as "ELK RIVER" (the "Owners");

W I T N E S S E T H:

WHEREAS, Elk River Development Corporation recorded the Elk River Declaration of Covenants and Restrictions on May 10, 1983 in the office of the Register of Deeds for Avery County, North Carolina in Book 140, at Page 1419, as amended or revised (the "Original Declaration"), encumbering the Properties as hereinafter defined; and

WHEREAS, the Association and Owners desire to amend and restate the Original Declaration in its entirety; and

WHEREAS, pursuant to the provisions of Article IX, Section 3 of the Original Declaration, the Original Declaration may be amended by the affirmative vote or written ballot by not less than sixty-seven percent (67%) of the total votes in the Association; and

WHEREAS, the Board of Directors of the Association (the "Board of Directors"), by a unanimous affirmative vote, approved and adopted this Declaration, and resolved that the same be submitted to a vote of the Owners at the annual meeting of Members; and

WHEREAS, the Association has obtained the affirmative vote of at least sixty-seven (67%) of the total member votes in the Association.

NOW, THEREFORE, the Association hereby covenants and declares, on behalf of the Owners, itself, its successors, and assigns, that the Original Declaration is hereby deleted and rescinded in its entirety, and this Declaration is adopted in its place.

## **STATEMENT OF PURPOSE**

Association is the fee simple owner of certain real property located in Banner Elk Township, Avery County, North Carolina. This private residential community is named "ELK RIVER" part of which has been developed as single-family residential dwellings and part of which has been developed as condominiums.

Association desires, for the use and benefit of itself, its successors, assigns, and future property owners, to provide for the preservation and protection of values, and to insure the attractiveness of all properties within ELK RIVER. To this end, the Developer subjected the real property described herein together with such additions as may hereafter be made thereto, to the covenants, conditions, restrictions, easements, charges and liens of the Original Declaration, all of which are for the benefit of said property and each owner thereof.

The Association is a North Carolina nonprofit corporation, which is assigned the powers of owning, maintaining, and administering the Common Area in ELK RIVER, administering and enforcing the covenants and restrictions contained herein, and collecting and disbursing the assessments and charges hereinafter created in order to efficiently preserve, protect and enhance the values and amenities in ELK RIVER, to insure the residents' enjoyment of the specific rights, privileges, and easements in the common area, and to provide for the maintenance and upkeep of the Common Area.

NOW, THEREFORE, Association for itself, its successors and assigns, and for its future grantees, their heirs, successors and assigns, hereby does declare that the property described herein and such additions as may be made subject to the provisions hereof is and shall be held, transferred and sold and conveyed subject to this Declaration. This Declaration applies to those residential Lots, Units, and Condominium Associations located within ELK RIVER as are shown on those certain maps referenced in the Original Declaration, such maps being recorded in the Office of the Register of Deeds for Avery County, North Carolina.

## **ARTICLE I**

### **DEFINITIONS**

**Section 1.** "Association" shall mean and refer to ELK RIVER PROPERTY OWNERS' ASSOCIATION, INC., a North Carolina non-profit corporation, its successors and assigns.

**Section 2.** "Common Area" shall mean all real property (including the improvements thereto) labeled as "Common Area" on the Maps and all roads and streets shown thereon.

**Section 3.** "Condominiums" shall mean condominiums which are located upon the Properties.

**Section 4.** "Condominium Associations" shall mean and refer to those certain associations of Unit owners which have been created pursuant to the provisions of the Condominium Declarations.

**Section 5.** "Condominium Declarations" shall mean and refer to those certain instruments recorded in the Avery County Register of Deeds, as amended or revised, which create the Condominiums.

**Section 6.** "Developer" shall mean and refer to Elk River Development Corporation, its successors and assigns.

**Section 7.** "Development" shall mean and refer to ELK RIVER, a residential development located upon the Properties.

**Section 8.** "Lot" shall mean and refer to any plot of land, with delineated boundary lines, appearing on the Maps with the exception of the Common Area and land dedicated to the Condominiums. The term "Improved Lot" shall mean any Lot upon which has been constructed any house or other dwelling. The term "Unimproved Lot" shall refer to any Lot which is not an Improved Lot.

**Section 9.** "Maps" shall mean and refer to the maps of the Properties as recorded (either now or hereafter) in the Avery County, North Carolina, Public Registry.

**Section 10.** "Member" shall mean and refer to all Lot Owners and Unit Owners.

**Section 11.** "Owner" shall mean and refer to the record Owner, whether one or more persons or entities, of a fee simple title to any Lot or Unit, except persons holding an interest merely as security for the performance of an obligation in which case the equitable owner will be considered an Owner.

**Section 12.** "Properties" shall mean and refer to the properties which are subject to this Declaration and brought within the jurisdiction of the Association.

**Section 13.** "Unit" shall mean and refer to those enclosed spaces within a Condominium capable of individual fee ownership as more particularly described in the Condominium Declarations.

**Section 14.** "Community-Wide Standard" shall mean the standard of conduct, upkeep, or other activity generally prevailing throughout the Properties. The standard shall be established by the Association's Board of Directors and the Architectural Review Committee. The standard may contain both objective and subjective elements, and may evolve and change as development progresses and as the needs and desires within the Properties change.

**Section 15.** "Landscaping" shall mean living plants, shrubs, trees, vegetation, ground coverings (including grass and sod) and appurtenant live/growing vegetative materials, pools (other than swimming pools), ornamental ponds, ornamental structures and any other living or non-living material or structure reasonably constituting a part of any or all of the foregoing installed upon a Lot or Condominium.



**Section 16.** "Time Share" shall mean the following:

- (a) A Time Share as defined in the North Carolina Time Share Act cited as Article 4 of Chapter 93A of the North Carolina General Statutes;
- (b) Any "vacation license" or "vacation lease" by which the purchaser or tenant acquires the right to occupy a designated or an undesignated Lot or Unit during a specified time each year for a specified number of years;
- (c) Any interest in a Lot or Unit which gives the purchaser or holder of such interest an undivided interest in the fee, coupled with an exclusive right of occupancy of the Lot or Unit during a designated time period;
- (d) Any plan of interval ownership whereby Units, and the undivided interest in the Common Areas appurtenant to such Lots or Units, are conveyed for a specified period of time over a specified number of years, together with a remainder owner in fee simple as tenants in common with all other Owners of interests in a particular Lot or Unit for a specified number of years;
- (e) Any plan, program or system which grants any right to use or occupy a Lot or Unit on the basis of points, vouchers or split, divided or floating use; or
- (f) Any and all other interests in a Lot or Unit however named or designated which create or attempt to create ownership in the form of a Time Share.

**Section 17.** "Time Share Program" shall mean an instrument transferring a Time Share, or any interest, legal or beneficial, in a Time Share, including a contract, installment contract, lease, deed, or other instrument.

## **ARTICLE II**

### **USE RESTRICTIONS**

**Section 1.** Residential Use. All Lots and Units shall be used only for single-family residential purposes and common recreational purposes auxiliary thereto and for no other purpose. Only one family may occupy a Lot or Unit as a principal residence at anyone time. Buildings constructed on the Lots are subject to the following general construction criteria in addition to the provisions of Article IV hereof:

- (a) Every single-family dwelling constructed on a Lot shall contain at least 2,600 square feet of fully enclosed and heated floor area exclusive of roofed or unroofed porches, decks, patios, terraces, attached garages and carports, and accessory buildings, with the largest main floor containing no less than 2,000 square feet of fully enclosed and heated floor area.
- (b) No building shall be located nearer than twenty (20) feet to the street line of any Lot or nearer than twenty (20) feet to each side Lot line; provided, however, the Architectural Review Committee shall have the authority to adopt reasonable rules and regulations requiring

any building to be further from the street and side Lot lines than twenty (20) feet. The Association reserves unto itself the right to absolutely and solely decide the precise site and location of any structure upon any Lot or building plot consisting of more than one Lot; provided, however, that such location shall be determined only after reasonable opportunity is afforded the Owner to recommend a specific site. Association's right to control the precise site and location of any structure shall specifically include the right to waive the above stated setback or sideline requirements without obtaining the permission of any other Owner.

**Section 2. Nuisance.** No noxious or offensive activity shall be conducted upon any Lot or in any building thereon, or in any Condominium building, or in any Unit nor shall anything be done thereon or therein which is or may become an annoyance or nuisance to other Owners.

**Section 3. Animals.** No animals, livestock, or poultry of any kind shall be kept on any Lot or in any building thereon or in any Unit except that dogs, cats or other common household pets may be so kept provided they are not kept for commercial purposes.

**Section 4. Temporary Structures.** No structure of a temporary character shall be placed on any Lot or Condominium common property; provided, however, that this prohibition shall not apply to shelters used by a contractor during the construction of the dwelling to be located on the Lot; provided further, however, that such permitted temporary shelters may not be used as residences or permitted to remain on the Lot after completion of construction.

**Section 5. Antennas and Power Lines.** No television or radio receiver, transmitter, aerial antenna, satellite dish or other antennae which are visible from any Common Area, street or adjoining Lot will be permitted without written approval from Association. All telephone, electric and other wires of all kinds or transmission cables located within the utility easements reserved in this Declaration to any dwelling, building or other structure must be installed underground.

**Section 6. Fuel tanks, Garbage Containers, and Generators.** All fuel tanks and similar storage receptacles, and generators must be installed within accessory buildings, underground, or screened in accordance with the Architectural Design Standards and approved by the Architectural Review Committee. All outdoor receptacles for ashes, trash, rubbish, or garbage shall either be installed underground or screened or placed so as not to be visible from any street, golf course, or any other Lot, but such receptacles must also be convenient for collection.

**Section 7. Clothes Drying.** No drying or airing of any clothing, rugs or bedding shall be permitted outdoors on any Lot, Unit, Condominium building, or any other unenclosed area (including porches and patios) of a Lot or Unit.

**Section 8. Signs.** No commercial signs of any kind, including, but not limited to, construction signs, "for rent," "for sale," and any other similar signs, shall be erected or maintained on any Lot or shall be placed in any structure thereon or upon any Condominium common property, or in any Unit so as to be visible from the Common Areas, any street or from any adjacent Lot or Unit except as may be permitted in writing by Association or except as may be required by legal proceedings. Property identification and similar signs having a surface area

in excess of three (3) square feet may not be erected without the written permission of the Architectural Review Committee.

**Section 9. Driveways, Vehicles, and Parking.** All driveways placed on the Lots should be asphalt paved. Any other type of application, including, but not limited to, pavers, concrete stamped, or any other material shall be approved by the Architectural Review Committee. Each Lot Owner shall provide space for parking at least two automobiles on his/her Lot prior to the occupancy of any dwelling constructed on said Lot in accordance with reasonable standards established by the Association. No on street vehicular parking shall be permitted except as in accordance with reasonable standards established by the Association. Except for bicycles and battery operated golf carts, no recreational vehicles of any kind, including but not limited to, motor homes, boats, dirt bikes, motorcycles, trailers, dune buggies, four-wheeler's or mopeds are permitted upon the Properties. No permanent basketball goals shall be permitted upon the Properties; only portable basketball goals are allowed and must be stored when not in use.

**Section 10. Maintenance.** It shall be the responsibility of each Lot Owner to maintain his or her Lot including any building and all other structures, parking areas, landscaping and other improvements upon the Lot in a manner consistent with the Community-Wide Standard and all applicable covenants. It shall be the responsibility of each Condominium Association to maintain its Condominium buildings and all other structures including parking areas, landscaping, and other improvements of the Condominium in a manner consistent with the Community-Wide Standard and all applicable covenants. In addition to any other enforcement rights, if an Owner or Condominium Association fails properly to perform its maintenance responsibility, the Association may perform such maintenance responsibilities and assess all costs incurred by the Association against the Lot or Units comprising the Condominium Association in accordance with Article II, Section 18. The Association shall afford the Owners and Condominium Associations reasonable notice and opportunity to cure the problem prior to entry, except when entry is required due to an emergency situation.

Notwithstanding anything to the contrary contained herein, neither the Association, nor any Owner shall be liable for property damage or personal injury occurring on, or arising out of the condition of, property which it does not own unless and only to the extent that it has been negligent in the performance of its maintenance responsibilities. All Lot Owners shall keep their Lots free from all garbage, refuse, and debris.

**Section 11. Removal of Trees.** No trees may be removed at any time from any Lot or Condominium common property without the prior written approval of the Architectural Review Committee.

**Section 12. Subdivision.** No Lot shall be subdivided, or its boundary lines changed, unless each part of the subdivided Lot becomes a part of an adjacent whole Lot. Each resulting modified Lot shall thereafter constitute one Lot. The restrictions and covenants herein shall apply to the modified Lots resulting from said subdivision and addition. If any Lots are combined, the Lot Owner shall remain responsible for the payment of all dues and assessments to the Association as if the Lots were not combined. If previously combined Lots are

uncombined, all past unpaid Association dues and assessments will be charged from the time of the combination, plus a ten percent (10%) simple interest fee.

**Section 13. Reconstruction.** In the event of damage to or destruction of any Condominium building or any building on any Lot or any other structures on or comprising his or her Lot, he or she shall proceed promptly to repair or to reconstruct in a manner consistent with the original construction or such other plans and specifications as are approved in accordance with Article III of this Declaration. Any such repairs or reconstruction must be commenced within six (6) months from the date of such damage or destruction and must receive a certificate of occupancy within thirty-six (36) months after construction has commenced, except where such completion is delayed by strikes, fires, national emergencies, or natural calamities. Alternatively, the Owner shall clear the Lot of all debris and ruins and maintain the Lot in a neat and attractive, condition consistent with the Community-Wide Standard. All such debris and ruins must be removed within six (6) months from the date of damage or destruction.

**Section 14. Utilities.** All plumbing fixtures, dishwashers, toilets, or sewage disposal systems shall be connected to a septic tank sewage system constructed by the Lot Owner and approved by the appropriate governmental authority, or shall be connected to a central sewer system wherever such system is available. No septic tank sewage disposal system shall be permitted on any Lot nor may any sewage disposal system be used unless such system is designed, located, constructed, and maintained in accordance with the requirements, standards, and recommendations of the appropriate public health authority. Approval of such system shall be obtained by the Lot Owner from such authority and presented to the Architectural Review Committee (as defined in Section 1 of Article IV) prior to any construction on the Lot. A certificate of approval issued by the appropriate governmental authority after inspection of the completed system shall be delivered to the Architectural Review Committee prior to use and occupancy of the dwelling Unit or residence. Each Lot shall connect to the central water distribution system of the Development.

**Section 15. Drainage.** It shall be the obligation of the Lot Owner to provide, install and maintain adequate culvert and drainage pipe under his Lot's driveway as it crosses the ditch line at the front or side of a Lot in order that the natural flow of surface water will not at any time be blocked along the roadway drainage ditch. The culvert or drainage pipe must be of sufficient size to accommodate the flow of surface water in the ditch and in no instance shall the drainage pipe be less than twenty-four (24) inches in diameter. The installation of such culvert or drainage pipe shall be approved by the Architectural Review Committee. No Owner shall interfere with or divert the natural flow of drainage of surface water, including any creek, stream, or river.

**Section 16. Divided Ownership.** No Owner shall transfer any or all of their interest in a Lot, any dwelling thereon, or any Unit in the form of a Time Share or permit their Lot or Unit to be part of a Time Share Program.

**Section 17. Rules and Regulations.** The Association may promulgate additional rules and regulations concerning the use and occupancy of the Lots and Units or the use of the

Common Areas. All such rules and regulations shall be mailed to all Owners via first class mail, postage prepaid, but a failure to mail shall not prevent enforcement of such rules and regulations.

**Section 18.** Compliance. In the event that any Owner or Condominium Association fails to comply with any of the restrictions set forth in this Article or the rules and regulations subsequently promulgated by the Association, the Association shall have the right, but not the obligation, to enter any Lot, Unit, or Condominium common property and undertake any necessary action in order to cure such Owner's or Condominium Association's default. All expense and cost incurred by the Association, its successors, assigns, or its authorized agents in curing such default shall be charged to the defaulting Owner or Condominium Association and shall be payable by such Owner or Condominium Association to the Association immediately on demand. The Association, directors, officers, and authorized agents shall not be liable for any damage which may result from such entry unless such damage results from the willful misconduct of Association.

### **ARTICLE III**

#### **ARCHITECTURAL CONTROL**

**Section 1.** Architectural Review. The Association's Board of Directors shall appoint the members of the Architectural Review Committee to carry out the functions set forth in this Article.

**Section 2.** Required Architectural Approval. No improvement or structure of any kind, including, without limitation, any building, fence, wall, swimming pool, screen enclosure, entry columns, sewer, drain, disposal system, sign, landscaping, recreational structure, external lighting, or other improvement shall be commenced, erected, placed or maintained upon any Lot, Unit, or Condominium common property, nor shall any addition, change or alteration to any of the foregoing be made, unless and until the plans, specifications and location of the same shall have been submitted to, evaluated and approved in writing by the Architectural Review Committee as to harmony of external design and location in relation to surrounding structures and topography and as to conformance with the architectural and landscape standards of the Architectural Review Committee, a copy of which shall be delivered to all Lot Owners, Unit Owners, and Condominium Associations as the same may from time to time be amended.

**Section 3.** Approval of Plans, Specifications, and Construction. Prior to commencement of any construction on any Lot, Unit, or Condominium common property, all proposed building plans, erosion control procedures, specifications, exterior color or finish, plot plans (showing the proposed location of such building or structure, drives and parking areas), and construction schedule shall be approved in writing by the Architectural Review Committee. A compliance deposit shall be required prior to the beginning of construction in an amount to be set and applied pursuant to the requirements of the Architectural Review Committee which requirements are subject to the approval of the Board of Directors of the Association. All building plans and specifications covering such construction shall be prepared by a qualified registered architect or reviewed and approved by a registered architect for the specific use of the owner submitting same. Upon written request by an Owner or Condominium Association for approval of plans, the Architectural Review Committee shall do its best to approve or disapprove the plans within

ninety (90) days of receipt, but a failure to disapprove within said ninety (90) day period shall not be deemed an approval of said plans. Garages and other accessory buildings on any Lot must be constructed of the same or compatible materials as specified for the dwelling constructed thereon. Disapproval of plans, location, or specifications may be based by the Architectural Review Committee upon any ground, including purely aesthetic considerations, which in its discretion it deems sufficient. No alterations may be made in such plans after approval by the Architectural Review Committee is given except with the written consent of the Architectural Review Committee; provided, however, the Architectural Review Committee's approval is not valid if it is inconsistent with the Architectural Design Standards. No alterations in the exterior appearance of any building or structure located on the Properties shall be made without the prior written consent of the Architectural Review Committee. One copy of all plans and related data shall be retained by the Architectural Review Committee for its records. All structures must receive a certificate of occupancy within thirty-six (36) months after construction has commenced, except where such completion is delayed by strikes, fires, national emergencies, or natural calamities.

**Section 4.** Approval Not a Guarantee. Approval of plans, specifications, and the publication of architectural and landscaping standards shall not be considered as representing or implying that plans, specifications, or standards if followed will result in properly designed improvements or that such improvements are consistent with the Declaration and Design Guidelines. The Association, its directors, officers, committee members, agents, and employees shall not be responsible or liable in any way for defects in any such plans or specifications submitted, revised, or approved pursuant to the terms of this Section.

## **ARTICLE IV**

### **EASEMENTS**

**Section 1.** Easements Reserved by Developer. Developer has reserved unto itself, its successors and assigns, a perpetual easement over, upon, across and under an area ten (10) feet in width running along each boundary line of each Lot for the installation and maintenance of electrical and telephone wires, cables, conduits, sewer lines and mains, water lines and mains and other utility facilities in order that utility services may be provided to all Owners. Developer reserves unto itself, its successors and assigns, easements to cut and maintain drainways for surface water wherever and whenever such action may appear to the Developer to be necessary in order to insure proper drainage of surface water while maintaining the overall appearance of the Development. These easements and rights expressly include the right to cut any trees, bushes or shrubbery, make any grading of the soil or to take any other similar action reasonably necessary to provide utility installation and to insure proper drainage. All rights reserved by Developer may be exercised by any licensee or successor and assign of the Developer in order to provide or maintain any utility services and drainage. Developer further reserves the right to locate pumping stations and tanks and other facilities which form a part of the water and sewer system of the Development on any Lot designated for such use on a Map without the permission of the Owner of such Lot.

**Section 2.** Easements for Ingress and Egress. Easements are hereby reserved and granted across all streets shown on the Maps for ingress and egress of the Developer, its successors and assigns, its licensees, public safety personnel and any authorized agents, employees or assigns of any of the foregoing for the purpose of constructing, maintaining, inspecting and repairing the streets to be built in the Common Areas and the utilities and drainage areas described in section 1 of this Article. In addition, the Developer, and such other entities shall have a continuing easement to enter the Lots in order to maintain, inspect, and repair all utilities facilities and drainage areas located on the Lots. This easement includes the right to disturb the structures located on each Lot in order to inspect, maintain, and repair any utility facility located within or beneath such structures.

**Section 3.** Obstruction. within any easements described in this Article, no structure, planting or other material shall be placed or permitted to remain which may interfere with the installation or maintenance of sewage disposal facilities and utilities, or which may change the direction of flow, or which may obstruct or retard the flow of water through the drainage channels.

## **ARTICLE V**

### **RIGHT OF FIRST REFUSAL**

**Section 1.** Applicability. No Lot or Unit may be sold by any owners except in compliance with the provisions of this Article.

**Section 2.** Right of First Refusal. In the event any Owners receives a bona fide written offer from a third party to purchase his Lot or Unit, such Owner shall immediately notify Association or its assignee(s) of such offer and shall forward a copy of said written offer, together with the name and address of the offer. Upon receipt of the said notice, the Association or its assignee(s) shall have thirty (30) days to notify such Owners that it desires to purchase his Lot or Unit on the same terms and conditions as set forth in the offer. If the Association or its assignee(s) notifies such Owners of its desire to purchase the Lot or Unit, then owner shall convey his Lot or Unit to the Association or its assignee(s) according to the provisions of Section 3 below. In the event that the Association or its assignee(s) elects not to purchase the Lot or Unit or fails to notify the Owners of its decision within such thirty (30) day period, then the Owner may sell the Lot or Unit to the third party offer or on terms and conditions no more favorable to the offer or as set forth in the original offer. Provided, however, that if such sale and conveyance does not take place to the original third party offer or within sixty (60) days after the Association or its assignee(s) failure to exercise its right of first refusal, then the Lot or Unit shall again become subject to the terms and provisions of this Article. Any conveyance by an Owner to a third party offer or shall be subject to the terms and conditions of this Declaration.

**Section 3.** Transfer to the Association or its assignee(s). In the event that the Association or its assignee(s) exercises its right of first refusal pursuant to Section 2 of this article, the closing of the conveyance of such Lot or Unit shall occur within thirty (30) days after receipt of the Owner of written notice from the Association or its assignee(s) that it elects to exercise its right of first refusal with respect to such Lot or Unit. At the closing, the Association or its assignee(s) shall make such payments in cash, by a promissory note, or otherwise to the

Owner as described in the third party offer. Owner shall deliver to the Association or its assignee(s) a general warranty deed conveying the Lot or Unit free and clear of all exceptions except as may be set forth in the written offer and subject to this declaration. In the event the closing occurs after the death of an owner, the Association or its assignee(s) may, in its discretion, require the personal representative of the Owner to post such bonds or other assurances as the Association or its assignee(s) may deem reasonable in order to protect the Association or its assignee(s) from any loss which might be caused by the failure to pay any federal or state inheritance tax or the failure to pay the claims of any creditors who may have a lien on the Lot or Unit superior to the Association or its assignee(s) rights as a purchaser of said Lot or Unit.

**Section 4. Death of an Owner.** The personal representative, heirs, successors, and assigns of any Owner who dies while owing any Lot or Unit shall become an Owner subject to the terms and conditions of this Declaration and any subsequent sale, transfer and conveyance of such Lot or Unit shall be governed by the provisions of this Article.

**Section 5.** Notwithstanding the above provisions, this Right of First Refusal shall not apply to a sale of Lot or Unit to a child or grandchild of the Owner.

## **ARTICLE VI**

### **COVENANTS FOR MAINTENANCE AND ASSESSMENTS**

**Section 1. Responsibilities for Maintenance.** The Association shall be responsible for providing the services set forth in Section 2 below and for collecting the assessments set forth in this Article.

**Section 2. Purpose of Annual Assessments.** The annual assessments levied by the Association shall be used as follows:

- (a) to maintain and repair all roads constructed within the Common Areas to the standard as such roads were in at the time of their completion, to maintain all landscaping adjacent to such roads in a manner consistent with the overall appearance of the Development, and to maintain and repair all street lights installed along such roads;
- (b) to provide such security services as may be deemed reasonably necessary for the protection of the Common Areas;
- (c) to provide garbage removal services for all Lots and Condominium Associations;
- (d) to pay all ad valorem taxes levied against the Common Areas and any property owned by the Association;
- (e) to pay the premiums on all hazard insurance carried by the owner of the Common Areas and all public liability insurance carried by the Association pursuant to its Bylaws;



(f) to pay all legal, accounting and other professional fees incurred by the Association in carrying out the duties as set forth herein or in the Bylaws.

**Section 3.** Creation of the Lien and personal Obligation for Assessments. The Association, for each Lot and Unit hereby covenants, and each Owner of any Lot or Unit by acceptance of a deed therefor, whether or not it shall be expressed in such deed, is deemed to covenant and agree to pay the annual assessments in such amounts necessary so as to pay for the services set forth in Section 2 of this Article and charges and special assessments for capital improvements, established and collected as hereinafter provided. Any such assessment or charge, together with interest, costs and reasonable attorney's fees shall be a charge and a continuing lien upon the Lot or Unit against which each such assessment charge is made. Each such assessment or charge, together with interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the Owner of such Lot or Unit at the time when the assessment fell due. The personal obligation for delinquent assessments or charges shall not pass to an Owner's successors in title unless expressly assumed by them.

**Section 4.** Special Assessments for Capital Improvements and Emergencies. In addition to the annual assessments authorized above, the Association may levy, in any year, a special assessment applicable to that year for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area, including fixtures and personal property related thereto, and the common roadways serving the Development or for the purpose of meeting any unanticipated expenses related to the Common Areas. Such special assessments may be levied only after obtaining written consent of the Owners of at least 51% of the aggregate number of Lots and Units then subject to the Declaration.

**Section 5.** Assessment Rate.

(a) Both annual and special assessments must be fixed at a uniform rate for all Unimproved Lots. Both annual and special assessments must be fixed at a uniform rate for all Improved Lots and Units.

(b) The amount of the aggregate annual assessments for each year shall be the amount necessary to fund the expenses described in Section 2 of this Article. For each calendar year, the maximum annual assessment may be increased by up to 20% of the prior year's maximum annual assessment by the appropriate assessing authority as set forth in Section 1 of this Article.

(c) Any increase in the annual assessments in excess of that permitted in subsection (b) of this section may be levied only after obtaining the written consent of the Owners of at least 51% of the aggregate number of Lots and Units then subject to the Declaration.

**Section 6.** Assessments on the Units. All annual and special assessments on the Units shall be billed to and collected directly from the Unit Owners. In addition to the assessments set forth herein, each Condominium Association may make additional assessments on its Unit Owners (even though such assessments would exceed the limit set forth in Section 5 of this Article) pursuant to the terms of the applicable Condominium Declaration.

**Section 7. Date of Commencement of Annual Assessments; Due Dates.** The annual assessments provided for here in shall commence for each Lot upon the installation of all utilities necessary to serve such Lot and upon the completion of the road on which such Lot fronts. A formerly Unimproved Lot shall be subject to the Improved Lot assessment beginning in January of the year immediately following the completion of construction. Assessments for the Units shall commence upon the filing of the Condominium Declaration creating the Condominium in which the Unit is contained in the Avery County, North Carolina Public Registry. The first annual assessment shall be prorated according to the number of months remaining in the calendar year. The Board of Directors of the Association shall fix the amount of the annual assessment against each Lot and Unit at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner. The due dates shall be established in such written notice.

**Section 8. Effect of Nonpayment of Assessments: Remedies of the Association.** Any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of sixteen percent (16%) per annum. In addition to such interest charge, the delinquent Lot Owner or Unit Owner shall also pay such late charge as may have been theretofore established by the Board of Directors of the Association, to defray the costs arising because of late payment. The Association may bring an action at law against the delinquent Lot Owner or Unit Owner or foreclose the lien against the Lot or Unit. All interest, late payment charges, costs and reasonable attorney's fees of such actions or foreclosures shall be added to the amount of such assessment. No Owner may waive or otherwise escape liability for the assessments provided for herein by not using the Common Area or abandoning his Lot or Unit.

**Section 9. Subordination of the Lien to Mortgages.** The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage or deed of trust on a Lot or Unit or any mortgage or deed of trust to the Association. Sale or transfer of any Lot or Unit shall not affect the assessment lien. However, the sale or transfer of any Lot or Unit pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer; provided, however, that the Board of Directors of the Association may in its sole discretion, determine such unpaid assessments to be an annual or special assessment, as applicable, collectable pro rata from all Lot Owners and Unit Owners including the foreclosure sale purchaser. Such pro rata portions are payable by all Lot Owners and Unit Owners notwithstanding the fact that such pro rata portions may cause the annual assessment to be in excess of the maximum permitted under Section 5 of this Article. No sale or transfer shall relieve the purchaser of such Lot or Unit from liability for any assessments thereafter becoming due or from the lien thereof, but the lien provided for herein shall continue to be subordinate to the lien of any mortgage or deed of trust as above provided.

**Section 10. Disclaimer of Liability.** The Association may, but shall not be obligated to, maintain or support certain activities within the Properties designed to promote the health, safety, and welfare of Owners and occupants of any Lot or Units.

(a) Notwithstanding anything contained herein or in the Association's Articles, Bylaws, Declaration, rules and regulations or the North Carolina Planned Community Act, neither the Association, the Board, nor the management company, if any, of the Association shall

be liable or responsible for, or in any manner a guarantor or insurer of, the health, safety or welfare of any Owner or occupant of any Lot or any tenant, guest or invitee of any Owner or occupant or for any property of any such persons. Each Owner and occupant of a Lot or Unit and each tenant, guest and invitee of any Owner or occupant shall assume all risks associated with the use and enjoyment of the Properties, including the airport and all recreational facilities.

(b) Neither the Association, the Board, nor the management company, if any, shall be liable or responsible for any personal injury, illness or any other loss or damage caused by the presence or malfunction of utility lines or utility sub-stations adjacent to, near, over, or on the Properties. Each Owner and occupant of a Lot or Unit and each family member, tenant, guest, and invitee of any Owner or occupant shall assume all risk of personal injury, illness, or other loss or damage arising from the presence of utility lines or utility sub-stations and further acknowledges that the Association, the Board, or the management company, if any, of the Association, have made no representations or warranties, nor has any Owner or occupant, or any family member, tenant, guest, or invitee of any Owner or occupant relied upon any representations or warranties, expressed or implied, relative to the condition or impact of utility lines or utility sub-stations.

(c) Each Owner and occupant, and each family member, tenant, guest and invitee of any Owner or occupant acknowledges that the Properties are located in the vicinity of mountains and wooded areas and that such areas may contain an abundance of wildlife, including, but not limited to, deer, skunks, opossums, snakes, bears, bobcats, mountain lions, reptiles, rodents and pests. Neither the Association, the Board, nor the management company, if any, of the Association, shall be liable or responsible for any personal injury, illness or any other loss or damage caused by the presence of such wildlife on the Property. Each Owner and occupant of a Lot or Unit and each family member, tenant, guest, and invitee of any Owner or occupant shall assume all risk of personal injury, illness, or other loss or damage arising from the presence of such wildlife and further acknowledges that the Association, the Board, or the management company, if any, of the Association, if any, have made no representations or warranties, nor has any Owner or occupant, or any family member, tenant, guest, or invitee of any Owner or occupant relied upon any representations or warranties, expressed or implied, relative to the presence of such wildlife.

(d) No provision of the Association's Articles, Bylaws, Declaration, and rules and regulations shall be interpreted as creating a duty of the Association, the Board, or the management company, if any, of the Association, to protect or further the health, safety or welfare of any person(s), even if the funds of the Association are used for any such purpose.

Each Owner (by virtue of his or her acceptance of title to his or her Lot or Unit and each other Person having an interest in or lien upon, or making any use of, any portion of the Properties by virtue of accepting such interest or lien or making such use) shall be bound by this Section and shall be deemed to have waived any and all rights, claims, demands and causes of action against the Association, or the management company, if any, their directors, officers, committee and Board members, employees, agents, contractors, subcontractors, successors and assigns arising from or connected with any matter for which the liability has been disclaimed.

**Section 11. Safety.** The Association may, but shall not be required to, maintain or support certain activities within the Properties designed to provide a greater level of safety than exists within the Properties.

(a) Neither the Association, nor any management company, if any, shall in any way be considered insurers or guarantors of safety within the Properties. Neither the Association, nor any management company, if any, shall be held liable for any loss or damage for failure to provide adequate safety or ineffectiveness of safety measures undertaken.

(b) All Owners and occupants of any Lot or Unit, and all family members, tenants, guests, and invitees of any Owner, acknowledge that the Association, its Board of Directors, and Association committees, the management company, if any, and the Architectural Review Committee do not represent or warrant that any entry gate, patrolling of the Properties, neighborhood watch group or volunteer safety patrol, or any safety system designated by or installed according to guidelines established by the Architectural Review Committee may not be compromised or circumvented; nor that any entry gate, patrolling of the Properties, neighborhood watch group or volunteer safety patrol, or any security systems will prevent loss by burglary, theft, hold-up, or otherwise; nor that any entry gate, patrolling of the Properties, neighborhood watch group or volunteer safety patrol, or any security systems will in all cases provide the detection or protection for which the system is designed or intended.

(c) All Owners and occupants of any Lot or Unit, and all family members, tenants, guests, and invitees of any Owner, acknowledge and understand that the Association, its Board, officers, committees, and the management company, if any, are not insurers of safety within the Properties. Each Owner acknowledges, understands and shall be responsible for informing its tenants and all occupants of its Lot or Unit that the Association, its Board, officers, and committees, are not guarantors of security or safety and that each person using Properties within the community assumes all risks of personal injury and loss or damage to property including Lots and Units, improvements thereon and the contents thereof, resulting from acts of third parties.

(d) All Owners and occupants of any Lot or Unit and all family members, tenants, guests, and invitees of any Owner assume all risks for loss or damage to persons, to Lots, and to the contents of Lots or Units and further acknowledge that the Association, its Board, officers, committees, and the management company, if any, have made no representations or warranties, nor has any Owner, occupant, or any tenant, guest, or invitee of any Owner relied upon any representations or warranties, expressed or implied, relative to any entry gate, patrolling of the Properties, neighborhood watch group or volunteer safety patrol, or any security systems recommended or installed or any safety measures undertaken within the Properties.

**Section 12. Ownership Fee.** A separate ownership fee shall be required of all new property owners to be assessed by the Association, in amounts determined by the Association to be paid by the new owner upon first acquisition of property within Elk River which property is subject to this Declaration.

## **ARTICLE VII**

### **ASSOCIATION**

**Section 1.** Membership. Every Lot Owner and Unit Owner of a Condominium Association shall be a Member of the Association. Membership of a Lot Owner shall be appurtenant to and may not be separated from the ownership of the Lot. Membership of a Unit Owner shall be appurtenant to and may not be separated from the ownership of the Unit.

**Section 2.** Voting. Each Member shall be entitled to one (1) vote for each Lot or Unit owned. When more than one person owns an interest (other than a leasehold or security interest) in any Lot or Unit, all such persons shall be Members and the voting rights appurtenant to said Lot or Unit may be exercised as they, among themselves, determine, but in no event shall more than one (1) vote be cast with respect to any Lot or Unit.

**Section 3.** Board of Directors. The Association shall be governed by a Board of Directors in accordance with its Bylaws.

## **ARTICLE VIII**

### **CONDOMINIUMS**

Developer reserves the right, but is not obligated, to develop a portion of the properties as Condominiums. In addition to all of the covenants, easements and restrictions set forth herein, all Units in each Condominium shall be subject to a Condominium Declaration.

## **ARTICLE IX**

### **PROPERTY RIGHTS**

**Section 1.** Use of Common Areas. Notwithstanding any recordation of any map or any other action by Developer or the Association, all Common Areas (including the roads thereon) shall remain private property and shall not be construed as dedicated to the use or enjoyment of the public.

**Section 2.** Owner's Rights to Use and Enjoy Common Areas. Each Owner shall have the right to use and enjoy the Common Areas which shall be appurtenant to and shall pass with the title to his Lot or Unit subject to the following:

(a) the right of the Association to promulgate any and enforce reasonable regulations governing the use of the Common Area to insure safety and rights of all Owners;

(b) the right of the Association to suspend the voting rights and right to use the Common Areas by any Owner for a period during which any assessment against his Lot or Unit remains unpaid and for a period not to exceed thirty (30) days for any infraction of its published rules and regulations; and

(c) the right of the Association to grant utility, drainage or other easements across the Common Areas.

**Section 3.** Owner's Easements for Ingress and Egress. Every Lot and Unit shall be conveyed with a perpetual, nonexclusive right to use any roadway which forms a part of the Common Area for the purpose of providing access to and from each Lot or Unit.

## **ARTICLE X**

### **GENERAL PROVISIONS**

**Section 1.** Enforcement. The Association or any non-breaching Owner or any of them jointly or severally, shall have the right to proceed at law or in equity to compel compliance with the terms hereof or to prevent the violation or breach of such terms by any Owner or his agent. In addition to the foregoing, the Association shall have the right, whenever there shall have been built on any Lot or Condominium common property any structure which is in violation of these restrictions, to enter upon such Lot or Condominium common property and correct or remove such violating structure at the expense of the Owner. Any such entry and abatement or removal shall not be deemed a trespass. The failure to enforce any right, reservation, restriction or condition contained in this Declaration shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect such enforcement.

**Section 2.** Severability. The invalidation by any Court of any restrictions contained in this Declaration shall in no way affect any of the other restrictions, but they shall remain in full force and effect.

**Section 3.** Duration and Amendment. This Declaration shall run with and bind the Properties, and shall inure to the benefit of and shall be enforceable by the Association or any Owner, their respective legal representatives, heirs, successors, and assigns, until January 1, 2017. After such time, this Declaration shall be automatically extended for successive periods of ten (10) years, unless an instrument in writing, signed by eighty percent (80%) of the then Owners, has been recorded within the year preceding each extension, agreeing to terminate this Declaration, in which case this Declaration shall be terminated as specified therein.

Except as otherwise specifically provided in this Declaration, this Declaration may be amended only by the affirmative vote or written consent, or any combination thereof, of Owners representing sixty-seven percent (67%) of the total votes in the Association.

Amendments to this Declaration shall become effective upon recordation in the Register of Deeds unless a later effective date is specified therein. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

If an Owner consents to any amendment to this Declaration or the Bylaws, it will be conclusively presumed that such Owner has the authority so 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.

**Section 4.** North Carolina Planned Community Act. The terms and provisions of the North Carolina Planned Community Act ("Planned Community Act"), N.C. Gen. Stat. § 47F-1-101, et. seq., are hereby adopted and incorporated herein by reference as if fully set forth. To the extent any terms and provisions of this Declaration or any amendment thereto conflict with or are inconsistent with the terms and provisions of the Planned Community Act, the terms and provisions of the Planned Community Act shall control.

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