
Prepared by and return after recording to: James Michael Lloyd, P.A., P.O. Box 948, Asheville, NC 28802

STATE OF NORTH CAROLINA
COUNTY OF SWAIN

Ref: Deed Book 214, Page 702
Deed Book 228, Page 583

SECOND AMENDMENT TO DECLARATION
OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR BRUSH CREEK PROPERTIES

This *Second Amendment to Declaration Of Covenants, Conditions and Restrictions For Brush Creek Properties* is made this the ____ day of _____, 2006 by Brush Creek Properties Owners Association, Inc., a North Carolina Nonprofit Corporation.

WITNESSETH:

WHEREAS, the planned community of Brush Creek Properties was created by that *Declaration Of Covenants, Conditions and Restrictions For Brush Creek Properties*, (hereinafter referred to as "the Original Declaration"), recorded in Deed Book 214, at Page 702 in the Swain County, North Carolina Registry, which is hereby incorporated by reference; and

WHEREAS, Brush Creek Property Owners Association, Inc., a North Carolina Nonprofit Corporation, (hereinafter referred to as the Association), is comprised of every Owner of a Lot in Brush Creek Properties and is the Association designated by the Original Declaration to promote and carry out the common interests of the Owners of Brush Creek Properties; and

WHEREAS, the Original Declaration has been previously amended by that *First Amendment to Restrictive Covenants, Terms and Conditions Governing Brush Creek Properties*, (hereinafter referred to as "the First Amendment"), recorded in 228, at Page 583 in the Swain County, North Carolina Registry, which is hereby incorporated by reference; and

WHEREAS, pursuant to Article X of the Original Declaration, (said Article having not been changed by the First Amendment), the Original Declaration may be amended by the affirmative vote of a majority of the Owners of all Lots in the Development entitled to vote and by the subsequent recordation of such an amendment by the Association, in which case, the amendment shall have attached to it a copy of the resolution of the Board of Directors of the Association attesting to the affirmative action of the requisite number of the owners to effect the amendment, certified by the secretary of the Association; and

WHEREAS, at a duly held meeting of the membership of Association, the affirmative vote of a majority of the Owners of all Lots in the Development entitled to vote were cast in favor of this *Second Amendment to Declaration Of Covenants, Conditions and Restrictions For Brush Creek Properties*,

NOW THEREFORE, the Original Declaration, as amended by the First Amendment, is amended as follows:

Article IV, Paragraph 2, entitled "Creation and Collection of Lien" of the Original Declaration, as amended by the First Amendment, is hereby stricken in its entirety and replaced with the following new Article IV, Paragraph 2:

"2. Allocation of Interests, Assessment and Collection of Common Expenses.

Section IV.2.1 **Purpose of Assessments.** Each owner of any Lot within the Development by acceptance of a deed therefor, whether or not it is expressed in such deed, is deemed to covenant and agree to pay to the Association fees and assessments as set forth in this Article. The assessments for common expenses as described in Section 47F-3-115 of the North Carolina Planned Community Act, and as otherwise provided for in the Declaration, shall be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and occupants of Lots in the Planned Community as may be more specifically authorized from time to time by the Board.

Section IV.2.2. **Initiation Fee.** Each owner of any Lot must pay to the Association an initiation fee of \$50.00 per lot, immediately upon acquiring ownership of a Lot. Said initiation fee shall be delivered to the Association together with the Lot Owner's preferred mailing address for the Association's records.

Section IV.2.3 **Apportionment of Common Expenses.** Except as set forth in this Article, common expenses shall be assessed against all Lots in accordance with the allocated interests in the common expenses as set forth in this Declaration.

Section IV.2.4 **Allocated Interests for Expenses.** The allocated interest in the common expense liability and the interest of each Lot of the Development shall be such that an unimproved lot shall be liable and responsible for two-thirds of the common expense assessed against an improved lot. For purposes of this allocation, an improved lot is defined as any lot

upon which a residential dwelling structure has been placed.

Section IV.2.5 Allocated Interests for Voting. Each Lot shall have one (1) vote on every matter for which a vote of the membership of the Association is required.

Section IV.2.6 Assessment of Common Expenses. Common expenses shall be shared by the Owners on the basis of the allocated interest of each Lot, except for those expenses that may be allocated otherwise pursuant to this Article of the Declaration.

Section IV.2.7 Common Expenses Attributable to Fewer than All Lots.

(a) If a common expense is caused by the misconduct of a Lot Owner, or, if a Lot Owner causes damage to the roadways during construction and does not immediately repair such damage and the Association carries out such repairs, the Association may assess that expense exclusively against that Lot Owner's Lot.

(b) Fees, charges, late charges, fines, all collection costs, including reasonable attorney's fees actually incurred and interest charged against a Lot Owner pursuant to the Planned Community Act, the Declaration, Bylaws and Rules and Regulations are common expenses attributable solely to the Lot Owner and Lot responsible for such fees, charges fines and costs and such expenses and are enforceable as common expense assessments against such Lot and Lot Owner.

Section IV.2.8 Lien for Assessments.

(a) (a) Any assessment levied against a Lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located in the manner provided herein. Fees, charges, late charges, and other charges imposed pursuant to N.C. Gen. Stat. §§. 47F-3-102, 47F-3-107, 47F-3-107.1, and 47F-3-115 are enforceable as assessments under this section. Except as provided in subsections (a1) and (a2) of this section, the Association may foreclose the claim of lien in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes.

(a1) The Association may not foreclose an association assessment lien under Article 2A of Chapter 45 of the General Statutes if the debt securing the lien consists solely of fines imposed by the Association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the Association. The Association, however, may enforce the lien by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(a2) The Association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any lot owner unless the fee is expressly allowed in the declaration. Any lien securing a debt consisting solely of these fees may only be enforced by

judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(b) The lien under this section is prior to all liens and encumbrances on a lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the lot) recorded before the docketing of the claim of lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments and charges against the lot. This subsection does not affect the priority of mechanics' or materialmen's liens.

(c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing of the claim of lien in the office of the clerk of superior court.

(d) This section does not prohibit other actions to recover the sums for which subsection (a) of this section creates a lien or prohibit an association taking a deed in lieu of foreclosure.

(e) A judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party. If the lot owner does not contest the collection of debt and enforcement of a lien after the expiration of the 15-day period following notice as required in subsection (e1) of this section, then reasonable attorneys' fees shall not exceed one thousand two hundred dollars (\$1,200), not including costs or expenses incurred. The collection of debt and enforcement of a lien remain uncontested as long as the lot owner does not dispute, contest, or raise any objection, defense, offset, or counterclaim as to the amount or validity of the debt and lien asserted or the association's right to collect the debt and enforce the lien as provided in this section. The attorneys' fee limitation in this subsection shall not apply to judicial foreclosures or to proceedings authorized under subsection (d) of this section or N.C. Gen. Stat. § 47F-3-120.

(e1) A lot owner may not be required to pay attorneys' fees and court costs until the lot owner is notified in writing of the association's intent to seek payment of attorneys' fees and court costs. The notice must be sent by first-class mail to the property address and, if different, to the mailing address for the lot owner in the association's records. The notice shall set out the outstanding balance due as of the date of the notice and state that the lot owner has 15 days from the mailing of the notice by first-class mail to pay the outstanding balance without the attorneys' fees and court costs. If the lot owner pays the outstanding balance within this period, then the lot owner shall have no obligation to pay attorneys' fees and court costs. The notice shall also inform the lot owner of the opportunity to contact a representative of the association to discuss a payment schedule for the outstanding balance as provided in subsection (e2) of this section and shall provide the name and telephone number of the representative.

(e2) The association, acting through its executive board and in the board's sole discretion, may agree to allow payment of an outstanding balance in installments. Neither the association nor the lot owner is obligated to offer or accept any proposed installment schedule. Reasonable administrative fees and costs for accepting and processing installments may be added to the outstanding balance and included in an installment payment schedule. Reasonable attorneys'

fees may be added to the outstanding balance and included in an installment schedule only after the lot owner has been given notice as required in subsection (e1) of this section.

(f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage or first deed of trust, such purchaser and its heirs, successors, and assigns, shall not be liable for the assessments against such lot which became due prior to the acquisition of title to such lot by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the lot owners including such purchaser, its heirs, successors, and assigns.

(g) A claim of lien shall set forth the name and address of the Association, the name of the record Owner of the Lot at the time the claim of lien is filed, a description of the Lot, and the amount of the lien claimed.

Section IV.2.9 Computation of Operating Budget and Annual Assessment. It shall be the duty of the Board to prepare a budget covering the estimated costs of operating the Development during the coming fiscal year and amounts necessary to provide working capital, a general operating reserve, and reserves for contingencies and replacements. The maximum annual assessment may be increased each year not more than ten percent (10%) above the maximum assessment for the previous year without a vote of the membership. The Board shall cause the budget and the annual assessments to be levied against each Lot for the coming fiscal year. Within 30 days after adoption of any proposed budget for the planned community, the Board shall provide to all the lot owners a summary of the budget and a notice of the meeting to consider ratification of the budget, including a statement that the budget may be ratified without a quorum. The Board shall set a date for a meeting of the lot owners to consider ratification of the budget, such meeting to be held not less than ten (10) and not more than sixty (60) days after mailing of the summary and notice. There shall be no requirements that a quorum be present at the meeting. The budget and the assessment established therefrom is ratified unless at the meeting sixty-seven percent (67%) of all the lot owners in the Association vote to reject the budget. Notwithstanding the foregoing, however, in the event that the membership rejects the proposed budget or the Board fails for any reason to so determine the budget for the succeeding year, then and until such time as a budget shall have been determined, as provided herein, the budget in effect for the current year shall continue for the succeeding year.

Section IV.2.10 Personal Liability of Lot Owners. The Owner of a Lot at the time any common expense assessment or portion thereof is due and payable is personally liable for such assessment, for any interest, if applicable, and for all costs of collection including, but not limited to, reasonable attorney's fees actually incurred. In addition to lien rights described in Section IV.2.8 above, the Association has the right to bring a separate collection action to enforce the personal liability of Lot owners to pay assessments.

The grantee(s) of a Lot shall be jointly and severally liable with the grantor Owner for all unpaid assessments against the latter for his proportionate share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the

grantor the amounts paid by the grantee therefore.

Assessments shall be paid in such manner and on such dates as may be fixed by the Board of Directors in its discretion. Unless otherwise provided, the annual assessment payments shall be late and the Lot Owner in default if not paid on or before the fifteenth (15th) day such installment becomes due.

Section IV.2.11 Acceleration. If a Lot Owner is in default in payment of any assessment or charge, which the Board has fixed to be paid in installments, the Board of Directors may accelerate the remaining balance of such assessment, including regular installments based on the budget, special assessments, and specific assessments, upon ten (10) days written notice to such Lot Owner, whereupon the entire unpaid balance shall become due and payable upon the date stated in such notice.

Section IV.2.12 No Waiver of Liability for Common Expenses. No Lot Owner may exempt himself or herself from liability for payment of the common expenses by waiver of the use or enjoyment of the common elements or by abandonment of the Lot against which the assessments are made.

Section IV.2.13 Special Assessments.

(a) Notwithstanding the provisions of Section IV.2.9, in the event that the annual assessment proves inadequate for any year, or in the event of an emergency, the Board may at any time levy a special assessment against all Owners.

(b) The Board of Directors may further levy special assessments for capital improvements upon the common elements and for such other matters as the Association shall determine; provided, however, prior to becoming effective any such special assessment for capital improvements shall be approved by the affirmative vote of a majority of all the lot owners at a special meeting of the Association duly called for that purpose.

Section IV.2.14 Capital Budget and Contribution. The Board of Directors shall annually prepare a capital budget which shall take into account the number and nature of replaceable assets, the expected life of each asset, and the expected repair or replacement cost. The Board may set the required capital contribution, if any, in an amount sufficient to meet the projected capital needs of the Association, as shown on the capital budget, with respect both to amount and timing by equal annual assessments over the period of the budget. The capital contribution required may be fixed by the Board and included within the budget and assessment as provided in Section IV.2.9 of this Article. A copy of the capital budget shall be distributed to each member in the same manner as the operating budget.

Section IV.2.15 Interest, Late Charges and Payments. In accordance with N.C. Gen. Stat. §47F-3-115(b), the Association hereby establishes that any past due common expense

assessment or installment thereof, past due special assessments, fines, or other past due charges shall bear interest at 18% per annum.

The Board shall set a late charge of ten percent (10%) of any assessment to be assessed against Lot Owners for late payment of any common expense assessments or installment thereof, special assessments, fines, or any other charges.

Any payments received by the Association in the discharge of a Lot Owner's obligation may be, but are not required to be, applied to the oldest balance due. Such payments may be applied at the discretion of the Board of Directors.

Section IV.2.16 **Surplus Funds.** Any surplus funds of the Association remaining after payment of or provisions for common expenses and any prepayment shall be retained in the general operating funds or long range fund of the Association in the sole discretion of the Board, and no such surplus funds shall be paid to Lot Owners nor shall such surplus funds be used as a credit to reduce future common expense assessments."

RESOLUTION OF THE BOARD OF DIRECTORS

We, the undersigned Directors of Brush Creek Property Owners Association, Inc. hereby attest that a duly held meeting of the membership of the Association the affirmative vote of a majority of the Owners of all Lots in the Development entitled to vote were cast in favor of this *Second Amendment to Declaration Of Covenants, Conditions and Restrictions For Brush Creek Properties.*

*Mike Boudreaux - Director -*Brush Creek Property Owners Association, Inc.

Bill Mayne - Director - Brush Creek Property Owners Association, Inc.

Scott Blanck - Director - Brush Creek Property Owners Association, Inc.

(CORPORATE SEAL)

ATTEST:

*Theresa Mayne - Secretary -*Brush Creek Property Owners Association, Inc.

STATE OF _____
COUNTY OF _____