

# COMMERCIAL COVENANTS: DRAFTING CONSIDERATIONS

*Written and Presented by:*

**ROBERT D. BURTON**

Winstead PC

401 Congress Ave., Suite 2100

Austin, Texas 78701

*Co-Presenter:*

**DENISE CHENEY**, *Austin*

Bickerstaff Heath Delgado Acosta

State Bar of Texas

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**ROBERT D. BURTON**  
**Winstead PC**  
**401 Congress Avenue, Suite 2100**  
**Austin, Texas 78701**  
**512-370-2869**  
**FAX: 512-370-2850**

**EDUCATION:**

B.S. M.S. (Accounting), University of North Texas

J.D., Tulane University, with honors and member and editor of Tulane Law Review

**PROFESSIONAL ACTIVITIES**

Shareholder, Winstead PC, Real Estate Development & Investments Practice Group and Co-Chair of Planned Community, Mixed-Use and Condominium Practice Group

Member, State Bar of Texas

Board Member, Texas Community Association Advocates

Member, Community Associations Institute

Full Member, Urban Land Institute

Board Member, Urban Land Institute – Austin, Urban Development and Mixed-Use Council

Member, Real Estate Council of Austin



# Denise V. Cheney

[dcheney@bickerstaff.com](mailto:dcheney@bickerstaff.com)

## ★ Profile

Denise's principal areas of practice are real estate, planning and development, construction and water law. She represents clients in both the public and private sector in these areas.

## ★ Career Highlights, Honors and Appointments

Vice-Chair, State Bar of Texas, Real Estate Forms Committee

Fellow, American College of Real Estate Attorneys

## ★ Educational and Professional Background

University of Texas (B.A. with highest honors, J.D., with Honors); Order of the Coif

Admitted to practice: Supreme Court of Texas, 1982; United States District Court, Western District of Texas

Board Certified - Residential and Commercial Real Estate Law, Texas Board of Legal Specialization



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# COMMERCIAL COVENANTS: DRAFTING CONSIDERATIONS

## I. INTRODUCTION

Over the past twenty (20) years, private covenant control of mixed-use projects has increased in popularity and complexity. Developers often seek to maximize land area and value by designing projects with multiple uses with some or all of the use components intended for separate ownership. The spatial interrelation of uses, and the developer's desire to establish a theme or specific character for the project, often translates into the need for a common building architecture, shared project amenities, e.g., roads, recreational areas, common way finding and signage, and a single authority to ensure that the theme, character, and amenities are preserved and maintained.

Integrated mixed-use projects can include varied uses and often include a residential for-sale component. This article addresses covenant control of the mixed-use project that excludes residential for-sale (as opposed to for-rent) product. This article assumes that the project will be impressed with a comprehensive set of governance documents (i.e., "CCRs") that provide for the creation of a commercial property owners association with mandatory assessments.

This article does not recommend a specific governance model though three general models are described in Section III below.<sup>1</sup> Due to the variation in size, composition, financing, and complexity of mixed-use projects it is not possible to recommend a single conceptual approach. Practitioners should match the model to the project and modify the model to fit the unique characteristics of the project.

This article also provides guidance and observations on common governance components, which should be addressed in all systems without regard to the specific model chosen for the project.

## II. TITLE 11, TEXAS PROPERTY CODE

Title 11 of the Texas Property Code includes statutory provisions applicable to restrictive covenants and/or the operation and administration of a property owners association. Several chapters in Title 11 only apply to projects that are restricted to residential use, or in which at least a majority of the land is restricted to residential use for single-family homes, townhomes

or duplexes. Specifically, Chapters 201, 204, 205, 206, 207, 209, 210, 211, and 212 would not apply to the mixed-use project that excludes a for-sale residential component. However, it should be noted that if there is any prospect that the mixed-use project may consist of a residential use component and should the component comprise a majority of the land within the governance system, those chapters whose applicability is premised on a majority of the land being restricted to residential use will then apply. Generally, post-creation application of the residential statutes will not pose structural or operational issues for the project. The exception to the general rule is Chapter 209 of Texas Property Code. Chapter 209, referred to as the "Texas Residential Property Owners Protection Act", includes significant association administration and operational requirements, including mandatory payment plans for association assessments, due process procedures for covenant violations, association voting requirements, and governance amendment constraints. In addition to provisions affecting operation and administration of the association, Chapter 209 injects requirements that can affect developer control of the association and project unless the drafter incorporates a development period as defined in Section 209.002(4-a). Specifically, if Chapter 209 applies post-creation, and if a development period as contemplated by Section 209.002(4-a) was not originally incorporated into the governance documents, it is possible that non-developer owners could prosecute an amendment or the developer association control period incorporated into the governance documents could change. To offset the effect of Chapter 209 on projects that may later be modified in a manner where Chapter 209 would apply, it is recommended that a development period be used to define the period of developer control of the project and that the following savings clause, or something similar in effect, be added to the governance documents to conform with the association owner participation requirement in Section 209.00591(c):

*It is not presently intended that the majority of the project will be restricted to residential use. However, in the event it is determined that Chapter 209 of the Texas Property Code applies to the project and/or the Association, then on or before the 10th anniversary of the date this instrument is recorded, or sooner as determined by Declarant, the Board will call a meeting of Members of the Association for the purpose of electing one-third of the Board (the "Initial Member Election Meeting"), which Board member(s) must be elected by Owners other than the Declarant. Declarant shall continue to have the sole right to appoint and remove two-thirds of the Board from and after the Initial Member Election Meeting*

<sup>1</sup> The term "governance model" means the architecture of the covenant control system for the project. The architecture consists of components where each component is a separate legal instrument. Some components will apply to the entire project while other components will apply only to specific uses (or use types) within the project. Each component, whether intended to apply to all or a portion of the project, form an integrated system, i.e., the governance model.

until expiration or termination of the Development Period.

### III. GOVERNANCE MODELS

The architecture, or structural form, of commercial governance varies from project to project, but a rough taxonomy can be applied for the purpose of classification.

#### A. Serial Governance

Serial governance refers to a system where a single independent covenant is filed for each portion of property in the project, usually in conjunction with the development or sale of a specific use component. There is no single instrument that applies to the entire project. The architect of the system provides for the same named property owners association in each separate covenant. See *Attachment 1* for a pictorial schematic structure of a serially governed project. For a multiple-use, multi-owner development which will be developed over an extended time period, serial governance is subject to several deficiencies namely:

##### Administrative Consistency and Ease of Use:

Use of duplicative covenants increases risk that downstream changes can break the governance system, e.g., modification of assessment caps, changes in vote allocations, slight modifications to amendment provisions.

##### Ability to Respond to Market and Project Changes:

Independent amendment provisions in each separate covenant can restrain the developer's ability to change use restrictions or address unanticipated events requiring overall system changes.

##### Retention of Developer Control:

Vote allocations are determined at each separate covenant level. For time-phased projects, risk that the overall control of governance will erode increases based on project duration.

##### Compliance with state enabling statutes:

Use of duplicative covenants with separate amendment provisions makes modifications to overall governance system more difficult in response to legislative changes that occur during the project lifecycle.

##### Assessment Subordination Provisions:

Initial and mid-stream lender negotiated subordination provisions may be difficult to change for prior and subsequent phases.

#### B. Expandable Governance

Expandable governance refers to a system where a founding covenant for the first component of the project is recorded, but it is intended that additional components be added to the same covenant. In other words, the first recorded covenant will eventually encumber all portions of the project as those portions of the project are later annexed into the covenant. Usually a supplemental short-form covenant is recorded to modify portions of the founding covenant applicable to the portion of the project then being annexed into the founding covenant. See *Attachment 2* for a pictorial schematic structure of an expandable governance project. The expandable governance system is preferable to the serial system and may be suitable for a project with a limited number of uses and a short or mid-range development timeline. However, there are risks associated with the model, namely:

##### Administrative Consistency and Ease of Use:

Modification of the founding covenant in conjunction with annexation of later components may make management and administration of the system more complicated and prone to mistakes in application.

##### Ability to Respond to Market and Project Changes:

Can be addressed by an amendment to founding covenant and supplemental covenants; however, amendment to previously recorded supplemental covenants may be limited by negotiated agreements with the owners of commercial tracts subject thereto.

##### Retention of Declarant Control:

In the expandable model, control of the association is often predicated on property then subject to the founding. For sequentially phased projects, market and regulatory changes can result in premature loss of control through failure to annex additional land. Efforts to retain control in these circumstances often require an amendment to the founding covenant and premature encumbrance of undeveloped portions of the project.

### C. Nested Governance

Nested governance refers to a system where a single “master covenant” is recorded which is intended to apply to the entire project. In many cases when first recorded, the master covenant does not encumber any portion of the project. When the use and development of a portion of the project is known and final, and often in conjunction with the sale of such portion of the project to a third-party, that portion is made subject to the master covenant. In addition, and in conjunction with annexation, a subordinate covenant is often filed with the specific restrictions applicable to the parcel or use. The principal difference between the expandable and nested model is that the founding covenant addresses matters which are known to apply to the entire project and excludes matters which are specific to a particular use. For example, a master covenant will address specific developer rights and control of the project, creation of the property owners association, the general rules governing architectural control, and association assessments. The master covenant does not include specific requirements associated with specific use, e.g., multi-family, office, retail, etc. Generally, the system can be characterized as “just-in-time” governance where the restrictions that apply to a use are determined in closer proximity to development and sale of the component. See *Attachment 3* for a pictorial schematic structure of a serially governed project. The nested model should be considered for long-term development projects as a means to mitigate market forces that may change the original conception of the project. The principal challenge with a nested system stems from its flexibility. The design often defers the determination of cost allocations (for shared amenities maintained by the association) and specific use restrictions for specific component until that component is added to the master covenant. Deferral of allocations and restrictions applicable to specific components is contrary to the stability and certainty sought by early entrants into the project.

## IV. GOVERNANCE COMPONENTS

Despite the governance model chosen for a particular project, there are certain customary provisions that are found in all models.

### A. Association Assessments and Voting

In most circumstances, consistent with the principal that representation should be proportionate to taxation, the governance model will use the same methodology to determine assessments and votes allocated to a specific and separately owned parcel. The methodology used to determine assessments and votes in a specific project depends on a variety of factors: the structure of the project, the mix of projected uses, projected long-term ownership, and/or

anticipated level of shared amenities and association expenses. Four common methodologies are ad valorem tax value, acreage, use and scale, and consumption.

#### 1) Ad Valorem Tax Value.

The ad valorem tax value formula allocates assessments and votes based on the ad valorem tax value of a separately owned parcel subject to the governance system. Only in rare cases should the ad valorem formula be used. Proper implementation of the system requires significant management oversight since ad valorem tax value, and accordingly votes and assessments, may change from year to year. Since commercial owners often protest value, it may be difficult for the association or developer to project yearly expenses for specific parcels within the community. In addition, since values are determined at a single point in time, parcels with long construction build-out periods may experience significant fluctuations in votes and assessments from year to year. For a phased project, cost allocations may be inequitable until final build-out.

#### 2) Acreage.

The acreage formula allocates assessments and votes based on the acreage of a specific parcel relative to the acreage of all parcels within the project. The acreage formula assumes that each parcel consumes and uses project resources based on the size of the land area within each parcel. The assumption often proves false when a variety of uses are present within the same project. For example, the multi-family rental project can be expected to consume and use a commonly maintained park or similar recreational facility more frequently than the guests of a retail grocery store in the same project. As a general rule, the acreage formula should be considered for similar uses and homogenous product types, e.g., an industrial warehouse facility.

#### 3) Use and Scale.

The use and scale formula allocates assessments and votes based on the specific use and density of the parcel. Each category of use, e.g., multi-family, office, hotel, retail, is assigned a factor which takes into account the scale of the use. For example, a project consisting of multi-family, retail, and hotel uses may assign a factor and use scale as follows:

Multi-Family:	0.5 Assessments Units per dwelling
Retail:	1.0 Assessment Unit per 1200 square feet of improvements excluding structured parking
Hotel:	0.3 Assessment Units per key (room)

The use and scale formula requires the use of a common allocation unit, in this case an Assessment Unit. The cost allocation assigned to a specific parcel is determined based on the Assessment Units allocated to that parcel relative to all Assessment Units. See *Attachment 4* for a sample use and scale matrix. The use and scale formula attempts to align the consumption of shared resources with the purpose for which the parcel is used.

#### 4) Consumption

The consumption formula allocates assessments and votes based on the measured use of a specific resource. For example, a regulatory authority may allocate impervious cover or living unit equivalents for water and wastewater flows. Unless the resource is easily measurable and stable, the consumption formula may suffer from the same administration and management burdens as the ad valorem tax formula. Even if measurable and stable, the consumption formula is generally not appropriate for projects with extensive shared facilities since the consumption of the resource may not be related to use of such facilities, e.g., multi-family project compared to a hospital, when living units equivalents are used.

### **B. Land Use**

When preparing governance documents for the mixed-use commercial project, unless all uses and users are known, it is often impossible to incorporate specific land use restrictions. One multi-family project may differ from another with respect to density, or may include an in-line retail component. It is better to impress land use restrictions closer in proximity to development when the use is fixed and the specific user is known. If the governance model is designed properly, the specific use can be addressed in a supplemental covenant expressly filed for the specific parcel. In addition, some parcels will be sold with specific expectations regarding density and/or use and often the purchase price is based on this assumption. These expectations can be incorporated into the supplemental covenant to enshrine the bargain between the developer and purchaser of the parcel. See *Attachment 5* for a sample multi-family use restriction that includes a density limit which formed the basis of the bargain between the developer and multi-family purchaser.

### **C. Behavior**

Behavioral restrictions address the acts and activities of owners of parcels within the project and their tenants and invitees. Often behavioral restrictions are use-specific and, as with land use restrictions, can be difficult to design in the early stages of a project. For example, pet limitations will likely differ between the multi-family and office

parcels, and may differ between different multi-family parcels in the same project. On the other hand, certain behavioral restrictions addressing health and safety have universal applicability. To the extent possible, the governance system for the project should be designed to address behavioral restrictions appropriate for particular uses once the specific use and user are known.

### **D. Architectural Control**

The governance documents should reserve on behalf of the developer the right to review and approve improvements to be constructed within the project. This right should be independent and separate from the developer's right to control operation and administration of the property owners association. In latter stages of the project, and once operations are stable, the developer may elect to transition control of the property owners association prior to sale and build-out of the project. Tying architectural control to the developer's control of the association can artificially delay transition of the association if a portion of the property remains to be sold and developed.

The developer's right to control the architectural review process should be absolute with no corresponding obligation to subsequent owners within the project. The project may change in response to market conditions or regulatory requirements and the developer needs to flexibility to respond and modify the project to the changed conditions.

Finally, except in rare circumstances, the architectural review process should be generally described and exceptions to the general process should be permitted. The developer, in conjunction with the sale of a specific parcel, may be required as a condition to the sale to approve conceptual plans or use a different approval procedure than the procedure outlined in the governance documents. If a specific approval process is required, it is advisable to incorporate those procedures in separate design guidelines.

See *Attachment 6* for a sample architectural review provision.

### **E. Developer Rights**

Each governance model should reserve on behalf of the developer certain special rights necessary to develop, market and sell the project. As discussed above, one of these rights is the absolute right to review and approve all proposed improvements to be constructed with the project. The governance document should also reserve the right for the developer to appoint all board members of the property owners association. As noted in Section II, unless a majority of the project is restricted to residential use, there is no requirement in Texas that

the developer transition the association to owner control. In most cases, the developer should retain the right to appoint all board members until the developer no longer owns any property subject to the governance system<sup>2</sup> or specify a term of years. Retention of the right to appoint all Board members does not require that all Board members be appointed by the developer for the project duration but instead allows the developer to tailor transition from developer to owner control based on the project. Other rights which should be reserved on behalf of the developer are as follows: (i) the sole and unilateral right to annex additional land into the governance system; (ii) the right to unilaterally amend the governance model; (ii) the right to modify the founding covenant or impress additional restrictions as to a specific parcel; and (iv) the right to determine assessment and votes (unless the formula is fixed in the governance model). The governance model should also permit the developer to assign, in whole or in part, all or any portion of the reserved developer rights. The partial assignment of developer rights as to a specific parcel is one means to accommodate users with high project leverage.

## V. CONCLUSION

In Texas, the practitioner is allowed the flexibility to design commercial restrictions in a manner tailored to the specific project. The design and architecture is dependent on the specifics of the project including the development timeline, mix of uses, projected users, and local regulatory environment. Care should be taken to incorporate flexibility into the system to respond to market and project changes. One size seldom fits all, but there are some governance features, which all systems should incorporate.

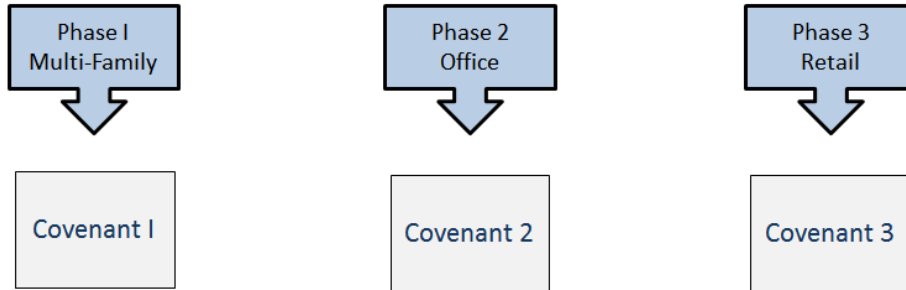
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<sup>2</sup> For governance models that annex property over time, the developer rights, including the right to appoint all members of the board should be based on the ownership or option to acquire the annexable land. This will require that the annexable land be described or depicted on an exhibit attached to the founding covenant.



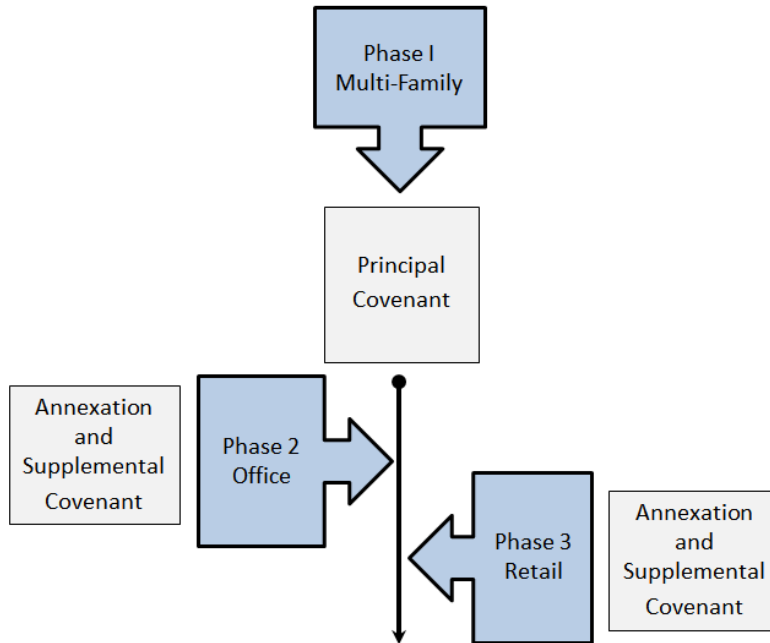
ATTACHMENT 1

# Serial Governance



ATTACHMENT 2

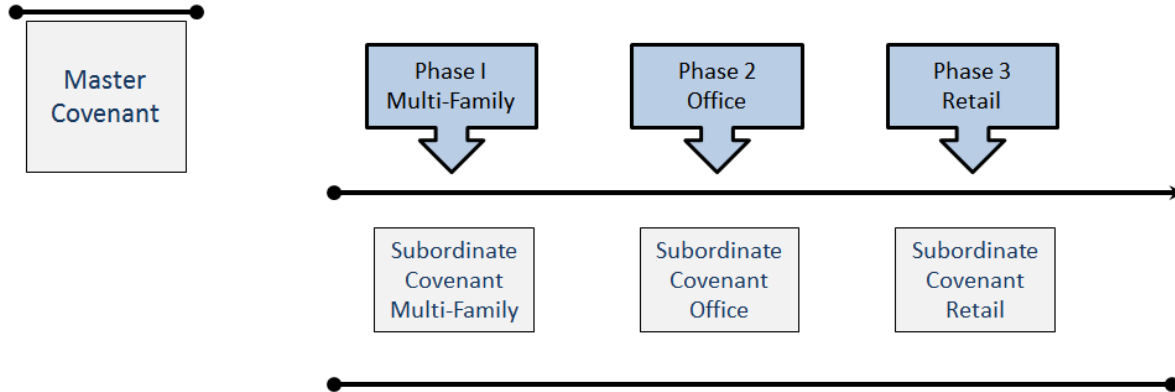
# Expandable Governance





ATTACHMENT 3

# Nested Governance



## ATTACHMENT 4

USE AND SCALE MATRIX

Use	Formula
Retail/Restaurant/Office	1 / 1,200 square feet (excluding structured parking)
Hotel	0.3 per key
Residential Condo	0.5 per dwelling unit
Multi-Family	0.5 per rental dwelling unit

1. Steps for Allocating Votes and Assessment Units:

- (a) Determine the total number of square feet of retail, restaurant, or office, number of hotel rooms, number of residential condominium units, or number of individual rental dwelling units for each parcel.
- (b) Apply the formulas listed above and round to the nearest whole number so that the resulting votes or Assessment Units are whole numbers (round up if equidistant).

2. Steps for Calculating Assessments:

- (a) Prepare a pro-forma build out budget projecting the total number of square feet of retail, restaurant, or office, number of hotel rooms, number of residential condominium units, or number of individual rental dwelling units within the Development. This is an estimate for planning purposes.
- (b) Determine the cost per Assessment Unit.
- (c) Establish the cost per Assessment Unit at the full build-out rate.

**ATTACHMENT 5**

Multi-Family Use; Prohibitions. Each Residential Unit shall be used solely for private multi-family residential purposes (and any related community facilities and amenities) and there shall not be constructed or maintained thereon more than four hundred and sixteen (416) Residential Units. No professional, business, or commercial activity to which the general public is invited shall be conducted on the Development Area, except for activities conducted by an Owner associated with the rental of Residential Units. A tenant or occupant of a Residential Unit may conduct business activities within a Residential Unit so long as: (i) such activity complies with all the applicable zoning ordinances (if any); (ii) the business activity is conducted without the employment of persons other than the occupants of the Residential Unit; (iii) the existence or operation of the business activity is not apparent or detectable by sight, i.e., no sign may be erected advertising the business; (iv) the business activity conforms to all zoning requirements (if any) for the Development Area; (v) the business activity does not involve door-to-door solicitation of residents within the Development; (vi) the business does not, in the Board's judgment, generate a level of vehicular or pedestrian traffic or a number of vehicles parked within the Development which is noticeably greater than that which is typical of residences in which no business activity is being conducted; (vii) the business activity is consistent with the residential character of the Development and does not constitute a nuisance, or a hazardous or offensive use, or threaten the security or safety of other residents of the Development as may be determined in the sole discretion of the Board; and (viii) the business does not require the installation of any machinery other than that customary to normal household operations. The terms "business" and "trade", as used in this provision, shall be construed to have their ordinary, generally accepted meanings and shall include, without limitation, any occupation, work, or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation, or other form of consideration, regardless of whether: (x) such activity is engaged in full or part-time; (y) such activity is intended to or does generate a profit; or (z) a license is required. No portion of the Development Area may be used for the takeoff, storage, or landing of aircraft (including, without limitation, helicopters) except for medical emergencies, or for a carport or other automobile storage open on more than one side. No portion of the Development Area may be used as a hotel, bed and breakfast lodge, or any similar purpose, but each Residential Unit within the Development Area may be leased for single family residential purposes for a minimum term of six (6) months; provided that each lease agreement must be in writing and must be made specifically subject to the Association Restrictions.

## ATTACHMENT 6

## ARCHITECTURAL CONTROL COMMITTEE

Declarant has a substantial interest in ensuring that Improvements within the Property maintain and enhance Declarant's reputation as a community developer and do not impair Declarant's ability to market and sell all or any portion of the Property. Until Declarant has delegated its right to appoint and remove all members of the ACC to the Board as provided in Section 7.02(a) below, the ACC will be acting solely in Declarant's interest and will owe no duty to any other Owner or the Association. Notwithstanding any provision in this Declaration to the contrary, Declarant may appoint a single person to exercise the rights of the ACC.

7.01 Construction of Improvements. No Improvement may be erected, placed, constructed, painted, altered, modified or remodeled on any Lot, and no Lot may be re subdivided or consolidated with other Lots or Property, by anyone other than Declarant without the prior written approval of the ACC.

7.02 Architectural Control Committee.

(a) Composition. The ACC will be composed of not more than three (3) persons (who need not be Members or Owners) appointed as provided below, who will review Improvements proposed to be made by any Owner other than Declarant. Declarant will have the right to appoint and remove (with or without cause) all members of the ACC. Declarant may assign its right to appoint all members of the ACC to the Association by Recorded written instrument, and thereafter, the Board will have the right to appoint and remove (with or without cause) all members of the ACC. Any assignment by Declarant of the right to appoint and remove all members of the ACC may be withdrawn until expiration of twenty-four (24) months after the expiration of the Development Period. If Declarant withdraws its assignment of the right to appoint and remove all members of the ACC, then on the date of such withdrawal, Declarant will have the right to appoint and remove (with or without cause) all members of the ACC. Declarant's right to appoint all members of the ACC will automatically be assigned to the Association upon the expiration of twenty-four (24) months after the expiration of the Development Period. Declarant, at its option, may create and assign specific duties and responsibilities to one or more sub-committees consisting of members and/or nonmembers of the ACC. In the event responsibilities and duties are assigned to a sub-committee, those responsibilities and duties will no longer be discharged by the ACC unless the sub-committee exercising such duties and responsibilities is dissolved by Declarant. The right to create, dissolve, and appoint members of such sub-committees will reside exclusively with Declarant until such time as Declarant has assigned its right to appoint members of the ACC to the Association. The ACC will have the right to employ consultants and advisors as it deems necessary or appropriate.

(b) Submission and Approval of Plans and Specifications. Construction plans and specifications or, when an Owner desires solely to re subdivide or consolidate Lots, a proposal for such re-subdivision or consolidation, will be submitted in accordance with the Design Guidelines, if any, or any additional rules adopted by the ACC together with any review fee which is imposed by the ACC in accordance with Section 7.02(c) to the ACC at the offices of Declarant, at such address as may hereafter be designated in writing from time to time. No re subdivision or consolidation will be made, nor any Improvement placed or allowed on any Lot, until the plans and specifications and the builder which the Owner intends to use to construct the proposed structure or Improvement have been approved in writing by a Majority of the members of the ACC. The ACC may, in reviewing such plans and specifications consider any information that it deems proper; including, without limitation, any permits, environmental impact statements or percolation tests that may be required by the ACC or any other entity; and harmony of external design and location in relation to surrounding structures, topography, vegetation, and finished grade elevation. The

ACC may postpone its review of any plans and specifications submitted for approval pending receipt of any information or material which the ACC, in its sole discretion, may require. Site plans must be approved by the ACC prior to the clearing of any Lot, or the construction of any Improvements. The ACC may refuse to approve plans and specifications for proposed Improvements, or for the re subdivision or consolidation of any Lot on any grounds that, in the sole and absolute discretion of the ACC, are deemed sufficient, including, but not limited to, purely aesthetic grounds.

(c) Design Guidelines. Declarant may adopt the initial Design Guidelines and, during the Development Period, will have the power from time to time, to adopt (unless previously adopted by Declarant), amend, modify, or supplement the Design Guidelines, if any. Upon expiration or termination of the Development Period, the ACC, or any sub-committee thereof created pursuant to Section 7.02(a), will have the power from time to time, to amend, modify, or supplement the Design Guidelines, if any; provided, however, that any amendment to the Design Guidelines made by a sub-committee will only apply to the Improvements under the jurisdiction of such sub-committee, and during the Development Period, any such amendment, modification or supplement must be approved in advance and in writing by the Declarant. In the event of any conflict between the terms and provisions of the Design Guidelines, if any, and the terms and provisions of this Declaration, the terms and provisions of this Declaration will control. In addition, the ACC will have the power and authority to impose a fee for the review of plans, specifications and other documents and information submitted to it pursuant to the terms of this Declaration. Such charges will be held by the ACC and used to defray the administrative expenses incurred by the ACC in performing its duties hereunder; provided, however, that any excess funds held by the ACC will be distributed to the Association at the end of each calendar year. The ACC will not be required to review any plans until a complete submittal package, as required by this Declaration and the Design Guidelines, is assembled and submitted to the ACC. The ACC will have the authority to adopt such additional procedural and substantive rules and guidelines (including, without limitation, the imposition of any requirements for certificates of compliance or completion relating to any Improvement and the right to approve in advance any contractor selected for the construction of Improvements), not in conflict with this Declaration, as it may deem necessary or appropriate in connection with the performance of its duties hereunder.

(d) Actions of the Architectural Control Committee. The ACC may, by resolution unanimously adopted in writing, designate one or more of its members, or an agent acting on its behalf, to take any action or perform any duties for and on behalf of the ACC, except the granting of variances. In the absence of such designation, the vote of a Majority of all of the members of the ACC taken at a duly constituted meeting will constitute an act of the ACC.

(e) Failure to Act. In the event that any plans and specifications are submitted to the ACC as provided herein, and the ACC fails either to approve or reject such plans and specifications for a period of sixty (60) days following such submission, rejection of such plans and specifications by the ACC will be presumed. In furtherance, and not in limitation, of the foregoing, any failure of the ACC to act upon a request for a variance will not be deemed a consent to such variance, and the ACC's written approval of all requests for variances will be expressly required.

(f) Variances. The ACC may grant variances from compliance with any of the provisions of the Design Guidelines, if any, or this Declaration, when, in the opinion of the ACC, in its sole and absolute discretion, such variance is justified. All variances must be evidenced in writing and must be signed by at least a Majority of the members of the ACC. Each variance must also be Recorded; provided however, that failure to record a variance will not affect the validity thereof or give rise to any claim or cause of action against the ACC, including the Declarant or its designee, the Association, or the Board. If a variance is granted, no violation of the covenants, conditions, or restrictions contained in this Declaration or the Design Guidelines, if any, will be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such variance will not operate to waive or amend any of the terms and provisions of this Declaration or the Design Guidelines, if any, for any purpose except as to the particular property and

in the particular instance covered by the variance, and such variance will not be considered to establish a precedent for any future waiver, modification, or amendment of the terms and provisions of this Declaration or the Design Guidelines, if any.

(g) **Duration of Approval.** The approval of the ACC of any plans and specifications, and any variances granted by the ACC, will be valid for a period of one hundred and twenty (120) days only. If construction in accordance with such plans and specifications or variance is not commenced within such one hundred and twenty (120) day period and diligently prosecuted to completion within either: (i) one year after issuance of approval of such plans and specifications; or (ii) such other period thereafter as determined by the ACC, in its sole and absolute discretion, the Owner will be required to resubmit such plans and specifications or request for a variance to the ACC, and the ACC will have the authority to re-evaluate such plans and specifications in accordance with this Section 7.02(g) and may, in addition, consider any change in circumstances which may have occurred since the time of the original approval.

(h) **No Waiver of Future Approvals.** The approval of the ACC to any plans or specifications for any work done or proposed in connection with any matter requiring the approval or consent of the ACC will not be deemed to constitute a waiver of any right to withhold approval or consent as to any plans and specifications on any other matter, subsequently or additionally submitted for approval by the same or a different person, nor will such approval or consent be deemed to establish a precedent for future approvals by the ACC.

(i) **Non Liability of Committee Members.** NEITHER DECLARANT, THE BOARD, THE ARCHITECTURAL CONTROL COMMITTEE, NOR ANY MEMBER WILL BE LIABLE TO ANY OWNER OR TO ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR INJURY ARISING OUT OF THE PERFORMANCE OF THE ARCHITECTURAL CONTROL COMMITTEE'S DUTIES UNDER THIS DECLARATION.