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DECLARATION OF CONDOMINIUM
BIRCH CREEK II CONDOMINIUMS

RECORDED AND VERIFIED
REBECCA P. TUCKER
REGISTER OF DEEDS
NEW HAVEN CO. NC

JAN 3 3 24 PM '89

BIRCH CREEK PARTNERSHIP, a Limited Partnership, doing business in the State of North Carolina, hereinafter called "Declarant" being the owner in fee simple of the property hereinafter described, hereby submits said property to condominium ownership pursuant to Chapter 47C of the North Carolina General Statutes, and to that end does hereby publish and declare that all of said property is and shall be held, conveyed, hypothecated, encumbered, used, occupied and improved subject to the following covenants, conditions, restrictions, uses, limitations and obligations, all of which shall be deemed to run with the land and shall be a burden to Declarant, its successors and assigns, and any person acquiring or owning an interest in the property and improvements, their grantees, successors, heirs, executors, administrators, devisees and assigns.

1. DEFINITIONS. As used herein and in the By-Laws attached hereto and in all amendments hereto, unless the context requires otherwise:

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- A. "Act" means the "North Carolina Condominium Act" set forth in Chapter 47C of the North Carolina General Statutes, as such may be supplemented or amended from time to time.
- B. "Assessment" means a share of the funds required for the payment of Common Expenses which from time to time is assessed against the Unit Owner by the Association.
- C. "Association" means the entity responsible for the operation of the Condominiums pursuant to the Act, whether or not incorporate, which entity includes all of the Unit Owners acting as a group in accordance with the Articles of Incorporation, By-Laws and Declaration. The "Association" shall be named BIRCH CREEK II HOMEOWNERS ASSOCIATION, INC.
- D. "Board of Directors" or "Board" means the Board of Directors of the Association and "Director" means a member of said Board of Directors.
- E. "Building" or "Buildings" shall mean all structures and improvements now or hereafter erected upon the Property, unless otherwise identified or defined herein.

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RETURNED TO *J. [Signature]*

ROUNTREE & SEAGLE
WILMINGTON, NORTH CAROLINA 28402-1409

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- F. "By-Laws" means the By-Laws for the government of the Association as they exist from time to time. A copy of the initial By-Laws are attached hereto as Exhibit F and made a part hereof by reference.
- G. "Common Areas and Facilities" means the portion of the Condominium Property owned, in undivided interest, by all the owners, as more specifically set forth herein.
- H. "Common Expenses" include the expenses of administration, maintenance, operation, repair and replacement, (including a capital reserve for repair, maintenance and replacement), of the Common Areas and Facilities, and other expenses declared by the Association to be Common Expenses, as further defined in the Act.
- I. "Common Surplus" shall mean and refer to the balance of all revenues of the Association remaining after the deduction of the Common Expenses. Any such Common Surplus shall be used to reduce the Assessments for members for the following fiscal year of the Association, based upon the proposed budget for the Association for the following fiscal year.
- J. "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common Ownership solely by the owners of those portions.
- K. "Condominium Documents" means this Declaration, the Articles of BIRCH CREEK II HOMEOWNERS ASSOCIATION, INC., By-Laws, the Rules and Regulations promulgated by the Board of Directors of the Association, and all other exhibits attached thereto and all other documents and regulations promulgated pursuant to the authority created herein and in the Act, and as such documents shall be amended or supplemented from time to time.
- L. "Declarant" means BIRCH CREEK PARTNERSHIP, its successors and/or assigns, or any person or group of persons acting in concert who
- (1) as part of a common promotional plan offers to dispose of his or its interest in a Unit not previously disposed of, or
 - (2) reserves or succeeds to any special Declarant Right.
- M. "Declaration" means this instrument as it may be from time to time amended or supplemented.
- N. "Development Rights" means any right or combination of rights reserved by Declarant in the Declaration to add real estate to a Condominium; to create units, common elements, or limited common elements within a Condominium; to subdivide units or convert units into common elements; or to withdraw real estate from a Condominium.
- O. "Limited Common Area and Facilities" means and includes those Common Areas and Facilities which are reserved for the use of a certain Unit or Units to the exclusion of any other Unit or Units, as more specifically defined herein.

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- P. "Mortgagee" means a beneficiary under a mortgage or Deed of Trust.
- Q. "Person" means a natural person, corporation, business trust, estate, trust, partnership, Association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.
- R. "Plans" shall mean or refer to the plans and specifications of the Condominium prepared by Robert H. Goslee, Registered Land Surveyor, and Robert W. Sawyer, Registered Architect, recorded under the name of the condominiums in the Condominium Map Book or Unit Ownership File in the Office of the Register of Deeds in New Hanover County, in Condominium Plat Book 9 at Pages 149 through 153 and attached hereto as Exhibit "D", Sheet 1 through 6, and incorporated herein by reference.
- S. "Property" means and includes the land described in Exhibit "A", attached hereto and incorporated herein by reference, together with any Buildings and improvements located thereon.
- T. "Special Declarant Rights" means rights reserved for the benefit of Declarant to complete improvements indicated on Plats and Plans filed with the Declaration as required by North Carolina General Statutes, Section 47C-2-109; to exercise any Development Right as specified in North Carolina General Statutes, Section 47C-2-110; to maintain sales offices, management offices, signs, advertising the Condominium and models pursuant to North Carolina General Statutes, Section 47C-2-115; to use and/or reserve easements through the Common Elements for the purpose of making improvements within the Condominium or within real estate which may be added to the Condominium as allowed by North Carolina General Statutes, Section 47C-2-116; to make the Condominium part of a larger Condominium as provided for in North Carolina General Statutes, Section 47C-2-121; or to appoint or move any officer of the Association or any executive Board member during any period of Declarant control as provided in North Carolina General Statutes, Section 47C-3-103(d).
- U. "Unit" or "Condominium Unit" means a part of the Property which is to be subject to private ownership and use, as designated on the exhibits attached to this "Declaration" and as further defined in the Act.
- V. "Unit Owner" or "Owner" means a person or entity, or any combination thereof, who owns a Unit.

2. DESCRIPTION OF PROPERTY. All that certain lot, parcel, piece or plot of land with the Buildings and improvements thereon erected or to be erected situated, lying and being in the City of Wilmington, County of New Hanover, State of North Carolina, and more particularly described in Exhibit "A" attached hereto and made a part hereof.

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Declarant submits only that portion of the land described in Exhibit "A" attached hereto upon which Phase 1 of BIRCH CREEK II CONDOMINIUMS is currently constructed. The Property hereby submitted is more particularly described in that Condominium Plat recorded in the Office of the Register of Deeds of New Hanover County in Condominium Plat Book 9 at Pages 149 through 153. Nevertheless, Declarant hereby reserves the right and option, but not the obligation, to expand the Property subject to this Declaration by adding all or any portion or portions of the land described in Exhibit "B" and shown as the area designated "FUTURE DEVELOPMENT" in Exhibit "C", Pages 1 and 2, of this Declaration to the coverage of this Declaration.

3. EXPANSION OF THE PROPERTY SUBJECT TO THIS DECLARATION.

A. By this Declaration the Declarant submits only the land described in Exhibit "A", together with the improvements thereon, and the same shall be known as BIRCH CREEK II CONDOMINIUMS. Nevertheless, Declarant hereby reserves the right and option, but not the obligation, to expand the Property subject to this Declaration by adding all or any portion or portions of the land described in Exhibit "B", attached hereto and made a part hereof and as further shown as the area designated "FUTURE DEVELOPMENT" upon the Plat recorded in the Office of the Register of Deeds for New Hanover County in Condominium Book 9 at Pages 149 through 153 and shown as Exhibit "C" attached hereto. Declarant makes no assurances that the Property described in Exhibit "B" or any portion thereof will be submitted to this Condominium. Nor does Declarant make any representations about the order in which those portions or parcels may be subjected to Development Rights.

B. Such expansion shall occur, if at all, by the recordation of one or more amendments or Supplemental Declarations to this Declaration, which amendment(s) shall be executed by the Declarant or its successors and assigns. The recordation of any such amendment, and expansion of the Property subject to this

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Declaration effectuated thereby, shall not require consent or ratification of any Unit Owner nor the Association.

C. The right and option described in sub-paragraphs A and B above shall terminate on December 31, 1999, and shall be subject to the conditions, restrictions and limitations set forth in sub-paragraphs D, E, F, and G, of this paragraph 3. However, if Declarant does not complete the expansion contemplated within the time specified herein, Declarant may amend this Declaration for the sole purpose of extending the time within which to complete expansion, which said amendment shall not require the consent or ratification of any Unit Owner or the Association.

D. If the Declarant adds all the land described in Exhibit "B" hereof, the Declarant covenants and agrees that no more than 102 Units will be added to the Property subject to this Declaration by such expansion. If Declarant adds any portion or portions of the aforesaid land, the Declarant covenants and agrees that with respect to any such portion the density of Units shall not exceed an average of 17 Units per acre.

E. The Declarant covenants and agrees that all Buildings containing Units built on any portion of the land added to and made subject to this Declaration shall be not more than three stories in height above finished grade and shall use wood, vinyl siding, stucco or brick exteriors, or combination thereof.

F. It is understood and declared that the undivided fractional or percentage interest owned by each Unit Owner of Units in BIRCH CREEK II CONDOMINIUMS, PHASE 1, in the Common Areas and Facilities of BIRCH CREEK II CONDOMINIUMS, PHASE 1, is as stated hereafter. However, it is further declared that in the event the Declarant, pursuant to the provisions of this Article, adds to or expands the Property, and therefore the number of Units, Unit Owners, and Common Areas and Facilities subject to this Declaration and the jurisdiction of the Association, then consequently the fractional or percentage interest owned by each Unit Owner of Units in BIRCH CREEK II CONDOMINIUMS, all phases, in the expanded Common Areas and Facilities of BIRCH CREEK II CONDOMINIUMS, all phases,

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shall necessarily have to change from that as established hereafter. It is further understood that the Act provides that the fractional or percentage undivided interest of each Unit Owner in the Common Areas and Facilities as expressed in any Declaration shall have a permanent character and shall not be altered except with the unanimous consent of all Unit Owners expressed in an amended Declaration duly recorded. Therefore, in the event the Declarant adds to or expands the Property subject to this Declaration, pursuant to this Article, then every Unit Owner of Units in BIRCH CREEK II CONDOMINIUMS, any phase, by the acceptance of the deed for his Unit shall be deemed to have specifically agreed for himself, his heirs, devisees, successors and/or assigns that the Declarant shall have the exclusive right and power, as attorney-in-fact for every Unit Owner, to establish the undivided fractional or percentage interest of each such Unit Owner in the expanded Common Areas and Facilities of BIRCH CREEK II CONDOMINIUMS, all phases, as well as the right and power to establish the undivided fractional or percentage interest in the expanded Common Areas and Facilities of BIRCH CREEK II CONDOMINIUMS, all phases, to be appurtenant to additional Units of BIRCH CREEK II CONDOMINIUMS, and, therefore, (a) the liability of each Unit Owner for Common Expenses, not specifically assessed, (b) the interest of each Unit Owner in any Common Surplus, and (c) the voting rights in the Association of each Unit Owner; which such undivided fractional or percentage interests shall be stated in any supplement to this Declaration required to be executed and recorded in the Office of the Register of Deeds of New Hanover County, North Carolina, in order to expand or add to the Property subject to this Declaration as is provided for hereinabove. It is hereby declared and agreed that the Declarant shall establish said undivided interests without prior consultation with or consent of any Unit Owner of any Unit in BIRCH CREEK II CONDOMINIUMS, any phase or the Association; and, that, the Declarant covenants and agrees to establish such undivided fractional or percentage interests for all Units at such times as may

be necessary pursuant to this Article in the proportions that the square footage of heated floor space in each Unit bears to the total square footage of heated floor space of all Units on the date of the Supplemental Declaration, or Declarations. In determining such square footage of heated floor space for any Unit existing or added to or made subject to this Declaration, all basements, attics, garages and porches (whether open or closed in) shall not be considered in establishing the square footage of heated floor space of any Unit.

G. Declarant anticipates that all Units built in future phases will be substantially similar in architectural style, quality of construction, size and will be otherwise compatible with existing Buildings, but Declarant cannot and does not make any assurances of same. Nothing herein shall be deemed to limit or alter Declarant's right, hereby reserved, to vary the internal layout or exterior configurations of any Units hereafter constructed and Declarant makes no assurances so long as Declarant substantially conforms with the provisions of this paragraph 3.

4. DESCRIPTION OF BUILDINGS AND UNIT DESIGNATIONS.

A. DESCRIPTION OF BUILDINGS. The Declarant has constructed or will construct, upon the Property described in Exhibit "A" attached hereto, one or more multi-Unit Buildings to be used for residential and lodging accommodation purposes, as hereinafter provided. A Plat of survey of the Property by Robert H. Goslee, R.L.S., showing the location of the Buildings is attached hereto and made a part hereof as Exhibit "D". The multi-Unit Buildings are more particularly described in the Plans of those Buildings, a copy of the Plans is attached and included as a part of Exhibit "D" hereto attached, showing all particulars of the Building as required by law. Typically and in general, each Unit has either one or two stories depending on the floor plan of same, and is constructed principally of concrete block with stucco, wood, vinyl siding or brick veneer, or wood frame with wood or brick veneer. The first floor is of concrete, the second floor is of wood

construction. All interior walls are wood or steel studs with wallboard facing with stripped seams and painted. The roof is of approved asphalt shingles.

B. UNIT DESIGNATIONS.

A. Designation. The Unit designation of each dwelling Unit, its location, approximate area, and immediate Common Areas and Facilities to which it has access and other data necessary for its proper identification are set forth in Exhibit "D" attached hereto and made a part hereof. Each Unit is identified by Phase Number and Unit Number.

B. Description. Each Unit is bounded vertically from the top of the first floor slab to the underside of the finished roof shingles. Each Unit is bounded horizontally by the inside of all outside walls and the walls separating Units, which are shown on said Plans, subject to such encroachments as are contained in each Building, whether the same now exist or may be caused or created by existing construction, settlement or movement of the Building, or by permissible repairs, construction or alterations. Typically and in general each two story Unit will have three bedrooms and two and one-half baths. Each one story Unit typically will have two bedrooms and two baths. The one story and the two story Units will each contain the following rooms: living room/dining room combination, kitchen, laundry room, garage and attics.

5. COMMON AREAS AND FACILITIES.

A. The Common Areas and Facilities consist of the following:

- (1) The land on which the Building is erected and lands surrounding the Building is as more fully described in Paragraph 2 above except as may be designated Limited Common Areas in Paragraph 6 below.
- (2) All common foundations, columns, girders, beams, supports, load-bearing walls, and other structural members.
- (3) All yards, roads, driveways, parking areas, walkways and paths except as may be designated Limited Common Areas in Paragraph 6 below.

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- (4) All roofs, exterior walls and interior walls except those non-load bearing partition walls, non-common chases and suspended ceiling wholly with a Unit.
- (5) All central and appurtenant installations, apparatus and equipment for utility services, including, but not limited to, power, light, gas, water, telephone, sewer, mail, irrigation, and trash disposal, if any, supplied for the use and convenience of the Unit Owners except as may be designated Limited Common Areas in Paragraph 6 below.
- (6) All fences which are located upon any common areas, including limited common areas. Specifically, any fences constructed by Declarant which encloses any courtyard, patio, refuse receptacle and any other limited common area or common area and facility.
- (7) All other parts of the Property and all apparatus and installations existing in the Building or upon the Property for common use or necessary or convenient to the enjoyment, existence, maintenance, or safety of the Property, including, but not limited to the concrete walkways and irrigation system.

B. Declarant anticipates that a small park area will be constructed and subjected to this Condominium. The park shall consist of walking trail, benches, general common recreational areas. Declarant makes no assurances that the park will be completed or subjected to the Condominium project nor, if the park is in fact subjected, a time within which the park will be completed and made a part of the Common Areas. If the park is completed and subjected to this Condominium as Common Areas, the upkeep and maintenance of same shall be the responsibility of the Association as with the other Common Areas and Facilities of the Condominium.

C. The undivided interest of each Unit Owner in such Common Areas and Facilities at the time of filing this Declaration of Condominium is as set forth in Exhibit "E" attached hereto and incorporated herein. The undivided ownership interest of each Unit Owner in the Condominium will be subject to change as and when the Condominium is expanded, if it is so expanded, all pursuant to Article 3 of this Declaration.

6. LIMITED COMMON AREAS AND FACILITIES. The Limited Common Areas and Facilities appurtenant to each Unit are as follows:

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- A. The surface areas and railings of any decks accessible by normal means solely from the Unit;
- B. All non-load bearing walls located entirely within the Unit;
- C. All materials, including but not limited to, studs, sheet-rock, plywood, carpet, paint, paneling, tile, vinyl or brick, attached to, or on, the inside surfaces or perimeter walls, floors, and ceilings of the Unit;
- D. All doors, windows, screens, ventilation fans and vents located entirely within the Unit or extending into the Unit from the perimeter walls, floors or ceilings thereof;
- E. All porches, whether open or enclosed, patios, courtyards (whether open or enclosed), balconies, decks, door steps, stoops, shutters, awnings and window boxes which are appurtenant to and adjoin each Condominium Unit and are intended for the exclusive use of the Condominium Unit to which it adjoins. Those areas are more specifically identified by hash lines shown on Exhibit "D" attached hereto and incorporated herein by reference, a copy of same which is recorded in Condominium Map Book 9 at Page 149-153 of the New Hanover County Registry;
- F. Any area adjoining and appurtenant to any Unit which is fenced by the Declarant.
- G. All air handling Units, ducts and components including air-conditioning Units or equipment appurtenant to and used by an individual Unit (whether inside or outside of Unit) and all water, power, telephone, television and cable television, electricity, plumbing, gas and sewer lines located in the Unit; provided, however, that the portion of said lines located in a common compartment for, or installation of, such lines shall be general Common Areas and Facilities as described above;
- H. All other areas which are depicted as Limited Common Areas on the Plats and Plans of the Condominiums which are recorded in Condominium Plat Book 9 at Page 149-153 of the New Hanover County Registry and attached hereto as Exhibit "C" and Exhibit "D".

The Limited Common Areas and Facilities which are appurtenant to any unit(s) shall not be separated therefrom and shall pass with title to any unit(s), whether or not separately described. Subject to the limitations contained herein, the owners of any unit(s) shall have exclusive (100%) use, possession and control of the Limited Common Areas and Facilities appurtenant to such Unit.

7. USE. Subject to the right of the Declarant specifically reserved hereby to construct models and a sales office to assist or facilitate the sale of Units, the Building and each of the Units

shall be used only for residential purposes, which shall include the rental of any Units by the Owners thereof for residential and lodging accommodations pursuant to rules and regulations established by the Association and other uses reasonably incidental thereto, including meetings by persons owning or occupying such Units; provided, however, that Declarant reserves the right to construct models and one or more sales offices to assist or facilitate the sale of Units. The sale offices or models may, but are not required to be, Units within any of the Condominium Buildings. If a sales office or model is a Unit within any Condominium Building, then that Unit shall be designated as a Condominium Unit on the Plats and Plans and shall carry with it the rights and responsibilities of ownership of a Unit in the Condominium, including, but not limited to, the responsibility to pay its pro rata share of Common Expenses. Further, Declarant reserves the right to use all recreational and other Common Areas for its reasonable sales efforts whether the sales office or model is a Condominium Unit or not.

The residential use contemplated by this paragraph cannot be changed, amended, or modified without the written consent of the Owners of majority of all Units.

8. PERSON TO RECEIVE SERVICE OF PROCESS. George Rountree, III, is hereby designated to receive Service of Process in any action which may be brought against or in relation to these Condominium Units. Such person's residence or place of business is 11 South Fifth Street, Wilmington, North Carolina, 28401, which is within the city and county in which the Property is located. The Board of Directors may change the Person designated to receive service of process by filing the appropriate information with the office of the Register of Deeds of New Hanover County.

9. EASEMENTS. Each Unit and all Common Areas and Facilities and Limited Common Areas and Facilities are hereby subjected to an easement for the repair, maintenance, expansion, reduction, inspection, removal, relocation or other service of or to all gas,

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electricity, television, telephone, water, plumbing, sewer, utility, drainage or other lines or other Common Areas and Facilities, whether or not the cause of any or all of those activities originates in the Unit in which the work must be performed.

Each Unit Owner shall have an easement in common with the other owners of all other Units to use all pipes, wires, ducts, cables, conduits, public utility lines and any other Common Areas and Facilities located in any of the other Units and serving his Unit. Each Unit shall be subject to an easement in favor of the owners of all other Units to use pipes, ducts, cables, wires, conduits, public utility lines and any other Common Areas and Facilities serving such other Units and located in such Unit.

The initial and subsequent Boards may grant or assume easements, leases or licenses for utility purposes for the benefit of the Property, including the right to install, lay, maintain, repair and replace water lines, pipes, sewer lines, gas mains, telephone and television wires and equipment and electrical conduits, and wires over, under, and along and on any portion of the Units, and/or Common Areas and Facilities and Limited Common Areas and Facilities; and each Unit Owner by accepting a Deed to a Unit grants to the Board, or its designee, the irrevocable power of attorney to execute, acknowledge and record for or in the name of the Association or each Unit Owner such instruments as may be necessary to effectuate the foregoing.

In the event any portion of the Common Areas and Facilities encroaches upon any Unit, or any Unit encroaches upon any other Unit, or any Unit encroaches upon the Common Areas and Facilities, (whether the same now exists or may be caused or created by existing construction, settlement or movement of the Buildings, or by permissible repairs, construction or alteration), a valid cross easement for any such encroachment, or encroachments, and maintenance of same is hereby created.

The Declarant hereby reserves unto itself and its successors and assigns, and any Person, firm or corporation claiming by, through or under it, the perpetual and alienable right and easement

over, through, across and upon all the streets or roadways in the Condominiums as shown in Exhibit "C" and Exhibit "D" hereto attached, as those Exhibits may be amended or changed as Declarant exercises development rights for the purpose of ingress and egress to the Property described in Exhibit "B" hereto attached.

Declarant further reserves for itself, its successors and assigns an easement in and to all utility easements, and facilities and services installed thereon provided by, through and with the utility easement, shown on Exhibit "C" and Exhibit "D", as those Exhibits may be amended or changed as Declarant exercises development rights, or as otherwise granted.

10. MAINTENANCE.

A. Without limiting any insurance voluntarily carried by the Association on Limited Common Areas and Facilities, all Limited Common Areas and Facilities, as described in Paragraph 6 hereof, shall be maintained (and, if Owner desires, insured) by the Owner. Any replacements or substitutions of such Limited Common Areas and Facilities shall be compatible with any Common Areas and Facilities affected thereby. The Association shall not be responsible for repairing, maintaining, or insuring such Limited Common Areas and Facilities.

B. The Owner of the dwelling Unit to which a deck or decks, patio, courtyards, or porches, or any area fenced by the Declarant which is contiguous with any Unit, are appurtenant shall be responsible for the upkeep, repair, and maintenance of the surface floor area and the railings of the deck, patio or porches and shall be responsible for the upkeep and maintenance of the courtyard areas, fences which enclose the courtyard and trash receptacles are to be considered Common Areas and Facilities. No change in color, material or finish shall be made, and no additions or fixtures shall be made without express written approval of the Board of Directors, based on actual samples and drawings of the proposed change acceptable to the Board. All remaining structural portions of the deck, patio, porch or fences shall be considered

Common Areas and Facilities as provided for in the remaining sections of this Declaration including specifically the maintenance, repair, and upkeep of same.

C. All parts of a Condominium Unit shall be kept in good condition and repair by and at the expense of the Owner. The Unit shall be maintained by the Owner in a clean and safe condition, free of nuisance. Each Unit Owner will promptly comply with any requirements of the insurance underwriters of the insurance for the Common Areas and Facilities when so requested in writing by the Board or its designated agent. Any failure of an Owner to repair, maintain or replace as may be required pursuant to the Condominium Documents or a determination by the Board or its designated agent that such failure will endanger or impair the value of the Common Areas and Facilities of any Unit, or the Limited Common Areas and Facilities belonging to another Owner, may be, upon written notice to the Owner of the nature of the required repair, maintenance or replacement, repaired or replaced by the Association at the expense of the Unit Owner, to be collected by special Assessment as provided herein and in the By-Laws. Such Assessment may include the cost to the Association incurred in the abatement of any nuisance maintained by the Unit Owner therein.

11. PARTITIONING. The Common Areas and Facilities shall not be divided nor shall any right to partition any thereof exist. Nothing herein contained, however, shall be deemed to prevent ownership of a Unit by the entireties, jointly, or in common or in any other form permitted by law.

12. LIENS.

A. Portions of the Common Elements may be conveyed or subjected to a security interest by the Association if persons entitled to cast at least eighty percent (80%) of the votes in the Association, including eighty percent (80%) of the votes allocated to Units not owned by a Declarant, or any larger percentage the Declaration specifies, agree to that action; provided, that all the owners of Units to which any Limited Common Element is allocated must agree in order to convey that Limited Common Element or

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subject it to a security interest. The Declaration may specify a smaller percentage only if all of the Units are restricted exclusively to nonresidential uses. Distribution of the proceeds of the sale of a Limited Common Element shall be as provided by agreement between the Unit Owners to which it is allocated and the Association. Proceeds of the sale or financing of a Common Element (other than a Limited Common Element) shall be an asset of the Association.

B. No labor performed or materials furnished to the Common Areas and Facilities shall be the basis for a lien against those Common Areas and Facilities but, if docketed, is a lien against all of the Units in the Condominiums. No Judgment for money against the Association shall be a lien against the Common Areas and Facilities but, if docketed, is a lien against all Units in the Condominiums.

C. Unless otherwise provided by law, in the event a lien against one or more Condominium Units becomes effective, each Owner thereof may relieve his Condominium Unit of the lien by paying the proportionate amount attributable to his Unit. Upon such payment, it shall be the duty of the lienor to release the lien of record for such Unit.

D. Assessments against Unit Owners by the Association made pursuant to the By-Laws shall, if not paid when due, bear interest at such rate as is determined by the Board, not to exceed eighteen (18) percent, and shall create a lien to the extent of such Assessment, together with interest thereon, in favor of the Association against the Unit of the defaulting Owner.

E. All liens provided for herein shall be subordinate, and are hereby subordinated, to the lien of any first mortgage or deed of trust given to any lender to secure a loan, the proceeds of which are used to finance the purchase of any Unit or Units, unless any such lien provided for herein shall have been recorded in the Office of the Clerk of Superior Court of New Hanover County prior to the recordation of such claimed first lien mortgage or deed of

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trust in the Office of the Register of Deeds of New Hanover County, North Carolina.

13. NATURE OF INTEREST IN UNIT.

A. Every Unit, together with its undivided common interest in the Common Areas and Facilities, shall for all purposes be a separate parcel of real Property and the Unit Owner thereof shall be entitled to the exclusive ownership and possession of such Unit subject only to the Condominium Documents and the covenants, restrictions, easements, regulations, resolutions and decisions adopted pursuant thereto.

B. The Owner shall be entitled to use the Common Areas and Facilities in accordance with the purposes for which they are intended, but no such use shall hinder or encroach upon the lawful rights of the owners of other Units.

14. INSURANCE.

A. Securing Policies.

- (1) Commencing not later than the time of the first conveyance of a Unit to a person other than a Declarant, the Association shall maintain, to the extent available:
 - a. Property insurance on the Common Elements in Units insuring against all risks of direct physical loss commonly insured against including fire and extended perils. The total amount of insurance after application of any deductibles shall not be less than eighty percent (80%) of the replacement cost of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies; and
 - b. By liability insurance in reasonable amounts, covering all occurrences commonly insured against death, bodily injury and property damage arising out of or in connection with the use, ownership, or maintenance of the Common Elements.
- (2) The insurance maintained under Subdivision A(1) above need not include improvements and betterments installed by Unit Owners. The Association may, but is in no way required, to obtain insurance coverage on all or a portion of the Limited Common Areas or Facilities.
- (3) The insurance policies described in Subsection A-1 must provide that:

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- a. Each Unit Owner is an insured person under the policy with respect to liability arising out of his interest in the Common Elements or membership in the Association;
- b. The insurer waives its right to subrogation under the policy against any Unit Owner or members of his household;
- c. No act or omission by any Unit Owner, unless acting within the scope of his authority on behalf of the Association, will preclude recovery under the policy; and
- d. If, at the time of a loss under the policy there is other insurance in the name of the Unit Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

B. Premiums. All insurance policy premiums on the Property and for the benefit of the Association purchased by the Board or by a Managing Agent and any deductibles payable by the Association upon loss shall be a common expense.

C. Proceeds. All insurance policies purchased pursuant to these provisions shall provide that all proceeds thereof shall be payable to the Board as insurance trustee or to such attorney-at-law or institution with trust powers as may be approved by the Board of Directors and not to any mortgagee or beneficiary under a Deed of Trust. The sole duty of insurance trustee shall be to receive such proceeds as are paid and to hold the same in trust for the Unit Owners and lienholders as their interest may appear.

15. DISTRIBUTION OF INSURANCE PROCEEDS. Proceeds of insurance policies shall be distributed to or for the benefit of the beneficial owners in the following manner:

A. Expense of Trust. All reasonable expenses of the insurance trustee shall be first paid or provision made therefor.

B. Reconstruction or Repair. If the damage for which the proceeds are paid is to be repaired or reconstructed, in accordance with the Act, the remaining proceeds shall be paid to defray the cost thereof as provided in Paragraph 16 hereof. Any proceeds remaining after defraying such cost shall be distributed to the beneficial owners, including lienholders of record.

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C. Failure to Reconstruct or Repair. If it is determined, as provided in Paragraph 16 hereof, that the damage for which the proceeds are paid shall not be reconstructed or repaired, the remaining proceeds shall be distributed to the beneficial owners, including lienholders of record.

16. DAMAGE AND DESTRUCTION. Any portion of the Condominium for which insurance is maintained by the Association which is damaged or destroyed shall be repaired or replaced promptly by the Association unless

- A. The Condominium is terminated pursuant to N.C.G.S. 47C-2-118,
- B. Repair or replacement would be illegal under any state or local health or safety statute or ordinance, or
- C. The Unit Owners decide not to rebuild by an eighty percent (80%) vote, including one hundred percent (100%) approval of owners of Units not to be rebuilt or Owners assigned to Limited Common Elements not to be rebuilt.

The cost of repair or replacement in excess of insurance proceeds in reserves is a Common Expense. If the entire Condominium is not repaired or replaced,

- A. The insurance proceeds attributable to the damaged Common Elements shall be used to restore the damaged area to a condition compatible with the remainder of the Condominium,
- B. The insurance proceeds attributable to Units and Limited Common Elements which are not rebuilt shall be distributed to the Owners of those Units and the Owners of the Units to which those Limited Common Elements were allocated or to lienholders, as their interests may appear, and
- C. The remainder of the proceeds shall be distributed to all Unit Owners or lienholders, as their interests may appear, in proportion to their Common Element interest.

If the Unit Owners vote not to rebuild any Unit, the Unit's allocated interest automatically reallocated upon the vote as if the Unit had been condemned under N.C.G.S. 47C-1-107, and the Association promptly shall prepare, execute, and record an amendment to the Declaration reflecting the reallocations. Notwithstanding the provisions of this Subsection, N.C.G.S. 47C-2-118 governs the distribution of insurance proceeds of the Condominium as terminated.

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Any reconstruction or repairs shall be in accordance with the plans and specifications of the original building and improvements, unless other plans and specifications are approved by the Board and any governmental authorities whose approval may be necessary.

17. TRANSFER OF UNITS.

A. Effective Date and Exemptions. The provisions of this paragraph shall become operative upon the transfer of title to all Units by the Declarant, or upon written notice to the Board by the Declarant to such effect. None of the above provisions restricting transfer of Units shall apply to any sale or transfer held pursuant to or in lieu of foreclosure proceedings.

B. Intra-Family Transfer An Owner may give, devise, lease, sell or bequeath his interest in any Unit to his spouse, his parents, a co-owner of record or to any lineal descendants, including adopted children, or to a corporation or partnership of which all classes of stock or partnership interests are more than eighty percent owned by such Unit Owner, his spouse, his parents, a co-owner of record and his lineal descendants, without the prior written consent of the Board of Directors.

18. MANAGEMENT AGENT.

A. Interim Management Agent and Assessments. From the date of the first conveyance of title by the Declarant to an Owner until the date of the first Annual Meeting of the Members of the Corporation, the Declarant or its designee shall serve as the interim Management Agent with responsibility for coordinating all normal management services of the Association. During the period from conveyance of title by Declarant to an Owner of a Unit until the First Annual Meeting (the time of determination by the Association of the new operating budget), the interim Management Agent shall not receive a Management fee. During such period, the Owner (including Declarant) shall pay monthly to the interim Management Agent an Assessment representing the Unit's percentage of the estimated total expenses of the Property. Any actual Association operating expenses in excess of the total Assessments received from

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owners for operating expenses prior to the first Annual Meeting of Members shall be paid by Declarant.

B. Regular Management Agent and Assessments. Upon selection by the Association of a regular Management Agent and the holding of the First Annual Meeting of Members, any excess of interim Assessments over total, actual Association operating expenses shall be deposited by Declarant to the account of the Association. The interim Management Agent shall provide to the regular Management Agent an accounting of operating revenues and expenses.

C. Time of Payment. Each Unit's monthly Assessment for the Common Expenses for the month of closing shall be payable at the time of conveyance of title to the Owner by the Declarant prorated as of the closing date. Subsequent payment shall be due on the first day of each month. Payments not received when due shall bear interest at the rate of eighteen percent (18%).

D. The Board of Directors of the Association shall establish an Annual Budget in advance for each fiscal year (which shall correspond to the calendar year, except that in the initial year of operation of the Condominium, the fiscal year shall commence with the closing of the sale of the first Condominium Unit). Such budget shall project all expenses for the forthcoming year which may be required for the proper operation, management and maintenance of the Condominium, including a reasonable allowance for contingencies and reserves, such budget to take into account anticipated income which is to be applied in reduction of the amounts required to be collected as an Assessment each year. The Board of Directors shall keep separate, in accordance with paragraph "D" hereof, items relating to operation and maintenance from items relating to capital improvements. Upon adoption of such Annual Budget by the Board of Directors of the Association, copies shall be delivered to each Owner of a Condominium Unit and the Assessment for said year shall be established based upon such budget, although the non-delivery of a copy of it to each Owner shall not affect the liability of any Owner for such Assessment. A

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majority of the Owners must approve an increase in the yearly Assessment if this increase exceeds the previous year's Assessment by an amount greater than fifteen percent (15%).

E. The Board of Directors of the Association, in establishing the Annual Budget for operation, management and maintenance of the Condominium, shall designate a sum to be collected and maintained as a reserve fund for replacement of and capital improvements to the Common Elements and Facilities (herein "Capital Improvement Fund") shall be for the purpose of enabling the Association to replace structural elements and mechanical equipment constituting a part of the Common Elements and Facilities, and the replacement of personal Property constituting a portion of the Common Elements and Facilities held for the joint use and benefit of the Owners of the Condominium Units. The amount to be allocated to the Capital Improvement Fund may be established by the Board of Directors to collect and maintain a sum reasonably necessary to anticipate the need for replacement of Common Property. The amount collected for the Capital Improvement Fund shall be maintained in a separate account by the Association and shall be used only to make capital improvements to Common Property. Any interest earned on the Capital Improvement Fund may be expended for current operation and maintenance.

F. Initial Assessment and Working Capital. At the time of conveyance of title to the Owner by the Declarant, the Owner of each such Unit shall pay, as a special Assessment, the sum of One Hundred (\$100.00) Dollars which shall be nonrefundable and commingled with the other general funds of the Association. Additionally, the owner to whom a Unit is conveyed shall prepay an amount equal to three (3) months estimated Common Area Assessment to be commingled with the other general funds of the Association. The prepaid three (3) months' assessment shall be used as established by the budget of the Association, and shall be treated as a credit toward assessments for the first three (3) months of ownership.

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19. UNITS SUBJECT TO CONDOMINIUM DOCUMENTS. All present and future owners, tenants and occupants of Units and their guest or invitees, shall be subject to, and shall comply with the provisions of the Condominium Documents, and as the Condominium Documents may be amended from time to time, including all rules and regulations adopted by the Board of Directors of the Corporation. The acceptance of a deed of conveyance or the entering into a lease of the entering into occupancy of any dwelling Unit shall constitute an agreement that the provisions of the Condominium Documents are accepted and ratified by such Owner, tenant or occupant, and all of such provisions shall be deemed and taken to be covenants running with the land and shall bind any Person having at any time any interest or estate in such Unit as though such provisions were made a part of each and every deed of conveyance or lease. Failure to comply with the provisions of the Condominium Documents shall entitle the Association or any Owner to seek legal and/or equitable relief, including costs and reasonable attorney's fees incurred in enforcing such compliance.

20. AMENDMENT OF DECLARATION. This Declaration may be amended by the vote of 67% in common interest of all Unit Owners present in Person or by proxy at a meeting duly held in accordance with the provisions of the By-Laws. The By-Laws may be amended in accordance with the procedure set forth in such By-Laws. No such amendment shall be effective until recorded in the Office of the Register of Deeds for the County wherein the Property is located. Provided, that in no event may this Declaration be amended so as to deprive the Declarant of any rights granted herein, including, without limitation, the rights to rent any Unit. Declarant in his sole discretion may, prior to termination of Declarant control, amend the Declaration to include a provision that any amendment to this Declaration which proposes to annex additional Property, other than that contemplated by Declarant at the time of execution of this Declaration, or which abrogates the rights of any Unit Owner, shall not be valid without the prior written consent of the

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Administrator of Veterans Affairs, Secretary of Housing & Urban Development or other mortgage lender, as may be required and/or their successors in such office, as such, and/or their duly appointed representative.

21. CONDOMINIUM ASSOCIATION. A non-profit North Carolina corporation known and designated as BIRCH CREEK II HOMEOWNERS' ASSOCIATION, INC. (the "Association"), has been or will be organized to provide for the administration of the Property. The Association shall administer the operation and maintenance of the Property and undertake and perform all acts and duties incident thereto in accordance with the terms of its By-Laws, a copy of which is attached hereto as Exhibit "F", and in accordance with the Act. Each Unit Owner shall automatically become a member of the Corporation upon his acquisition of an ownership interest in any Unit and its appurtenant undivided interest in the Common Areas and Facilities. The membership of such Unit Owners shall terminate automatically upon such Unit Owner being divested of ownership interest in the title to such Unit. In the operation and management of the Property, the Board of Directors shall have the power to enforce the provisions of this Declaration; to levy and collect assessments pursuant to the By-Laws and the Acts; to grant permits, licenses and easements over the Common Areas for utilities, roads pursuant to the Act, for purposes reasonably necessary for the proper maintenance and operation of the Condominium; and to adopt, promulgate and enforce such rules and regulations governing the use of the Units and Common Areas and Facilities as the Board of Directors may deem to be in the best interest of the Association in accordance with the By-Laws and the Act.

The Declarant shall have the right to appoint or remove any member or members of the Board of Directors or any Officer or Officers of the Association until such time as the first of the following events occurs: (i) 120 days after conveyance of 75% of the Units (including Units which may be created pursuant to Special Declarant Rights) to Unit Owners other than a Declarant; (ii) two years after all Declarants cease to offer Units for sale in the

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ordinary course of business; (iii) two years after any development rights to add new Units was last exercised; or (iv) five years following conveyance of the first Unit to a Unit Owner other than a Declarant. Declarant may voluntarily surrender this right, but in that event, the Declarant may require, for the duration of the period of Declarant control, that specified actions of the Association or Board of Directors, as described in an express Amendment to this Declaration, duly recorded in the New Hanover County Registry, executed by the Declarant, be approved by the Declarant before they become effective.

The above-referenced Declarant control over the Board of Directors is limited as follows: Not later than 60 days after conveyance of 25% of the Units (including Units which may be created pursuant to Special Declarant Rights) to Unit Owners other than a Declarant, at least one member and not less than 25% of the members of the Executive Board shall be elected by Unit Owners other than the Declarant. Not later than 60 days after conveyance of 50% of the Units (including Units which may be created pursuant to Special Declarant Rights) to Unit Owners other than a Declarant, not less than 33% of the members of the Executive Board shall be elected by Unit Owners other than the Declarant. Further, not later than the termination of any period of Declarant control, the Unit Owners shall elect a Board of Directors of at least three (3) members and a majority of this Board must be Unit Owners.

Whenever the Declarant shall be entitled to designate and select any person or persons to serve on the Board of Directors or Board of the Association or as Officers of the Association, the manner in which such person or persons shall be designated shall be as provided in the Articles of Incorporation and/or the By-Laws of the Association; and Declarant shall have the right to remove any person or persons selected by it to act and serve on said Executive Board or as Officers and to replace such person or persons with another person or persons to act and serve in the place of any Director or Officer so removed for the remainder of the unexpired

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term of any Director or Officer so removed. Any Director or Officer designated and selected by Declarant need not be a resident in the Property or Unit Owner.

22. INVALIDITY. The invalidity of any provision of this Declaration shall not impair or effect the validity and enforceability of the remainder of this Declaration, and, in such event, all of the other provisions of this Declaration shall continue in full force and effect as if such invalid provision had never been included.

23. WAIVER. No provisions contained in this Declaration shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches which may occur.

24. PERPETUAL NON-EXCLUSIVE EASEMENT IN COMMON AREAS. The Common Areas and Facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all of the Owners of Condominium Units in the Condominium for their use and the use of their immediate families, guests and invitees, for all proper and normal purposes, and for the furnishing of services and facilities for which the same are reasonably intended, for the enjoyment of said Owners of Condominium Units. Notwithstanding anything above provided in this Article, the BIRCH CREEK II HOMEOWNERS' ASSOCIATION, INC., herein identified, shall have the exclusive right to establish the rules and regulations pursuant to which the Owner of any Condominium Unit, his family, guests, and invitees, may be entitled to use the Common Areas and Facilities, including the right to make permanent and temporary assignments of parking spaces, and to establish rules and regulations concerning the use of any recreation area.

25. LAW CONTROLLING. This Declaration and the By-Laws attached hereto shall be construed under and controlled by the laws of the State of North Carolina.

26. WARRANTIES. Declarant acknowledges that all contractual warranties set forth in the Buildings' construction contract, of

