

10/24/2003 01:54 PM  
 Instrument# 2003-270051  
 Book: 5193  
 Page: 2136

2  
*This instrument prepared by,  
 and after recording return to:*  
 Kinsey, Vincent, Pyle, LC  
 150 South Palmetto Avenue, Box A  
 Daytona Beach, Florida 32114-4336  
 (386) 252-1561

**DECLARATION OF COVENANTS, CONDITIONS,  
 RESTRICTIONS AND EASEMENTS FOR  
WHISPERING CREEK, UNIT II**

This DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR WHISPERING CREEK, UNIT II (this "Declaration"), dated as of March 1, 2000, is made to be effective as of the "Effective Date" (as defined in ¶ 1.11, below) by AVA & RUFUS, INC., a Florida corporation having its principal place of business at 2552 Tomoka Farms Road, Daytona Beach, Florida 32128 (the "Developer" or "Declarant").

**RECITALS**

A. Developer is the record owner of all the real property (the "Property") described in and depicted by the subdivision plat, entitled "Plat of Whispering Creek - Unit II" (the "Plat"), a subdivision in Volusia County, Florida, which plat was filed for record on 10/23/, 2003 and is recorded in Map Book 50 at page 65-68, Public Records of Volusia County, Florida ("PRVCF"). The Property subject to this Declaration may be referred to herein either as the "Property" or as "Whispering Creek, Unit II".

B. The Developer's title to the Property is subject to the lien of a mortgage executed on March 17, 1999, by Ava & Rufus, Inc., a Florida corporation, and granted to SouthTrust Bank, N.A., a Florida corporation, recorded on March 22, 1999 in Official Records Book 4412, Page 3346, of the PRVCF; and Mortgage Modification Agreement and Future Advance, to SouthTrust Bank, N.A., recorded in Official Records Book 5083, Page 944, PRVCF.

C. The Lots in Whispering Creek, Unit II will be used for single-family dwellings and the related purposes described herein. The easements in Whispering Creek, Unit II will be used by the various utility providers to furnish services to the neighborhood. The common areas and recreation areas will be transferred to a nonprofit Florida corporation (to be known as the Whispering Creek, Unit II Homeowners' Association, Inc.), which is to be formed by Developer. The corporation will own such areas for the benefit of the homeowners in Whispering Creek, Unit II.

**NOW, THEREFORE**, Developer hereby covenants, establishes, imposes, grants, sets apart, publishes, dedicates, and conveys under and pursuant to this Declaration the covenants, conditions, restrictions, and easements prescribed below. This Declaration and the rights and obligations under it shall run with the Property and shall be binding on and inure to the benefit of every Owner of Property (as defined below) in Whispering Creek, Unit II.

BOOK: 5193  
PAGE: 2137

**ARTICLE I**  
**(Definitions)**

The following definitions apply wherever the capitalized terms appear in this Declaration. Additional terms also may be defined the first time they appear.

1.1 "*Articles*" means the Articles of Incorporation of the Whispering Creek, Unit II Homeowners' Association, Inc., filed with the Florida Department of State, as amended from time to time, a copy of which is attached hereto as Exhibit "A".

1.2 "*Assessments*" means, collectively, the following assessments made by the Board against each Lot, as follows:

(a) "*General Assessment*" means the amount assessed to provide operating revenues to the Homeowners' Association sufficient to meet the Association's annual budgeted expenses.

(b) "*Individual Lot Assessment*" means an amount assessed to provide capital funds or operating expenses which relate to the maintenance or improvement of a particular Lot or Lots.

(c) "*Special Assessment*" means an amount assessed to provide capital funds for budgeted annual improvements or for emergency expenses.

1.3 "*Board*" means the Board of Directors of the Homeowners' Association.

1.4 "*Bylaws*" means the Bylaws of the Homeowners' Association, a copy of which is attached hereto as Exhibit "B".

1.5 "*Common Property*" means those tracts of land that are (i) deeded to the Homeowners' Association and designated in the deed as "Common Property", or (ii) labeled as a "Common Area," or a "Recreation Area" on the Plat. The term "Common Property" also means any personal property appurtenant to any real property owned by the Homeowners' Association or acquired by the Homeowners' Association if the personal property is designated as such in the bill of sale or other instrument by which the Association acquired title. "Common Property" does not mean any area that is (i) dedicated in the Plat to The County of Volusia or to a municipal government, if any, or any party other than the Homeowners' Association, or (ii) property that is sold or dedicated by the Homeowners' Association.

1.6 "*Cost of Collection*" means all filing fees, service of process fees, recording fees and reasonable attorney's fees incurred in connection with the collection of Assessments, including attorney's fees at trial and on appeal .

1.7 "*Declarant*" or "*Developer*" means Ava & Rufus, Inc., a Florida corporation, and its successors and assigns. The Developer also may be an Owner. The various rights of Developer under this Declaration may be separated and assigned to different persons and, if so separated and assigned, each assignee will be considered as a "Developer" as to the specific rights so assigned. Developer may collaterally assign its rights as Developer by mortgage or other instrument, and such assignees may elect to either exercise the assigned rights or designate another person to exercise such rights if such assignees succeed to Developer's interest in Whispering Creek, Unit II or any portion thereof.

BOOK: 5193  
PAGE: 2138

1.8 "Declaration" means this Declaration of Covenants, Conditions, Restrictions, and Easements for Whispering Creek, Unit II, and all supplements and amendments to it.

1.9 "Development Agreement" means the Development Agreement for the Whispering Creek, Unit II RPUD, as amended, recorded in Official Records Book 4772, Page 2049, PRVCF.

1.10 "Dwelling Unit" means one building constructed for use by a single family as a residential dwelling unit.

1.11 "Effective Date" means the date this Declaration is recorded in the PRVCF.

1.12 "Homeowners' Association" means Whispering Creek, Unit II Homeowners' Association, Inc., a Florida nonprofit corporation, its successors and assigns, that was formed or is to be formed by Developer.

1.13 "Land Development Code" means the Volusia County Land Development Code (Ordinance 88-3 as amended), as it existed on the Effective Date and as it may be amended from time to time. If the Subdivision is incorporated into a municipality, the land development code of the municipality shall be substituted for the Volusia County Land Development Code.

1.14 "Lot" means a parcel of real property located in the Subdivision and depicted as a Lot on the Plat. A Lot shall be deemed to be unimproved until the improvements being constructed thereon are substantially completed or until they are assessed as real property for ad valorem tax purposes, whichever date shall last occur. If a Lot is improved, it shall include all improvements located or affixed thereon.

1.15 "Member" means a Member of the Homeowners' Association. Each Lot Owner shall be a Member. There are two classes of Members.

1.16 "Mortgagee" means any institutional lender that holds a bona fide mortgage encumbering one or more Lots. The term "institutional lender" specifically includes, but is not limited to, a bank, a savings and loan association, a mortgage lending company, an insurance company, a credit union, and the Federal National Mortgage Association or similar agency.

1.17 "Owner" means the record title owner, whether that is individual, joint or entireties ownership, of (i) the fee simple title to any Lot, or (ii) a life estate in any Lot. "Owner" does not mean a Mortgagee.

1.18 "Plat" means the Plat of the Whispering Creek, Unit II, a subdivision in Volusia County, Florida, filed for record on 10/23, 2003, and recorded in Map Book 50 at page 65-68 of the PRVCF, and the plat of any additional real property annexed to and made part of Whispering Creek, Unit II, from time to time.

1.19 "Public Records" means the official Public Records of Volusia County, Florida (PRVCF).

1.20 "Recreation Facilities" means the amenities constructed or to be constructed on the Common Property by Developer or by the Homeowners' Association.

1.21 "Rules" means rules governing the use of the Common Property originally promulgated by Developer and revised from time to time by the Homeowners' Association.

BOOK: 5193  
PAGE: 2139

1.22 "SJRWMD" means the St. Johns River Water Management District, or its successor agency.

1.23 "Storm Water Management System" means all drainage rights of way, lakes, ponds, water management tracts, drainage facilities, conservation districts, conservation areas, and buffer zones, as shown on the Plat. The "Storm water Management System" also means a system that is designed and constructed or implemented to control discharges necessitated by rainfall events, incorporating methods to (i) collect, convey, store, absorb, inhibit, treat, use, or reuse water; or (ii) prevent or reduce flooding, over drainage, environmental degradation, and water pollution, or otherwise affect the quantity and quality of discharges from the system as permitted pursuant to Chapters 40C-4, 40C-40, or 40C-42 of the Florida Administrative Code, or to the corresponding chapters or sections of similar rules of the governmental agency having jurisdiction.

1.24 "Subdivision" means the Whispering Creek, Unit II, subdivision as defined in this Declaration and as graphically depicted and legally described in the Plat.

1.25 "Third Party Purchaser" means a person, other than a builder, contractor or other person who purchases a Lot for the purpose of constructing improvements on a Lot for resale.

1.26 "Turnover Date" means the date, no later than ninety (90) days after 90% of the Lots within Whispering Creek, Unit II have been conveyed to Members other than the Class B Members, on which date a new Board of Directors shall be promptly elected for the Homeowners' Association. Similarly, "Turnover" or "Turnover of Association Control" means the transferring of control of the Homeowners' Association from the Developer to the Owners.

1.27 "Whispering Creek, Unit II" means Whispering Creek, Unit II, a subdivision in Volusia County, Florida, according to the Plat (as defined above), and any additional real property included in and made subject to this Declaration from time to time.

**ARTICLE II**  
**(Property Subject to this Declaration)**

This article describes the real property initially comprising Whispering Creek, Unit II, and provides the method for adding real property to Whispering Creek, Unit II. The total Property subject to this Declaration shall consist of the initial Property and any annexed additional Property.

2.1 Initial Property. The real property initially subject to this Declaration consists of the real property described on and depicted in the Plat.

2.2 Annexation of Additional Property.

(a) Parties Authorized to Annex Property. The following parties may annex additional property:

(i) By Developer. Unless waived by recorded instrument, Developer will have the right, but not the obligation, from time to time in its sole discretion, to annex any property to Whispering Creek, Unit II, if such property is adjacent to or abuts any property shown on the Plat. In determining whether the property to be annexed is adjacent to or abuts the property shown on the Plat, Developer may disregard any roads that are situated between the property shown on the Plat and the property to be annexed.

(ii) *By Homeowners' Association.* Additional property may be annexed to Whispering Creek, Unit II by the Homeowners' Association, but only after the termination of the Class B Membership thereof.

(b) *Procedure.* The person owning the property being annexed shall record a Supplemental Declaration in the PRVCF. The Supplemental Declaration shall also be executed by the Developer or its assigns, or by the Homeowners' Association, as the case may be. The Supplemental Declaration shall contain the legal description of the property being annexed. The Supplemental Declaration may contain special provisions applicable to the property being annexed. These special provisions may limit the applicability of specific covenants, restrictions, and easements contained in this Declaration to the annexed property or may impose additional or different covenants, conditions, or restrictions to reflect the different character of the property being annexed. The person making the Supplemental Declaration will have sole discretion to determine the special provisions to be contained in the Supplemental Declaration; provided, however, no special provisions may be included that exempt the owners of the property being annexed from equitably sharing in the capital and operating expenses of Whispering Creek, Unit II. The Supplemental Declaration shall be effective upon its filing for public record, and at that time the annexed property shall become part of Whispering Creek, Unit II.

2.3 *Further Subdivision or Replat of Lots.* Lot Owners (other than Developer) may not subdivide or separate any Lot into smaller parcels; provided, however, this shall not prohibit corrective deeds or similar corrective instruments. An Owner may, by recording an instrument to that effect in the official PRVCF, combine two or more Lots for the purpose of using the combined Lots as a single home site, whereupon the combined property will be deemed to be a single Lot for all purposes except for assessment purposes, unless the Owner uses the combined Lots as a hobby breeder for the shelter, breeding, or training of domesticated dogs or cats belonging to the Owner in accordance with the requirements set forth in Subsection (d) of the Development Agreement of The Whispering Creek, Unit II RPUD. Developer shall have the right to modify the Plat to make adjustments to Lot boundary lines if the Owners of the affected Lots consent. Developer may make other adjustments to the Plat if Owners are not materially affected or if all Owners who will be materially affected consent to the modification. Owners shall not unreasonably withhold or delay their consent to an adjustment, and consent will be deemed given if an Owner does not object in writing to a request for the Owner's consent within fifteen (15) days from the date such written request for consent is received by the Owner. Developer also may replat or join a Lot or Lots to Common Property, to roadway, or to other legal purpose, without the consent of the other Owners, whereupon such replatted Lot or Lots will no longer be deemed a "Lot." Developer also may establish additional public utility easements on a Lot or Lots without the consent of the other Owners.

### **ARTICLE III** **(Architectural Review and Construction Requirements)**

To ensure that the homes and accessory buildings and structures in the Subdivision blend into a common, congruous, and harmonious architectural theme, there shall be created an Architectural Review Committee. The committee shall have authority to review all construction, as defined below, proposed to be done in the Subdivision. If the construction has not been approved by the committee, then the Owner of the Lot on which the construction is to take place is not authorized, or permitted under this Declaration to construct any part or all of a building, structure or improvement. Although certain requirements are specified herein, the architectural review committee will not be limited to the specific requirements but rather will have broad discretion.

### 3.1 Architectural Review Committee

(a) Composition. The Architectural Review Committee will consist of a single person or a committee of persons selected by Developer. Developer may temporarily delegate this right to appoint members or may assign this right by written instrument recorded in the Public Records. Members of the Architectural Review Committee will serve at the pleasure of the entity entitled to select the members and may be replaced at any time. If Developer (or assignee) fails to appoint at least one person to the Architectural Review Committee and such vacancy continues for 30 days after the Homeowners' Association gives written notice to Developer (or assignee) of such vacancy, the Homeowners' Association will have the right to appoint the members of the Architectural Review Committee until such time as Developer (or assignee) exercises its right of appointment.

(b) Professional Advisor. The Architectural Review Committee may employ one or more licensed architects, landscape architects, or land planners to advise the Architectural Review Committee. Each advisor may sit on the Architectural Review Committee as either a voting or nonvoting member, at the discretion of the other members of the Architectural Review Committee. At the discretion of the Architectural Review Committee, the advisor may be paid a reasonable fee derived from application fees or payable by the Homeowners' Association from the General Assessment.

### 3.2 Architectural Review Procedure

(a) Subject to Review. All construction of buildings, structures, facilities, improvements, and all remodeling or modifications thereto, on or to a Lot, except interior alterations not affecting the external appearance of the Lot or improvements on a Lot, must be approved, in advance of such construction, by the Architectural Review Committee. The prior approval of construction includes, but is not limited to, prior approval of the paint type and color and other alterations of a building (including doors, windows, and trim), structures, facilities or improvements; the replacement of roof or other parts of a building other than with duplicates of the original material; construction of, fountains, swimming pools, whirlpools, saunas or other pools; construction of privacy walls or other fences or gates; outdoor ornamentation; and initial landscaping, and any material alteration of landscaping. This right is general and is not limited to the specific items listed in this paragraph or in Paragraph 3.4. Construction undertaken by or on behalf of Developer will not be subject to approval by the Architectural Review Committee.

(b) Application. The items to be submitted for approval shall include (i) the construction plans and specifications of the improvement, including all proposed clearing, grading and landscaping; (ii) elevations of all proposed improvements; (iii) a Lot survey showing current improvements; and (iv) such other items as the Architectural Review Committee requires. No construction on any Lot shall be commenced and no Lot shall be modified except in accordance with the plans that have been submitted to and approved by the Committee. Any modification to the approved plans must also be reviewed and approved by the Architectural Review Committee.

(c) Basis for Decision. The Architectural Review Committee, in making its decisions, may consider purely aesthetic matters that in the sole opinion of the Architectural Review Committee will affect the desirability or suitability of the construction and the aesthetics of the Subdivision. The Architectural Review Committee will not be limited to the specific restrictions and requirements of this Article in making its decisions.

(d) Application Fee: Deposit. The Architectural Review Committee may establish procedures for the review of applications, and impose a reasonable fee to be paid by the applicant. The Architectural Review Committee also may require an applicant to post a security deposit to ensure that all work is undertaken and completed only in accordance with approved plans.

(e) Notification of Approval. The Architectural Review Committee must notify an applicant in writing of its decision within 30 days of receiving a completed application and all supporting documentation. If approval or disapproval is not given within 30 days after submission of a completed application, the application will be deemed approved unless the applicant agrees to an extension of time within which the Committee is permitted to act.

(f) Enforcement. If any construction is undertaken that has not been approved or that deviates substantially from the approved plans, Developer or the party delegated or assigned Developer's right to appoint the Architectural Review Committee, may bring an action for specific performance, declaratory judgment, or injunction, and will be entitled to recover all costs of such action including attorneys fees at trial or on appeal. Any such action also shall determine entitlement to any retained security deposit. The Association will have the right to enforce these provisions when the Developer (and its affiliates) owns no Lots within Whispering Creek, Unit II. The failure to strictly enforce these provisions as to a particular violation or violations will not be deemed a waiver to enforce these provisions as to future or continuing violations.

3.3 Liability. The Architectural Review Committee and Developer will not be liable to the applicant or to any other person: to ensure that the proposed plans are sufficient to warrant issuance of a building permit; to ensure that the proposed plans comply with any applicable safety or building codes; for inadequacy or deficiency in the plans resulting in defects in the improvements; to ensure the habitability of the improvements; or to ensure that construction was done in accordance with the plans.

3.4 Specific Restrictions. The following restrictions shall apply to the Lots; provided, however, the Architectural Review Committee will not be limited to these items when reviewing plans and will have broad discretion in the interpretation of these restrictions.

(a) Residential Building. No building may be erected, placed, or permitted to remain on any Lot other than one single-family dwelling, a garage, a barn, and, if approved by the Architectural Review Committee, accessory buildings that do not furnish residential accommodations for an additional family.

(b) Building Restriction Lines. No dwelling shall be located nearer to the streets or adjacent Lots than the applicable building setback requirements on the Plat or under the Land Development Code.

(c) Minimum Floor Space. Each single-story dwelling located on a Lot must contain at least 2,500 square feet of floor area, and each multi-story dwelling located on a Lot must contain at least 3,000 square feet of floor area. "Floor area" means only enclosed, heated, air-conditioned livable floor area and does not include barns, garages, porches (open or with screened enclosures), terraces, balconies, or patios.

(d) Garages/Barns. Unless otherwise specifically approved by the Architectural Review Committee, no building may be constructed separate and apart from the dwelling unit that is not of the same style, type and building materials. Each dwelling unit must have an enclosed garage to accommodate at least two (2) cars. No carports will be permitted. Without the prior

written approval of the Architectural Review Committee, no garage may be enclosed permanently or converted to another use without the substitution of another garage on the Lot meeting the requirements of this Declaration. No barn shall be built to accommodate more than two (2) horses per acre without specific written approval by the Architectural Review Committee.

(e) Driveways. All Lots must have a paved driveway of stable and permanent construction extending from the adjacent street to the garage. All driveways must be of approved material and design.

(f) Exterior Color and Materials. The color and materials of all exterior surfaces will be subject to approval of the Architectural Review Committee. The Architectural Review Committee may promulgate a list of approved colors and materials for this purpose. This restriction includes window tints and films.

(g) Recreation Facilities, and Lighting. All recreation facilities constructed or erected on a Lot, or other structures of a similar kind or nature must be adequately walled, fenced, or landscaped in a manner specifically approved by the Architectural Review Committee before such facility is constructed or erected. The Architectural Review Committee must specifically approve all exterior lighting.

(h) Non-Interference With Easements. No structure, improvement, planting, or other material may be placed or permitted to remain on a Lot if it may damage or interfere with the installation and maintenance of any entry way, hedge, planting, tree, grass, fence, or other improvement or landscaping located within the Common Property or Drainage Easement. Any easement area located on a Lot and all improvements on an easement area shall be maintained by the Owner of the Lot whereon the easement area lies, except for those easement areas the maintenance of which is the responsibility of a public authority, utility, or the Homeowners Association. In any event, an Owner may not interfere with the maintenance of an easement area on the Owner's Lot by the party responsible for maintaining the same. This provision may be enforced by any person or party benefitting from the easements or responsible for the maintenance of them.

(i) Utility Connections. Connections for all utilities, including, but not limited to, electricity, telephone, and television must be placed underground from the connecting point to the dwelling in such a manner as is acceptable to the respective utility authority or company and the Architectural Review Committee.

(j) Air Conditioning Units. No window or wall air conditioning unit will be permitted on any Lot. All air condition and heating units must be screened with plants or walls.

(k) Mailboxes. All mailboxes, paper boxes, or other receptacles of any kind for use in the delivery of mail, newspapers, magazines, or similar material shall be erected or permitted in only the location approved by the Architectural Review Committee and must be constructed according to a size, design, and material approved by the Architectural Review Committee. A nameplate and address plate in size and design approved by Developer may be displayed on a Lot.

(l) Antennae, Aerials, and Satellite Dishes. No satellite dish or antennae visible either from a street, road, Common Property or other Lot may be placed on any Lot or affixed to the exterior of any building without the prior written approval of the Architectural Review Committee.

(m) Clothes Drying Area. No clotheslines or other facilities or apparatus for the drying of clothes outside of a dwelling shall be constructed or maintained on a Lot if viewable from other Lots, Common Property, or adjacent roads.



BOOK: 5193  
PAGE: 2144

(n) Signs. The size, color, and design of all signs located on a Lot will be subject to the approval of the Architectural Review Committee. No sign of any kind shall be displayed to general view on any Lot (whether freestanding, attached to a Building, or displayed in a window) except under any of the following circumstances:

(i) Directional or traffic signs may be installed by the appropriate governmental authority, by Developer, or by the Board, and entrance or other identification signs may be installed by or with the consent of the Architectural Review Committee;

(ii) Developer may display signs for the sale of Lots, homes, and promotion of the subdivision;

(iii) One "For Sale" sign not more than two square feet (as measured on each side of the sign) may be displayed on a Lot by the Owner or the agent for such Owner; and

(iv) A nameplate and address plate of a size and design and in a location approved by Developer may be displayed on a Lot.

(o) Fences. No fences, except as may be required by law or government regulation, may be erected on any Lot without prior written approval of the Architectural Review Committee. The Architectural Review Committee may specify the height, location, and material as conditions of any approval. As a general guideline (and not as a limitation on the discretion of the Architectural Review Committee), all fences shall be of a wooden type, treated so as to provide extended life, or shall be constructed of fibrous reinforced cement, plastic, or fiberglass designed to simulate wood fencing. Square deal horse fence shall be approved for pasture areas. Fences shall be located only where indicated on plans approved by the Architectural Review Committee but, generally, will be permitted only in the rear and side yards of a Lot. If the front of the dwelling is irregular in design, the Architectural Review Committee will determine the setback requirement for the fences. These restrictions will not apply to fences constructed by Developer or the Homeowners Association.

3.5 Temporary Structures. No structure of a temporary nature, whether a trailer, tent, shack, garage, barn, or any other such building, is permitted on a Lot for a period of time in excess of seventy-two (72) hours. This restriction excludes temporary buildings used in connection with and during the construction of a dwelling if approved by the Architectural Review Committee.

3.6 Completion of Construction and Repairs. The improvement of a Lot and the construction, repair, or remodeling of any improvement must be diligently and continuously pursued once begun and, in any event, promptly completed. The Architectural Review Committee may, as a condition of approval, impose a deadline to complete construction. In addition to any other remedies, the Architectural Review Committee may impose a fine for each day of violation for work that is not diligently pursued, continued, and completed.

3.7 Sales Offices. Notwithstanding anything in this Declaration to the contrary, Developer and parties approved by Developer may construct and maintain sales offices and sales trailers, together with a sign or signs relating thereto, on a Lot or Lots or on any other property within Whispering Creek, Unit II until such time as all of the Lots are sold.

3.8 Destruction Or Damage to Subdivision Improvements. Owners will be responsible for any and all damage caused to Common Property or subdivision improvements, including, but not limited to, curbs, gutters, water hydrants, sidewalks, power poles, or fences erected by anyone,

whether such damage is caused by the Owner or the Owner's employees, agents, invitees, guests, contractors, or subcontractors. Any liability incurred under this provision will be both a personal obligation of the Owner and a basis for an Individual Lot Assessment on such Owner's Lot.

3.9 ***Trees.*** Except for slash pines, no living trees with a diameter of five (5) inches or more, when measured at a height of four (4) feet above the natural grade, may be removed, cut down, or destroyed without the prior approval of the Architectural Review Committee. Removal or destruction of a tree that poses an immediate danger to life or property shall not require approval of the Architectural Review Committee. This restriction will apply to all live oak trees of any diameter with a height of at least eight (8) feet. This prohibition will not prohibit the usual and customary pruning or trimming of trees. If this provision is violated, an Owner may be required to replace the subject tree or otherwise mitigate the damage as directed by the Architectural Review Committee. An Owner must use reasonable care to preserve, in good health, all protected trees on the Owner's Lot. All developed Lots must have at least one (1) tree per 2,500 square feet that is 1½" DBH (diameter of tree as measured 4½ feet above ground) and is six (6) feet in overall height. Additionally, four (4) trees that are 1 ½" DBH must be planted on a Lot prior to issuance of a certificate of occupancy.

3.10 ***Conversion of Lots to Other Uses.*** Notwithstanding anything herein to the contrary, Developer reserves the rights to (i) use any Lot owned by it for the purpose of ingress and egress to any adjoining property, (ii) cause any Lot to be platted as a right of way. Developer also reserves the right to impose additional easements on any Lot owned by Developer, and (iii) cause any Lot or combination to be used for agricultural purposes of pasturing horses or growing plants and trees.

#### **ARTICLE IV** **(Use of Property: Individual Lots)**

The following restrictions are imposed on the use of the Lots to promote a harmonious neighborhood and limit uses that may be a nuisance to other Owners.

4.1 ***Residential Use.*** No business or commercial building may be erected on any Lot, and no business or commercial activity may be conducted on any Lot, except for a sales and marketing program of the Lots by Developer or parties approved by Developer. A Lot Owner who chooses not to build a residential structure on any adjoining Lot may fence the adjoining Lot in accordance with then existing rules and regulations of the Association, and seek approval from the Architectural Review Committee to build a structure to house horses on the adjoining Lot. The maximum number of horses that may be housed on an adjoining Lot shall be as provided in the Attached Exhibit "C".

4.2 ***Agricultural Use.*** Developer reserves the right to maintain and use Lots 1, 2, 3, 4, 17, 18, 19 and 20 for bonafide agricultural pursuits and purposes, including but not limited to, pasture, paddock areas and nurseries.

4.3 ***Further Subdivision.*** Developer reserves the right to replat the Subdivision or part thereof; provided, however, no residence shall be erected on or allowed to occupy such replatted Lot if the same has an area less than that required by the Land Development Code. In the event of replatting, all provisions in this Declaration will apply to each replatted Lot as if each replatted Lot had been a Lot originally shown on the Plat.

4.4 ***Maintenance of Exteriors.*** Each Owner shall at all times maintain the exterior of all structures on the Owner's Lot and any and all fixtures attached thereto in a sightly manner. If an Owner fails to undertake the necessary repair or maintenance within thirty (30) days of notice of

BOOK: 5193  
PAGE: 2146

violation (given by Developer or the Architectural Review Committee) or fails to complete the work within sixty (60) days of the notice, Developer or the Homeowners Association may effect the repairs or maintenance to the Owner's Lot to preserve the beauty, quality, and value of the neighborhood and the costs of these repairs or maintenance, plus a 15% administrative fee, shall be payable by the Owner to the party effecting the work. If the Owner fails to make this payment within five days of demand, the costs and fee will constitute an Individual Lot Assessment against the Owner's Lot. If Developer effected the work, the Homeowners Association will be responsible to pay the requisite costs and fee to Developer and collect the same from the Owner. Each Owner grants Developer, the Homeowners Association, and their respective contractors, employees, and agents a perpetual easement to enter onto the Owner's Lot to carry out the work, and releases those parties from all liability with respect to such work. Additionally, the Homeowners Association may impose a fine for each day this paragraph is violated.

4.5 **Noxious Vegetation.** No Owner may permit the growth of unsightly or noxious weeds or vegetation on the Owner's Lot or on the land lying between the street pavement and the front Lot line of the Owner's Lot. All unimproved areas of a Lot must be maintained in an attractive manner, and, if cleared to provide pasture, mowed every 90 days. The Homeowners Association may impose a fine for each day this paragraph is violated.

4.6 **Trash and Garbage.** No garbage, trash, refuse, or rubbish may be deposited, dumped, or kept on any Lot except in closed sanitary containers. Trash containers must be kept inside a garage or otherwise hidden from public view. Trash containers may be placed at the front of the Lot on the day designated for pickup, but only if promptly returned to the proper storage area as soon as possible.

4.7 **Nuisances.** No Owner may cause or permit unreasonable noises or odors on the Owner's Lot. No Owner may commit or permit any nuisance (whether public or private), any immoral or illegal activity, or anything that may be an annoyance or a noxious or offensive activity to the other Owners or their guests. Soliciting within Whispering Creek, Unit II is strictly prohibited without the approval of Developer or the Homeowners Association.

4.8 **Parking of Vehicles and Boats.** Cars, trucks, tractors, recreational vehicles, and trailers (collectively called "Vehicles") are not permitted to be parked elsewhere on a Lot or on a street or within plain view within the Subdivision, except as otherwise specifically permitted in this paragraph. Boats and boat trailers must be kept at all times completely inside a garage and are not permitted to be parked elsewhere on a Lot or on a street within the Subdivision, except as otherwise specifically permitted by the Architectural Review Committee. Private cars or private trucks (exclusive of all other Vehicles) owned by an Owner or an Owner's guests may be parked in the Owner's driveway, but only if they do not display commercial signs. Commercial Vehicles may be parked in a street or driveway when necessary for providing services to an Owner, or for pickup and delivery service, but only while undertaking this activity and never overnight. Recreational vehicles, travel trailers, trailers, and campers may be parked in the driveway of a Lot for up to a total of 48 hours per week. If a recreational vehicle, travel trailer, trailer or camper is stored on a Lot, the vehicle shall be placed on the Lot in such a way as to limit visibility of the vehicle from the roadways or adjacent Lots. No Vehicles may be repaired or maintained on or adjacent to a Lot, except within a garage. Vehicles engaged in construction of subdivision improvements or dwellings will be permitted within Whispering Creek, Unit II for such purposes.

4.9 **Garage Doors.** Garage doors must be kept closed except when opened to permit persons or vehicles to enter and exit from a garage. All garages must be entered from the side of the residence.

Book: 5193  
Page: 2147

4.10 Pets. Up to five (5) "household pets" may be kept at a Lot. All other pets and animals are strictly forbidden to be kept, bred, or maintained within Whispering Creek, Unit II. A "household pet" is a dog, cat, or other common domestic animal approved by the Architectural Review Committee. In no event may any pet, including household pets, be kept, bred, or maintained for any commercial purpose for a period of time in excess of 90 days. Each Owner will be strictly responsible for the behavior of his or her household pets. An Owner may not permit the household pet to become a nuisance or annoyance to other Owners. Each Owner will be responsible to immediately collect and dispose of waste and litter from the Owner's pets. Pets will be allowed on the Common Property in designated areas.

4.11 Horses. Except as provided in Paragraph 4.1 above, horses will be allowed based on a ratio of one horse for each acre of land.

**ARTICLE V**  
**(Common Property)**

The Homeowners Association will own and maintain the Common Property for the benefit of all Members and, when necessary, improve, convey, or lease the property for the benefit of the Association or the Owners of the Lots.

5.1 Title to Common Property.

(a) Ownership. The Common Property will be owned by the Homeowners Association for the benefit of all Owners.

(b) Conveyance. Prior to termination of the Class B Membership, the Homeowners Association is authorized to buy or lease real or personal property to be added to the Common Property with the consent of the Declarant. After termination of the Class B Membership, the Homeowners Association may sell or lease any part of the Common Property in the manner provided in the Articles, the By-Laws or by law.

(c) Dedication. If The County of Volusia or a municipal government requests that the Homeowners Association to convey title to or dedicate the Common Property or any portion thereof to the public, the Homeowners Association will be authorized to make such conveyance or dedication, but only with the approval of a majority of the Members. Upon such dedication, all obligations of the Homeowners Association regarding the property so dedicated will cease except for requirements imposed as a condition of the dedication.

5.2 Maintenance; Management; Contracts.

(a) Homeowners Association Responsibility. The Homeowners Association will be responsible for the management, control, and improvement of the Common Property and must keep the same attractive, clean, and in good repair in accordance with this Declaration and applicable governmental regulations.

(b) Management Agreements. The Homeowners Association may contract with Developer or any other party for the performance of all or any portion of the management of the Homeowners Association and the Homeowners Association's maintenance and repair obligations. Management costs will be included within the Assessments. The property manager for the Homeowners Association, its employees, officers, contractors, and assigns will have the right to use

the Common Property without liability for Assessments or other charges, as more particularly specified in the management agreement.

5.3 **Capital Improvements.** The Homeowners Association may make capital improvements to the Common Property and may modify the uses of the Common Property.

5.4 **Damage or Destruction of Common Property by Owner.** If any Owner or any guest, tenant, licensee, agent, employee, family member, or pet of an Owner damages any of the Common Property as a result of negligence or misuse, the Owner hereby authorizes the Homeowners Association to repair the damage. The cost of repair will be the responsibility of that Owner and will become an Individual Lot Assessment payable by the responsible Owner.

5.5 **Compliance with Laws.** Lots and the Common Property may be used and must be maintained in accordance with all applicable laws, ordinances, and regulations, including, without limitation, all regulations and requirements of the SJRWMD and the Florida Department of Environmental Protection.

5.6 **Rules for Use of Common Property.** Members will have the right to use the Common Property only in accordance with the terms of the Rules initially made by Developer and revised from time to time by the Homeowners Association. The Rules may restrict the time of use, provide for the reservation of certain recreation facilities, provide limitations on use of the Common Property by a Member's guests and lessees, and provide for the imposition of a fee or charge for use of certain facilities, provided such fee or charge is uniformly assessed. No Member will be entitled to any rebate or reduction in such Member's Assessments on account of any such restrictions imposed on the Member's use of the Common Property. The Rules will be kept at the offices of the Homeowners Association and copies will be made available without charge to any Member requesting the same.

5.7 **Use of Common Property by Developer.** As long as the Developer owns one Lot in Whispering Creek, Unit II, the Developer, its invitees and guests, shall be entitled to use the Common Property for horseback riding, providing such use does not interfere with the reasonable use of the Common Property by the Members and their guests and lessees. No fee or charge shall be imposed upon the Developer, its invitees and guests, for such use, except such a fee or charge as may be uniformly be imposed upon the Members.

5.8 **Use of Common Property by Civic Groups.** The Homeowners Association may permit persons and groups other than Members to use the Common Property for civic, charitable, educational, or other purposes; provided that the costs associated with such use are paid by the person or group using the Common Property. The Board will have the authority to determine which person and groups may use the Common Property, and shall establish a schedule of applicable fees. The property manager for the Homeowners Association may be delegated this authority in the management agreement.

5.9 **Stormwater Management System Located in Common Property.** Homeowners Association will be responsible for the maintenance, operation, and repair of such portion of the Storm water Management System as is located on Common Property. Maintenance means the exercise of practices that allow the system to provide drainage, water storage, conveyance, or other storm water management capabilities as permitted by the SJRWMD. Any repair or reconstruction of the Storm water Management System shall be as permitted or, if modified, as approved by the SJRWMD.

BOOK: 5193  
PAGE: 2149

**ARTICLE VI  
(Grant and Reservation of Easements)**

Every Owner has the benefit of certain easements and the responsibility for others.

6.1 **Owners' Easement of Enjoyment of the Common Property.** Every Owner will have a right and easement of enjoyment in and to the Common Property, subject to the restrictions imposed in this Declaration or in the Rules. This easement will be appurtenant to and shall pass with title to every Lot. Any Owner, subject to the provisions of this Declaration, the Articles, the Bylaws, and the Rules, may delegate the Owner's right to enjoyment of the Common Property to the Owner's family, tenants, and guests.

6.2 **Easements in Favor of Development and Homeowners Association.**

Developer reserves for itself, its successors and assigns and for the Homeowners Association the following perpetual easements:

(a) **Utilities.** Easements, for ingress, egress, installation, replacement, repair, and maintenance of all public and private utilities and conveniences, upon all property subject to Public Utility Easements as shown on the Plat; and across, over, through, and under the Common Property Easement shown on the Plat along side Lot lines shall automatically be deemed abandoned as to the interior side Lot lines if two or more Lots are combined into a single home site.

(b) **Police Powers; Security.** A blanket easement throughout Whispering Creek, Unit II for police powers and services supplied by the local, state, and federal governments and for any security services that may be provided by the Homeowners Association.

(c) **Horse Paths.** No fence, wall, planting, or underground culvert shall be constructed or planted in the front or rear utility easements so as to prevent a horse and rider or walker to traverse the easement.

6.3 **Easement to Construct Improvements.** Developer reserves to itself, its employees, contractors, and assigns, an alienable assignable easement to be or travel on, under, and through the Common Property for the purpose of constructing improvements.

**ARTICLE VII  
(Association Organization)**

Although Developer will control the Homeowners Association during the development stage, the Owners eventually will be responsible for the continuation of the Homeowners Association.

7.1 **Membership.** Every Owner is a mandatory Member of the Homeowners Association. Membership is appurtenant to and may not be separated from title to any Lot.

7.2 **Voting Rights.** The Homeowners Association will have two classes of voting

(a) **Class A.** Class A Members are all Owners of Lots other than Developer. Class A Members will be entitled to one vote for each Lot owned.

(b) **Class B.** The Class B Member is the developer, who shall be entitled to 10 votes in all matters for each Lot owned by the Class B Member or its affiliates. Developer may

assign its Class B Membership. The Class B Membership will end and be converted to Class A Membership three months after the first to occur of the following events:

(i) The total votes outstanding in the Class A Membership equals the total votes outstanding in the Class B Membership;

(ii) All phases of Whispering Creek, Unit II have been completed and made subject to this Declaration, and 90% of the Lots within Whispering Creek, Unit II have been conveyed to Members other than the Class B Members; or

(iii) Developer chooses to become a Class A Member, as evidenced by instrument to such effect, executed by Developer and Developer's mortgagees holding a mortgage encumbering Whispering Creek, Unit II or portion thereof, which is recorded in the Public Records.

7.3 Exercise of Vote. When more than one person holds an interest in any Lot, all such persons shall be Members; however, the number of votes for that Lot will not be increased, and the Members must determine among themselves how the Lot's vote may be exercised. Corporations, partnerships, and other entities must notify the Homeowners Association of the natural person who will be considered a Member of the Homeowners Association and be entitled to exercise its vote.

#### 7.4 Board of Directors.

(a) Composition. The Board initially will consist of at least three persons appointed by Developer. Upon termination of the Class B Membership, the Board will consist of at least three directors, selected in accordance with the Articles and Bylaws. In any event, the number of directors shall never be less than three nor more than five.

(b) Classes. Each director will be appointed or elected to one of three classes: Class 1, Class 2 or Class 3. Directors will be elected by class to provide for staggered terms. If the number of directors is increased, it shall be in multiples of three and each new position must be assigned to a class so that each class will have an equal number of directors.

(c) Term of Office. The initial term for the Class 1 director will be for one year. The initial term for the Class 2 director will be for two years. The initial term for the Class 3 director will be for three years. Subsequent terms for directors of any class will be for three years; however, directors will always serve until resignation, removal, or the election of their successors.

(d) Qualifications. After termination of the Class B Membership, each director must be a Member. If a director ceases to be a Member during the term of office, such person shall be deemed to have automatically resigned from the Board, immediately upon the director ceasing to be a Member.

(e) Voting Procedure. At each annual meeting, the Members will elect the directors to replace the directors of the class whose term of office is then expiring. Each Class A Member will have one vote for each seat to be filled and the Class B Member will have 10 votes for each Lot owned by the Class B Member or its affiliates. No cumulative voting will be permitted. The candidate(s) receiving the highest number of votes will be declared elected. If there is a tie vote, the Class B Member will be given one additional vote and the opportunity to cast such vote to break the tie. The meeting will, in other respects, be conducted in accordance with the Articles and the Bylaws.

Book: 5193  
Page: 2151

(f) Removal. Any director may be removed from office, with or without cause, by at least a majority vote of the Members.

(g) Vacancies; Replacement of Directors. Any vacancy occurring in the office of director may be filled by a majority vote of the remaining Board members. If the remaining Board members do not constitute a quorum, a special meeting of the Homeowners Association may be called by any officer or by any Member to elect new members to the Board.

(h) Compensation. Directors will not receive compensation for their services unless such compensation is specifically approved by a vote of the Members. This will not prevent a Class B Member or an affiliate of a Class B Member from being compensated for management or other services.

7.5 Relationship to Articles and Bylaws. The Articles and Bylaws will govern all matters of the Homeowners Association not set forth in this Declaration. The terms of this Declaration will prevail over any conflicting provisions in the Articles and Bylaws.

**ARTICLE VIII**  
**(Operation of Association and Board)**

Most day-to-day decisions about the maintenance of the Common Property and enforcement of the Declaration shall be the responsibility of the Association acting pursuant to the Board. For those decisions requiring Members' approval, a regular or special meeting of the Members shall provide a public opportunity for discussion and action.

8.1 Annual Meeting.

(a) When called. The Annual Meeting will be called every year for the election to the Board of the class of directors whose term then expires and for other business requiring approval of the Members. The meeting date shall be as determined by the Articles and Bylaws.

(b) Quorum. Voting at an annual meeting requires the presence of (i) Members (in person or by proxy) representing 30% of votes, and (ii) Developer or its representative so long as Developer owns at least one Lot.

(c) Notice. Notice of the annual meeting may be given by (i) mailing a notice to each Member at the last address furnished to the Homeowners Association, (ii) delivering notices to the Member's dwellings or Lots, or (iii) posting conspicuous notices for the meeting in the Common Property. Notice should be given at least 30 days before the annual meeting. Notices may also be given by posting an electronic notice on an electronic bulletin board or Website maintained or designated by or at the direction of the Homeowners Association and designed to facilitate communication with and among the Members.

8.2 Board Meetings.

(a) Board's Responsibility. Except as specifically provided in this Article or elsewhere in this Declaration, the Board has been delegated the power, and has the authority to act on behalf of the Homeowners Association in all matters.

(b) Quorum. Voting at a Board meeting requires presence of at least ½ of the directors (in person or by proxy). Except as prohibited by law, action required to be taken by vote



BOOK: 5193  
PAGE: 2152

of the Board may be taken in the absence of a meeting by obtaining the written approval of a majority of the Board.

(c) **Notices.** Notices of all meetings of the Board shall be posted in a conspicuous place in the Common Property 48 hours in advance, absent emergency. Notices may also be given by posting an electronic bulletin board or Website maintained or designated by or at the direction of the Homeowners Association and designed to facilitate communication with and among the Members. If the Board desires to levy an assessment at a meeting, the notice must include a statement describing the purpose and amount of the assessment to be considered. All meetings must be open to the Members, except for meetings permitted by law to be closed.

8.3 **Record Keeping.** The Board shall keep, or cause to be kept, a record of all meetings, both of the Board and of the Homeowners Association. For each action taken, the record must state the vote and a description of the action approved, and, if applicable, the reasons why the action was considered necessary and a summary of the information on which the decision was based. The record must be available for inspection by any Member, except for records of closed meetings of the Board. Officers may be elected by the Board by secret ballot.

**ARTICLE IX  
(Association Budget)**

To fulfill its obligation to maintain the Common Property, the Board is responsible for the fiscal management of the Homeowners Association.

9.1 **Fiscal Year.** The fiscal year of the Homeowners Association will begin January 1 of each year and end on December 31 of that year. The Board may elect another fiscal year. The Board must prepare an annual Budget.

9.2 **Budget.** A copy of the budget must be provided to each Member or a notice must be given to the Members that a copy of the budget is available upon request and without charge. Notices and a copy of the proposed budget may also be given by posting an electronic bulletin board or Website maintained or designated by or at the direction of the Homeowners Association and designed to facilitate communication with and among the Members. The annual budget will estimate total expenses to be incurred by the Homeowners Association in carrying out its responsibilities. The budget must include:

- (a) The cost of wages, materials, insurance premiums, services, supplies, and other expenses for the rendering of all services required or permitted under this Declaration;
- (b) Reasonable amounts, as determined by the Board, for working capital for the Homeowners Association and for reserves;
- (c) Fees for professional management of the Homeowners Association (which may include Developer), legal counsel, and accounting;
- (d) Taxes, if the Common Property is taxed separately from the Lots;
- (e) An itemized list of all fees or charges for recreational amenities; and
- (f) An estimate of revenues from the General Assessment.

9.3 **Reserves.** The Homeowners Association shall accumulate and maintain adequate reserves for working capital, contingencies, and replacements, to be included in the annual budget and collected as part of the annual General Assessment. This shall not occur until the termination of Developer's guarantee described in Paragraph 10.2 of this document. Extraordinary expenses not originally included in the annual budget will be charged first against such reserves. Except in the event of an emergency, reserves accumulated for one purpose may not be expended for any other purpose. If there is an excess of reserves at the end of a fiscal year, such excess may be used to reduce the following year's assessments.

9.4 **Preparation and Approval of Annual Budget.**

(a) **Initial Budget.** Developer will prepare the first annual budget.

(b) **Subsequent Years.** Budgets other than the initial budget will be prepared at the direction of the Board at least one month before the end of the fiscal year. The budget and the annual General Assessment must be adopted by a majority of the Board.

9.5 **Effect of Failure to Prepare or Adopt Budget.** The Board's failure or delay in preparing or adopting the annual budget for any fiscal year will not waive or release a Member's obligation to pay General Assessments, whenever the amount of such assessments is finally determined. In the absence of an annual Homeowners Association budget, each Member shall continue to pay the assessment at the rate established for the previous fiscal period until notified otherwise.

9.6 **Financial Reporting.** The Board shall prepare an annual financial report for the Homeowners Association within 60 days of the close of the fiscal year and provide each Member with either a copy of the report or a notice that a copy is available without charge. The report must be in form required by 617.303(7) Florida Statutes.

9.7 **Capital Improvements.** The Board shall determine whether capital improvements should be paid from General Assessments or by Special Assessment. If the cost of all capital improvements to be paid within a single year totals more than 25% of the Homeowners Association's annual budget, the capital improvements must be approved by majority vote of the Members. Any repair or replacement of existing improvements will not be considered a capital improvement.

9.8. **Reserves shall be kept separate from other Homeowners Association funds.** All other sums collected by the Board with respect to Assessments and charges of all types may be commingled in a single fund.

9.9 **Amendment of Budget.** The Board may amend the budget during any fiscal year and increase the amount of the annual General Assessment for such year if it appears that there will be insufficient income to meet the obligations of the Homeowners Association.

**ARTICLE X**  
**(Covenants to Pay Assessments)**

The cost of fulfilling the Homeowners Association's financial obligations is divided equitably among the Members by means of Assessments. To ensure that the Homeowners Association has a reliable source of funds and to protect those Members who contribute their

BOOK: 5193  
PAGE: 2154

equitable share, assessments are mandatory and are secured both by a lien on the Lots and the Member's personal obligation.

10.1 **Obligation for Assessments.** Developer covenants for each Lot, and, by acceptance of a deed or other transfer instrument, whether or not expressed in such deed or instrument, each Owner of any Lot is deemed to covenant and agree to pay to the Homeowners Association the following (to be known collectively as "Assessments"):

- (a) General Assessment for expenses included in the budget,
- (b) Special Assessments for the purposes provided in this Declaration,
- (c) Individual Lot Assessments for any charges particular to that Lot, and
- (d) Working Capital Contribution.

10.2 **Guarantee of Class B Member.** The Class B Member agrees that it will be obligated to pay any operating expenses of the Homeowners Association in excess of the revenue derived from the Assessments until December 31, 2004. This obligation is called the "Budget Guarantee." The Class B Member may elect to renew the Budget Guarantee on an annual basis. In return for the Budget Guarantee, the Class B Member and its affiliates will not be liable for any Assessments on any Lots it owns during the period of the Budget Guarantee. A Lot exempt from Assessments pursuant to this paragraph is referred to as an "Exempt Lot."

10.3 **Equitable Division of Assessments.** The General Assessment and Special Assessments shall be assessed among all Lots as follows:

- (a) Exempt Lots will not be subject to assessment.
- (b) The General Assessment and Special Assessment will be payable by class. It is the intent that Vacant Lots be assessed significantly less than Improved Lots. The classes will be "Improved Lots" and "Vacant Lots" respectively. Lots unimproved by dwelling other than a model home (not occupied as a dwelling) will constitute the "Vacant Lots" class and all other Lots will constitute the "Improved Lots" class. Each Lot in the Vacant Lots class will be subject to a sum equal to the respective General Assessment or Special Assessment divided by the number of all Lots, excluding Exempt Lots, multiplied by 10%. The remainder of the respective General Assessment or Special Assessment will be assessed equally among the Lots in the Improved Lots class, excluding Exempt Lots.

10.4 **General Assessment.**

(a) **Establishment by Board.** The Board will set the date or dates the General Assessment will be due, and it may provide for payment in monthly, quarterly, semiannual, or annual installments.

(b) **Proration Upon Sale of Exempt Lot or Loss of Exemption.** Upon conveyance of an Exempt Lot, or upon an Exempt Lot becoming subject to Assessments on account of the Class B Member not extending the Budget Guarantee, the annual General Assessment will become due for such Lot(s); provided however, that the General Assessment will be prorated on a monthly or daily basis, whichever the Board elects, and only the portion of the General Assessment attributable

BOOK: 5193  
PAGE: 2155

to the remainder of the fiscal year will be due. The portion of the General Assessment attributable to the portion of the fiscal year in which the affected Lot was an Exempt Lot will not be assessed. If payment of the General Assessment is by installment, only the applicable portion of the current installment will be due.

(c) Late Fee and Interest. The Board may impose a reasonable late fee. Additionally, interest will accrue at the highest lawful rate on delinquent payments.

10.5 Special Assessment. In addition to the General Assessment, the Board may levy, in any fiscal year, a Special Assessment applicable as follows:

(a) Capital Improvements. Any capital improvement that has been approved in accordance with this Declaration.

(b) Emergency Assessment. By a 2/3 vote of the Board present and voting, the Board may impose a Special Assessment for any unusual or emergency maintenance or repair or other expense that this Declaration requires the Homeowners Association to pay (including, after depletion of reserves, any unexpected expenditures not provided by the budget, or unanticipated increases in the amounts budgeted).

(c) Exemption. Exempt Lots will not be subject to Special Assessments, nor will an Exempt Lot be subject to payment of any Special Assessment or any portion thereof declared or assessed while such Lot was an Exempt Lot even if payments for such Special Assessments are made in installments becoming due subsequent to the time such Lot no longer is considered an Exempt Lot. For example, if a Special Assessment is declared on January 1 while Lot 20 is an Exempt Lot, but the payment of the Special Assessment is not required until March of the same year, then even if Lot 20 is not an Exempt Lot as of February of such year, Lot 20 still will be considered exempt from such Special Assessment.

10.6 Individual Lot Assessments. The Homeowners Association may levy at any time an Individual Lot Assessment against a particular Lot for the purpose of defraying, in whole or in part, the cost of any special services to that Lot or any other charges designated in this Declaration as an Individual Lot Assessment. An Individual Lot Assessment may be levied on account of any legal expenses (at trial or on appeal) and costs incurred by the Homeowners Association in enforcing this Declaration or in enforcing any other declaration the Homeowners Association is authorized to enforce.

10.7 Working Capital Contribution. The initial Third Party Purchaser of any Lot shall be required to pay to the Association for that Lot an amount equal to one-sixth (1/6) of the annual General Assessment for that Lot. Each Lot's share of the working capital fund must be collected and transferred to the Association at the time of closing of the sale of each Lot to the initial Third Party Purchaser and maintained in an account for the use and benefit of the Association. The purpose of the fund is to insure that the Board will have cash available to meet unforeseen expenditures or to acquire additional equipment or services deemed necessary or desirable by the Board for the use and benefit of the Association. Amounts paid into the working capital fund are not to be considered as advance payment of regular Assessments, or as payment of a portion of General Assessments.

BOOK: 5193  
PAGE: 2156

10.8 Effect of Nonpayment of Assessment; Remedies.

(a) Personal Obligation. All Assessments, together with any late fees, interests, and costs of collection when delinquent, including reasonable attorneys' fees (at trial or on appeal) whether or not a lawsuit is brought (collectively, the "Assessment Charge") shall be the personal obligation of the person or entity who was the Owner of the Lot at the time the Assessment Charge was levied, and of each subsequent Owner. No Owner may waive or otherwise escape liability for the Assessment Charge by abandonment of the Lot.

(b) Creation of Lien. The Assessment Charge also shall be a continuing lien on the Lot against which the Assessment Charge is made, which lien is effective upon recording a claim of lien, but relating back to and having a priority as of the date of this Declaration. This lien in favor of the Homeowners Association will secure the Assessment Charge that is then due and that may accrue subsequent to the recording of the claim of lien and before entry of final judgment of foreclosure. The lien in favor of the Assessment Charge is subject to the subordination provisions of Paragraph 10.8(d).

(c) Action for Payment; Foreclosure of Lien. The Homeowners Association may bring an action at law against the Owner personally obligated to pay the Assessment Charge, or may foreclose the lien in a manner similar to foreclosure of a mortgage lien, or both. The Homeowners Association, acting on behalf of the Owners, shall have the power to bid for an interest in any Lot foreclosed at such foreclosure sale and to acquire, hold, lease, mortgage, and convey the Lot.

(d) Subordination of the Lien to Mortgages. The lien of the Assessment Charge will be inferior to the first mortgage lien of any Mortgagee. Sale or transfer of any Lot pursuant to foreclosure of such a mortgage, including a deed in lieu of foreclosure, shall extinguish the lien as to payments that became due before the sale or transfer. The transferees of such Lot shall be liable for any assessments coming due after the sale or transfer.

(e) Other Remedies. The Homeowners Association may assess fines and suspend the voting rights and right to use of the Homeowners Property by an Owner for any period during which any Assessment against the Owner's Lot remains unpaid, but only as permitted by law.

10.9 Certificate of Payment. The treasurer of the Homeowners Association or the manager of the Homeowners Association, upon request of any Owner, shall furnish a certificate signed by a member of the Board or by the manager, if authorized by the Board, stating whether any Assessments are owed by that Owner. The Board may establish a reasonable fee for such certificate. Such certificate will be conclusive evidence of payment of an Assessment through the date of the certificate.

**ARTICLE XI**  
**(Insurance and Indemnity)**

Insurance is essential to protect the interests of the various Owners and to ensure that funds will be available for rebuilding after a casualty; however, because insurance costs may increase significantly or new types of coverage may be available, this Article gives some flexibility to the Board to select insurance coverage that is reasonable for the conditions that exist at that time.

11.1 Review of Coverage. The Board shall review limits of coverage for each type of insurance at least once each year.

BOOK: 5193  
PAGE: 2157

11.2 **Casualty Insurance.** The Board shall obtain and maintain fire insurance as appropriate. Endorsements for extended coverage, vandalism, malicious mischief, and windstorm should be obtained if available at reasonable cost. Coverage shall be in an amount not less than necessary to comply with the co-insurance percentage stipulated in the policy, but in any event not less than 80% of the insurable value (based upon replacement) of the improvements constructed on the Common Property.

11.3 **Public Liability.** The Board shall obtain public liability insurance in such limits as the Board may from time to time determine, insuring against any liability arising out of, or incident to, the ownership and use of the Common Property. Whenever practicable, such insurance should be issued on a comprehensive liability basis and should contain a "severability of interest" endorsement that shall preclude the insurer from denying the claim of an Owner because of negligent acts of the Homeowners Association, the Board, or other Owners. Such insurance must always name Developer as an additional insured until 50 years after the date of this Declaration.

11.4 **Director Liability Insurance.** The Board may obtain liability insurance insuring against personal loss for actions taken by members of the Board in the performance of their duties. The Board in its discretion shall determine the type and amount of such insurance.

11.5 **Other Insurance.** The Board shall obtain and maintain worker's compensation insurance if and to the extent necessary to meet the requirements of law, and such other insurance as the Board may deem prudent.

11.6 **Repair and Reconstruction after Fire or Other Casualty.** If fire or other casualty damages or destroys any of the Common Property, the Board shall arrange for and supervise the prompt repair and restoration of the improvements. The Board shall obtain funds for such reconstruction first from the insurance proceeds, then from reserves for the repair and replacement of such improvements, and then from any Special Assessments that may be necessary after exhausting insurance and reserves.

11.7 **Indemnity of Developer.** In consideration of Developer conveying the Common Property to the Homeowners Association, the Homeowners Association releases, indemnifies, and holds Developer, its officers, employees, and agents harmless from any and all liability arising out of the Common Property or construction of the Recreation Facilities and shall defend Developer against all claims of any third party. Such indemnity includes any attorneys' fees and costs incurred by Developer at trial and on appeal.

**ARTICLE XII  
(General Provisions)**

This article sets forth rules of interpreting the Declaration, provides for enforcement, and sets forth the procedure to amend the Declaration.

12.1 **Incorporation of the Land Use Documents.** Any and all deeds conveying a Lot shall be conclusively presumed to have incorporated therein all of the terms and conditions of this Declaration.

12.2 **Release From Minor Violations.** Developer and the Architectural Review Committee or either of them shall have the right, by written instrument, at any time to release a Lot from minor violations of this Declaration or the Plat including, without limitation (i) encroachments into easements, (ii) encroachments over building restriction lines, and (iii) construction of less than

BOOK: 5193  
PAGE: 2158

the required minimum square footage for the dwelling provided that the square footage is at least 90% or the required minimum.

12.3 **Enforcement.** The covenants and restrictions contained in this Declaration may be enforced by Developer, any Owner, and any Mortgagee in any judicial proceeding seeking any remedy recognizable at law or in equity, including an action or lawsuit seeking damages, injunction, specific performance, or any other form of relief, against any person, firm, or entity violating or attempting to violate any covenant or restriction herein. The failure by any party to enforce any covenant or restriction contained herein shall in no event be deemed a waiver of such covenant or restriction or of the right of such party to thereafter enforce such covenant or restriction. The prevailing party in any such litigation shall be entitled to reasonable attorneys' fees and court costs at all trial and appellate levels. The SJRWMD will have the right to enforce, by proceedings at law or in equity, the provisions contained in this Declaration that relate to the maintenance, operation, and repair of the Drainage System. All parties agree that any dispute shall be determined by a judge and not a jury, and waive their right to a jury trial in any litigation arising out of this Declaration.

12.4 **Assignment.** Developer shall have the right, from time to time, to assign any of its rights or obligations pursuant hereto in part or in whole.

12.5 **Notices.** Notices shall be given as to Owners by posting at the Owner's dwelling or vacant Lot, or mailing first class postage prepaid to the Owner's address maintained by the Homeowners Association, or by posting a notice applicable to all Owners at the Common Property, and as to Developer, by sending certified mail to the corporate address of Developer filed with the Florida Secretary of State. Notices may also be given by posting an electronic bulletin board or Website maintained or designated by or at the direction of the Homeowners Association and designed to facilitate communication with and among the Members

12.6 **Amendment.**

(a) Subject to the provisions of Paragraph 12.7, Developer specifically reserves the absolute and unconditional right, as long as Developer owns any of the Lots, to amend this Declaration without the consent or joinder of any party to (i) conform to the requirements of the SJRWMD, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Veterans Administration, Department of Housing and Urban Development, or any other generally recognized institution involved in the purchase and sale of home loan mortgages; (ii) conform to the requirements of mortgage lenders or title insurance companies; or (iii) perfect, clarify, or make internally consistent the provisions hereof.

(b) Subject to the provisions of Paragraph 12.7, this Declaration may be amended by consent of Owners of 50% or more of the Lots as evidenced by recording an instrument executed by said Owners in the Public Records, provided that no such amendment will be effective without the consent of Developer, or its assigns, until Developer and its affiliates own no Lots or other property within Whispering Creek, Unit II.

(c) Developer, without the consent of any party, may bring within the scheme of this Declaration additional land by Supplementary Declaration in accordance with the procedures set forth in Paragraph 2.2.

(d) Any amendment to the Declaration that would alter the Drainage System must have the prior written approval of the SJRWMD.

BOOK: 5193  
PAGE: 2159

12.7 **Mortgagee's Consent to Amendments.** This Declaration contains provisions concerning various rights, priorities, remedies, and interests of the Mortgagees. Such provisions are to be construed as covenants for the protection of the Mortgagees on which they may rely in making loans secured by mortgages on the Lots. Accordingly, no amendment or modification of this Declaration impairing such rights, priorities, remedies, or interests of a Mortgagee shall be adopted without the prior written consent of Mortgagees holding liens on 30% or more of the Lots encumbered by mortgages to Mortgagees. Each Mortgagee agrees that it will either consent to a proposed amendment or refuse consent to a proposed amendment by written notice to the party requesting consent within 30 days after receipt of the request. If a Mortgagee does not respond within such time, the Mortgagee's consent will be deemed given, and an affidavit to such effect recorded in the PRVCF by the party requesting the consent will be sufficient evidence to make the requested amendment; provided, that a photocopy of the documentation proving receipt of the request to the Mortgagee is attached to the affidavit. This paragraph shall not apply or be construed as a limitation on those rights of Developer, the Homeowners Association, or the Owners to make amendments that do not adversely affect the Mortgagees.

12.8 **Captions and Statement of Purpose.** Captions inserted throughout this Declaration are intended only as a matter of convenience and for reference only, and in no way shall such captions or headings define, limit, or in any way affect any of the terms or provisions of this Declaration. The Statement of Purpose is a summary of general information only and in no way shall such statement define, limit, or in any way affect any of the terms or provisions of this Declaration.

12.9 **Gender and Plural Terms.** Whenever the context so requires, any pronoun used herein may be deemed to mean the corresponding masculine, feminine, or neuter form thereof, and the singular form of any noun or pronoun herein may be deemed to mean the corresponding plural form thereof and vice versa.

12.10 **Severability; Amendments to Laws.** If a court of competent jurisdiction shall deem any one of the provisions of this Declaration invalid, that judicial determination shall in no way affect any of the other provisions hereof, which shall remain in full force and effect. Without limitation of the foregoing, the invalidation of any of the covenants, restrictions, terms, or conditions of this Declaration, or a reduction in the term of the same by reason of the legal rule against perpetuities, shall in no way affect any other provision, which shall remain in full force and effect for such period of time as may be permitted by law. Any amendment to applicable law that has the effect of reducing the rights of Developer, increasing the liabilities of or duties imposed on Developer, will not be incorporated into this Declaration by reference. All other references to applicable laws and regulations will incorporate amendments to those laws and regulations.

12.11 **Duration and Renewal.** This Declaration (but excluding the easements herein created, which are perpetual) and the terms, provisions, conditions, covenants, restrictions, reservations, regulations, burdens, and liens contained herein, including, without limitation, the provisions for assessment of Lots, shall run with and bind all of the Lots and inure to the benefit of Developer, the Owners, and their respective legal representatives, heirs, successors, and assigns, for a term of 90 years from the date hereof, after which time this Declaration shall be automatically renewed and extended for successive periods of 10 years each unless at least one year before the termination of the 90-year period or before each such 10-year extension, as the case may be, there is recorded in the Public Records an instrument agreeing to terminate this Declaration, which instrument is signed by a majority of all Owners and all Mortgagees, upon which event this Declaration shall be terminated upon the expiration of the 90-year term or the 10-year extension during which such instrument was recorded, as the case may be.



BOOK: 5193  
PAGE: 2160

IN WITNESS WHEREOF, Developer has caused this Declaration to be executed the day and year first above written.

WITNESS TO EXECUTION

EXECUTION BY OWNER

AVA & RUFUS, INC.,  
a Florida corporation

J. Doyle Tumbleson  
Printed Name: J. DOYLE TUMBLESON

By: Charles Kleinschmidt  
Charles Kleinschmidt  
As Vice President

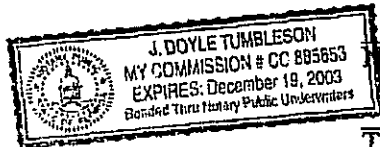
Pam Clifton  
Printed Name: pam clifton

ACKNOWLEDGMENT OF CORPORATE PARTY

STATE OF FLORIDA  
COUNTY OF VOLUSIA

The execution of the foregoing instrument was acknowledged before me by Charles Kleinschmidt, as Vice President of AVA & RUFUS, INC., a Florida corporation, on behalf of the corporation. The corporate officer identified this instrument signed this instrument willingly and with full corporate authority. The corporate officer is personally known to me or produced as identification, this 28<sup>th</sup> day of AUGUST, 2003.

(Notary's Public Seal)



J. Doyle Tumbleson  
Notary Public, State of Florida

Typewritten Name

**JOINDER AND CONSENT**

The undersigned, **SouthTrust Bank, N.A.**, hereby consents to and joins in this Declaration of Covenants, Conditions, Restrictions and Easements for Whispering Creek, Unit II, a Subdivision, in Volusia County, Florida.

DATED this 27<sup>th</sup> day of August, 2003.

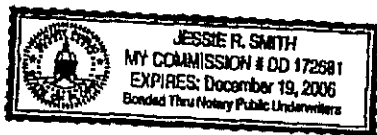
**SOUTHTRUST BANK, N.A.**

Cynthia L. Hart  
Printed Name: Cynthia L. Hart  
Jessie R. Smith  
Printed Name: Jessie R. Smith

By: James A. Battle  
Print Name: James A. Battle  
Title: Vice President

**STATE OF FLORIDA  
COUNTY OF VOLUSIA**

The foregoing instrument was acknowledged before me this 27<sup>th</sup> day of August, 2003, by James A. Battle, as Vice President of **SouthTrust Bank, N.A.**, who is personally known to me or who has produced \_\_\_\_\_ as identification.



Jessie R. Smith  
Notary Public  
Jessie R. Smith  
(type/print name)  
My commission expires:  
Commission No.:

BOOK: 5193  
PAGE: 2161

Book: 5193  
Page: 2162

EXHIBIT "A"

AMENDED AND RESTATED  
ARTICLES OF INCORPORATION  
OF  
WHISPERING CREEK HOMEOWNERS ASSOCIATION II, INC.  
A FLORIDA CORPORATION NOT FOR PROFIT

Whereas, the Articles of Incorporation of this corporation were filed on March 21, 2003; and

Whereas, the Board of Directors of the corporation has resolved to amend and restate the Articles of Incorporation in their entirety and have adopted these Amended and Restated Articles pursuant to Sections 617.1006 and 617.1007, Florida Statutes, for that purpose on the date shown below; and

Whereas, there are no members of the corporation as of the date hereof.

Now therefore the following Amended and Restated Articles of Incorporation are adopted:

ARTICLE 1 - NAME

The name of this corporation shall be WHISPERING CREEK UNIT II, HOMEOWNERS' ASSOCIATION, INC. (the "Association"), and it shall be located in Volusia County, Florida. The street address of the corporation's registered office and the mailing address of the corporation are 721 South Kirkman Road, Orlando, Florida, 32811.

ARTICLE II - PURPOSES AND POWERS

The general purpose or purposes for which the Association is formed are as follows:

- (a) To acquire, own, equip, manage, maintain, and repair the common area, including but not limited to the private roadways, bridal paths, utility

BOOK: 5193  
PAGE: 2163

easements and drainage easements, of WHISPERING CREEK - UNIT II subdivision, in Volusia County, Florida, for the benefit of the members of the Association upon such terms and conditions so as to meet the expense thereof;

(b) To enforce the Covenants and Restrictions of WHISPERING CREEK - UNIT II subdivision, that are or will be recorded in the public records of Volusia County, Florida;

(c) To establish and collect assessments from the owners of lots within WHISPERING CREEK, UNIT II subdivision, for the purpose of operating, maintaining, insuring, and improving the properties of the Association and to enforce liens for such assessments, by legal action, if necessary, including but not limited to levy and collection of adequate assessments against members of the Association for the costs of maintenance and operation of the surface water or stormwater management system. The assessments shall be used for the maintenance and repair of the surface water or stormwater management systems including, but not limited to, work within retention areas, drainage structures and drainage easements;

(d) To purchase and maintain such personal property as may be necessary or useful in the conduct of the Association's business; and

(e) In furtherance of the foregoing, to engage in any activity permitted to a corporation not-for-profit under Chapter 720 and Chapter 617, Florida Statutes (2001).

All of the Association's assets and income shall be used exclusively for the purposes set forth herein and no part of the assets or income of this Association

BOOK: 5193  
PAGE: 2164

shall inure to the benefit of any individual member or other person. The Association may, however, reimburse its members for actual expenses incurred for or in behalf of the Association and may pay compensation in a reasonable amount to its members for actual services rendered to the Association as permitted by law.

(f) To operate, maintain and manage the surface water or stormwater management system(s) in a manner consistent with the applicable St. Johns River Water Management District permit including but not limited to requirements and applicable District rules, and shall assist in the enforcement of the restrictions and covenants contained therein.

ARTICLE III - MEMBERS

As is set forth in the Declaration of Covenants, Conditions, Restrictions and Easements for Whispering Creek, Unit II (the "Declaration") and as may be regulated by the Bylaws, every person or entity who is a record owner of a fee or undivided fee interest in any lot or lots within the development known as WHISPERING CREEK, UNIT II subdivision, who shall pay the normal and any special assessments which may from time to time be fixed by the Board of Directors of the Association, shall be a member of the Association. The foregoing shall not include persons or entities who hold an interest merely as security for the performance of an obligation. Membership shall be on the terms and conditions as set forth herein and as regulated by the Board of Directors of the Association, and it shall be appurtenant to and may not be separated from the ownership of any lot in WHISPERING CREEK, UNIT II subdivision.

BOOK: 5193  
PAGE: 2165

ARTICLE IV - TERM

This Association shall have perpetual existence.

ARTICLE V - VOTING

The Association shall have two classes of voting memberships as provided in the Declaration and the Bylaws. Class A Members are all Owners of Lots other than Developer. Class A Members will be entitled to one vote for each Lot owned. The Class B Member is the Developer, who shall be entitled to 10 votes in all matters for each Lot owned until Class B Membership is converted to Class A Membership, as more fully provided in the Declaration and the Bylaws. When more than one person or entity holds an ownership interest in any lot, all such persons shall be members. The vote or votes for each lot shall be exercised by only one member, however, designated in writing to the Association.

ARTICLE VI - REGISTERED AGENT

The name and address of the Registered Agent of the corporation is:

Charles Kleinschmidt                      721 S. Kirkman Road  
Orlando, FL 32811

ARTICLE VII - MANAGEMENT

The affairs and business of the Association shall be managed by a Board of Directors and by the following officers: President, Vice President, Secretary, and Treasurer, and such other officers as the Board shall appoint. The officers shall be elected by the Board at the first meeting of the Board following the

BOOK: 5193  
PAGE: 2166

annual meeting of the Association. The President shall be a director but no other officer need be a director. The same person may hold one or more offices.

ARTICLE VIII - OFFICERS

Diane Lapham	President
Charles Kleinschmidt	Vice President, Secretary, Treasurer

ARTICLE IV - DIRECTORS

Section 1. The Association shall have three directors initially. The number of directors may be either increased or diminished from time to time as provided by the Bylaws but shall never be less than three.

Section 2. The names and addresses of the persons who are to serve on the first Board are:

Diane Lapham	2552 Tomoka Farms Road Daytona Beach, FL 32124
Charles Kleinschmidt	721 S. Kirkman Road Orlando, FL 32811
Elizabeth L. Kleinschmidt	721 S. Kirkman Road Orlando, FL 32811

Section 3. The initial directors shall serve until the first annual meeting of the Association, and thereafter as provided in Section 4 below.

Section 4. The Developer shall comply with Florida Statutes Section 720.307 in relation to transition of association control in a community. Until the first meeting three months following the date on which the Developer has been paid in full any sums owed it by the Association and has conveyed away more

Book: 5193  
Page: 2167

than ninety percent (90%) of the lots within WHISPERING CREEK, UNIT II subdivision, the Developer shall appoint at least two of the three members of the Board who shall serve at the pleasure of the Developer. The members of the Association other than the Developer may elect the remaining member of the Board. At the first meeting three months following the date on which the Developer has been paid in full and has conveyed away ownership of more than ninety percent (90%) of the lots within WHISPERING CREEK, UNIT II subdivision, the members of the Association including the Developer shall elect the members of the Board by a plurality of the votes cast at such election. The Developer reserves the right to turn over the Association at an earlier date. At the first election by the full membership of replacements for the directors appointed by the Developer, such directors shall be elected to terms so that each year for the following three (3) years the term of one (1) of the three (3) directors shall expire. Thereafter all directors shall serve for terms of three (3) years. It is the intent of this Section that following the expiration of the power of appointment by the Developer and the election of a full Board, one (1) director's term will expire each year.

Section 5. In the event of the removal, resignation, death, or other vacancy of a director the vacancy shall be filled by the Developer if such director had been appointed by the Developer, otherwise it shall be filled by the Board. The replacement director shall serve the remainder of the term of the predecessor.



BOOK: 5193  
PAGE: 2168

Section 6. No member of the Board or any committee of the Association or any officer of the Association, or the Developer, or any employee of the Association, shall be personally liable to any member of the Association, or to any other party, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence of such person or group, provided that such person or group has, upon the basis of such information as may be possessed by said person(s), acted in good faith, without willful or intentional misconduct.

Section 7. The Board of Directors shall determine the amounts of the normal and special assessments for each subdivision. Assessments shall be assessed equally against all lots within the respective subdivisions of WHISPERING CREEK, UNIT II subdivision but not in such an amount that would cause the Association to be in violation of Chapter 720 Florida Statutes. No assessments shall be made against Lots owned by the Developer during the Budget Guarantee period as provided in the Declaration and the Bylaws. Where there are multiple owners of any lot or lots such owners shall be jointly and severally liable for the payment of the assessments. In establishing the amount of the assessments, the Board may not provide that a member other than the Developer shall pay no assessments. The assessments shall be fixed by the Board annually and shall be based upon the costs and expenses expected to be incurred in owning, operating, maintaining, and improving Association properties in the coming year and on the establishment of reasonable reserves for future use as deemed advisable by the Board. The normal assessments may include

BOOK: 5193  
PAGE: 2169

any amounts to cover deficiencies from the previous year, or, at the end of each year the Board as an alternative to increasing the coming year's assessments, may make a special assessment above and beyond the annual assessment if the costs and expenses of owning, operating, maintaining, and improving Association properties in that year exceeded the amount of the normal assessments and other income earlier received by the Association.

ARTICLE X - BYLAWS

The first Bylaws of the Association shall be adopted by the Board of Directors and may be altered, amended or rescinded by a majority of the members as provided in the Bylaws.

ARTICLE XI - AMENDMENTS

Amendments to the Articles of Incorporation shall be approved by the Board of Directors, proposed by them to the members and approved at the meeting by a two-thirds (2/3rds) vote of the voting interests of the Association, provided that not less than thirty (30) days notice by mail shall have been given to all of the members setting forth the proposed amendment.

ARTICLE XII - DISSOLUTION

In the event of termination, dissolution or final liquidation of the Association, the responsibility for the operation and maintenance of the surface water or stormwater management system must be transferred to and accepted by an entity which would comply with Section 40C-42.027, F.A.C., and be approved by the St. Johns River Water Management District prior to such termination, dissolution or liquidation.

BOOK: 5193  
PAGE: 2170

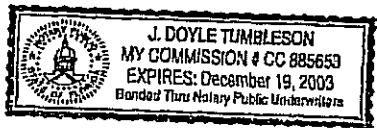
IN WITNESS WHEREOF, the undersigned directors of the corporation have hereunto set their hands and seals at Daytona Beach, Florida, this 28<sup>th</sup> day of August, 2003.

Diane Lapham  
Diane Lapham  
Charles Kleinschmidt  
Charles Kleinschmidt  
E. L. Kleinschmidt  
Elizabeth L. Kleinschmidt

STATE OF FLORIDA  
COUNTY OF VOLUSIA

The foregoing instrument was acknowledged before me this 28<sup>th</sup> day of August, 2003, by Diane Lapham, Charles Kleinschmidt and Elizabeth L. Kleinschmidt, who are personally known to me.

J. Doyle Tumbleson  
Notary Public  
My Commission Expires:



HAVING BEEN NAMED TO ACCEPT SERVICE OF PROCESS FOR THE ABOVE-STATED CORPORATION, AT THE PLACE DESIGNATED HEREIN, I HEREBY AGREE TO ACT IN THIS CAPACITY, AND I FURTHER AGREE TO COMPLY WITH THE PROVISIONS OF ALL STATUTES RELATIVE TO THE PROPER AND COMPLETE PERFORMANCE OF MY DUTIES, AND I ACCEPT THE DUTIES AND OBLIGATIONS OF SECTION 607.325 FLORIDA STATUTES.

Charles Kleinschmidt  
Charles Kleinschmidt  
Registered Agent

Dated: 8/28/03

Book: 5193  
Page: 2171

**BY-LAWS  
OF  
WHISPERING CREEK, UNIT II HOMEOWNERS' ASSOCIATION, INC.  
(A Florida Corporation Not For Profit)**

**ARTICLE I  
NAME AND LOCATION**

1.01 The name of this Corporation is Whispering Creek, Unit II Homeowners' Association, Inc., hereinafter referred to as the "Association".

1.02 The initial principal office of the Association shall be located at 721 S. Kirkman Road, Orlando, Florida, 328111, and thereafter may be located at any place in Volusia County, Florida designated by the Board of Directors of the Association.

**ARTICLE II  
DEFINITIONS**

2.01 All terms which are defined in the Declaration of Covenants, Conditions, Restrictions and Easements of Whispering Creek, Unit II Homeowners' Association, Inc. ("Declaration"), shall be used herein with the same meanings as defined in said Declaration, except as set forth herein.

2.02 "Association" as used herein shall mean the Whispering Creek, Unit II Homeowners' Association, Inc., a Florida corporation not for profit.

2.03 "Documents" as used herein shall mean, collectively, the Declaration, Articles, these By-Laws and the Rules of the Association.

**ARTICLE III  
CORPORATE SEAL**

3.01 The seal of the Association shall bear the name of the Association, the year of its incorporation, the state of incorporation and the words "Corporation Not For Profit" inscribed on it.

**ARTICLE IV  
MEMBERSHIP**

4.01 The qualification of Members of the Association, the manner of their admission into membership and their termination from such membership shall be as set forth in Article III of the Articles of Incorporation of Whispering Creek, Unit II Association, Inc. ("Articles"), and Article VII of the Declaration.

4.02 Declarant shall be a member of the Association so long as it holds title to any lot (or "Unit") in Whispering Creek, Unit II.

**ARTICLE V**  
**MEETING OF MEMBERS AND VOTING**

BOOK: 5193  
PAGE: 2172

5.01 The Association shall have an annual meeting of its Members. The first annual meeting of the Members shall be held in the year in which a majority of the Board of Directors of the Association are elected by the Owners, other than the Declarant. The annual meeting shall be held on the first Monday in November and each subsequent regular annual meeting of the Members shall be held on the same day of the same month of each year thereafter, at a place in Volusia County designated by the Directors, at the hour of 7:00 P.M. or at such other time determined by the Directors. The date of the annual meeting of the Members may be changed by the vote of a majority of the Members at any annual or special meeting.

5.02 Special meetings of the Members shall be held at any place within Volusia County, Florida, whenever called by the President or a majority of the Board of Directors. A special meeting must be called by the President upon receipt of a written request from one-fourth (1/4) of the Members.

5.03 A written notice of the meeting (whether the Annual Meeting or a special meeting) shall be mailed to each Member at his last known address as it appears on the books of the Association. Such written notice of an Annual Meeting shall be mailed to each member not less than thirty (30) days nor more than sixty (60) days prior to the date of the Annual Meeting. Written notice of a special meeting of the Members shall be mailed not less than ten (10) days nor more than thirty (30) days prior to the date of a special meeting. The written notice of a special meeting shall state the specific matter or matters to be voted on, and every written notice of a meeting, whether an annual meeting or a special meeting, shall state the time and place of such meeting and shall be signed by an officer of the Association. Notice of any meeting may be waived by any Member before, during or after a meeting, which waiver shall be in writing and shall set forth a waiver of written notice of such meeting.

5.04 The number of votes in the Association shall be determined as set forth in Article VII of the Articles. The Owners, other than the Declarant, shall be entitled to one (1) vote for each Unit owned. Declarant shall be entitled to ten (10) votes for each Unit owned until Turnover, at which time Declarant shall have the same votes as any other owner for each Unit it owns.

5.05 The presence at a meeting of Members entitled to cast a majority of the votes shall constitute a quorum, except as otherwise provided in these By-Laws. If, however, such quorum shall not be present or represented at a duly called meeting, the Board of Directors may call a second meeting at which the quorum required for the first meeting shall be reduced by fifty percent (50%). The notice for the first meeting may include notice for the second meeting with the time and date for the second called meeting and shall be sufficient for any adjournment thereof.

BOOK: 5193  
PAGE: 2173

5.06 A question shall be decided by the vote of Members constituting a majority of the membership interests represented at a meeting at which a quorum is present unless the Declaration, Articles or these By-Laws require a different number.

5.07 Voting rights of Members shall be as stated in the Declaration and Articles. Such votes may be cast in person or by proxy. "Proxy" is defined to mean an instrument containing the appointment of a person who is substituted by a member to vote for him and in the member's place and stead. Proxies shall be in writing and shall be valid only for the particular meeting designated therein and any adjournments thereof if so stated. A proxy must be filed with the Secretary of the Association before commencement of the particular meeting designated in the proxy. The proxy may be revoked prior to the time a vote is cast according to such proxy.

5.08 At any time prior to a vote upon any matter at a meeting of the Members, any member may demand the use of a secret written ballot for voting on such matter. The Chairman of the meeting shall call for nominations for Inspectors of Election to collect and tally written ballots upon the completion of balloting upon the subject matter.

5.09 The Members may, at the discretion of the Board of Directors, act by written agreement in lieu of meeting, provided written notice of the matter or matters to be agreed upon is given to the Members at the addresses and within the time periods set forth in Section 5.08 herein or duly waived in accordance with such Section. The decision of the majority of the Members as to the matter or matters to be agreed upon (as evidenced by written response to be solicited in the notice) shall be binding on the Members provided a quorum of the Members submits a response. The notice shall set forth a time period during which time a response must be made by a Member.

5.10 Minutes of all meetings of the Members shall be kept and made available for inspection by the Members, Directors and Institutional Mortgagees at all reasonable times. The Association shall retain minutes for at least seven (7) years subsequent to the date of the meeting the minutes reflect.

**ARTICLE VI**  
**BOARD OF DIRECTORS; DIRECTORS' MEETINGS**

6.01 The affairs and property of the Corporation shall be managed and governed by a Board of Directors composed of not less than three (3) nor more than five (5) persons.

6.02 The initial Board of Directors shall consist of three (3) persons, who need not be Members who are entitled to vote in the Association, and who shall be appointed by Declarant. The number of Directors is subject to the increases set forth in Article VII of the Articles.

6.03 The term of each Director's service shall extend until the next Annual Meeting at which time his term expires as provided in the Articles, and until his successor is duly elected and qualified, or until he is removed in the manner elsewhere provided herein.

BOOK: 5193  
PAGE: 2174

6.04 (a) A Director elected by the Members other than Declarant may be removed from office upon the affirmative vote or the agreement in writing of a majority of the Members other than Declarant at a special meeting of the Members other than Declarant for any reason deemed by the Members other than Declarant to be in the best interests of the Association. A meeting of Members other than Declarant to so remove a Director elected by them shall be held, subject to the notice provisions of Section 3.4 hereof, upon the written request of ten percent (10%) of the Members other than Declarant. However, before any Director is removed from office, he shall be notified in writing prior to the meeting at which a motion will be made to remove him that such a motion will be made, and such Director shall be given an opportunity to be heard at such meeting should he be present prior to the vote on his removal.

(b) Members other than Declarant shall elect, at a special meeting of the Members or at an Annual Meeting, persons to fill vacancies on the Board of Directors caused by the removal of Director elected by Members other than Declarant.

(c) A Director designated by Declarant, as provided in the Articles, may be removed only by Declarant in its sole and absolute discretion and without any need for a meeting or vote. Declarant shall have the unqualified right to name a successor for any Director designated and thereafter removed by it or for any vacancy on the Board of Directors as to a Director designated by it and Declarant shall notify the Board of Directors of the name of the respective successor Director and the commencement date for the term of such successor Director. No Director or officer designated or appointed by Declarant shall be required to be a member of the Association.

(d) Until such time as Directors are replaced as provided above, vacancies on the Board of Directors shall be filled by persons appointed by the remaining Directors. Any such person shall be a Director and have all of the rights, privileges, duties and obligations as a Director elected at an Annual Meeting and shall serve for the remaining term of the replaced Director.

6.05 The first meeting of a newly elected Board of Directors shall be held at such place and time as shall be fixed by the Directors at the meeting at which they were elected. No further notice of the organizational meeting shall be necessary.

6.06 Regular meetings of the Board of Directors may be held at such time and place as shall be determined from time to time by majority of Directors. Special meetings of the Board of Directors may be called at the discretion of the President of the Association. Special meetings must be called by the Secretary at the written request of one-third (1/3) of the Directors.

6.07 Notice of the time and place of regular and special meetings of the Board of Directors, or adjournments thereof, shall be given to each Director personally or by mail, telephone or telegraph at least three (3) days prior to the day named for such meeting. Any Director may waive notice of a meeting before, during or after a meeting, and such waiver shall be deemed equivalent to the receipt of notice by such Director.

BOOK: 5193  
PAGE: 2175

6.08 A quorum of the Board of Directors shall consist of the Directors entitled to cast a majority of the votes of the entire Board of Directors. Matters approved by a majority of the Directors present at a meeting at which a quorum is present shall constitute the official acts of the Board of Directors, except as otherwise provided in the Declaration, Articles or elsewhere herein. If at any meeting of the Board of Directors there shall be less than a quorum present, the majority of those present may adjourn the meeting from time to time until a quorum is present. At any meeting being held because of such an adjournment, any business which might have been transacted at the meeting as originally called may be transacted. In the case of a meeting, notice to the Directors of such adjournment shall, subject to the Declaration, be as determined by the Board of Directors.

6.09 The presiding officer at Board of Directors meetings shall be the President.

6.10 Minutes of all meetings of the Board of Directors shall be kept and made available for inspection by Members, Directors and Institutional Mortgagees at all reasonable times. The minutes shall be retained by the Association for at least seven (7) years subsequent to the date of the meeting the minutes reflect.

6.11 Meetings of the Board of Directors shall be open to all Members. Unless a Member serves as a Director or unless he has been specifically invited by the Directors to participate in a meeting of the Board of Directors, such Member shall not participate in the meeting, but shall only be entitled to act as an observer. If a Member not serving as a Director or not otherwise invited by the Directors to participate in a meeting attempts to become more than a mere observer at such meeting or conducts himself in a manner detrimental to the carrying on of such meeting, then any Director may expel said Member from the meeting by any reasonable means which may be necessary to accomplish such expulsion. Also, any Director shall have the right to exclude from any meeting of the Board of Directors any person who is not able to provide sufficient proof that he is a Member, unless said person was specifically invited by the Directors to participate in such meeting.

**ARTICLE VII**  
**POWERS AND DUTIES OF THE BOARD OF Directors**

7.01 The Board of Directors shall have the powers necessary for the proper administration of the affairs of the Association and it may do all acts and things which are not specifically reserved to be exercised and done under the Documents.

7.02 In addition to the duties imposed by these By-Laws, the Declaration, or by resolution of the Association, the Board of Directors shall be responsible for the following:

(a) Making and collecting Assessments against Members to pay the costs of Common Expenses, and the Members' portion of Operating Expenses and Assessments. These Assessments shall be collected by the Association through payments made directly to it by the Members as set forth in the Declaration.



BOOK: 5193  
PAGE: 2176

(b) Using the proceeds of Assessments in the exercise of the powers and duties of the Association and the Board of Directors.

(c) Maintaining, repairing and operating the Property.

(d) Reconstructing improvements after casualties and losses and making further authorized improvements.

(e) Making and amending Rules.

(f) Enforcing by legal means the provisions of the Documents including the Declaration, the Articles, these By-Laws and the Rules adopted by the Association.

(g) To contract for the management and maintenance of the Property and to authorize a management agent to assist the Association in carrying out its powers and duties by performing such functions as the submission of proposals, collection of Assessments, preparation of records, enforcement of rules and regulations and maintenance, repair and replacement of Commons Areas and other services with funds that shall be made available by the Association for such purposes and to terminate such contracts and authorizations. The Association and its officers shall, however, retain at all times the powers and duties granted by the Documents including, but not limited to, the levying of Assessments, promulgation of rules and regulations and execution of contracts on behalf of the Association.

(h) Paying taxes and assessments which are or may become liens against the Common Areas and any Units owned by the Association and assessing the same against Units which are or may become subject to such liens.

(i) Purchasing and carrying insurance for the protection of Owners and the Association against casualty and liability loss.

(j) Paying costs of all power, water, sewer and other utility services rendered to the Association and not billed to Owners of individual Units.

(k) Hiring and retaining such employees as are necessary to administer and carry out the services required for the proper administration of the purposes of this Association, including the hiring of a resident manager and paying all salaries therefor.

(l) Performing all of the covenants, conditions and obligations set forth in the Declaration and required thereby.

(m) To acquire, own, mortgage and convey real and personal property and take other reasonable actions in that regard.

Book: 5193  
Page: 2177

**ARTICLE VII**  
**OFFICERS**

8.01 The officers of this Association shall be a president and vice-president, who shall at all times be members of the Board of Directors, a secretary, and a treasurer, and such other officers as the Board may from time to time by resolution create.

8.02 The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the Members.

8.03. The officers of this Association shall be elected and hold office in the manner and for the terms set forth in Article VII of the Articles, or until a successor is duly elected and qualified, unless he or she shall sooner resign, or shall be removed, or otherwise be disqualified to serve.

8.04. The Board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine.

8.05. Any officer may be removed from office with or without cause by the Board. Any officer may resign at any time by giving written notice to the Board, the President or the Secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

8.06. A vacancy in any office may be filled by appointment by the Board. The officers appointed to such vacancy shall serve for the remainder of the term of the officer he replaces.

8.07. The offices of Secretary and Treasurer may be held by the same person. No person shall simultaneously hold more than one of any of the other offices except in the case of special offices created pursuant to this Article.

8.08 The President shall be the chief executive officer of the Association. He shall have all of the powers and duties which are usually vested in the office of the President of a property owners association, including, but not limited to, the power to appoint such committees at such times from among the Members as he may, in his discretion, determine appropriate to assist in conducting the affairs of the Association. The President shall preside at all meetings of the Board of Directors.

8.09 In the absence or disability of the President, the Vice President shall exercise the powers and perform the duties of the President. The Vice President shall also generally assist the President and exercise such other powers and perform such other duties as shall be prescribed by the Board of Directors.

BOOK: 5193  
PAGE: 217B

8.10 The Secretary shall cause to be kept the minutes of all meetings of the Board of Directors and the Members. He shall have custody of the seal of the Association and shall affix the same to instruments requiring such seal when duly authorized and directed by the Board of Directors to do so. He shall keep the records of the Association, except those of the Treasurer, and shall perform all of the duties incident to the office of Secretary of the Association as may be required by the Board of Directors or the President.

8.11 The Treasurer shall have custody of all of the property of the Association, including funds, securities and evidences of indebtedness. He shall keep the assessment rolls and accounts of the Members, keep the books of the Association in accordance with good accounting practices and shall perform all of the duties incident to the office of a Treasurer.

**ARTICLE IX**  
**ACCOUNTING RECORDS AND FISCAL MANAGEMENT**

9.01 The Board of Directors shall appoint a Budget Committee to be responsible for establishing and maintaining the accounting policies and procedures of the Association.

**ARTICLE X**  
**OBLIGATIONS OF OWNERS**

10.01 All Owners are obligated to pay the periodic assessments imposed by the Association.

10.02 Every Owner and every occupant of any Unit shall comply with all lawful provisions of this Declaration, the By-Laws, and the rules and regulations of the Association. Failure to comply shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the Association or, in a proper case, by any aggrieved Owner or Owners. In addition, the Association may avail itself of any and all remedies provided in this Declaration or the By-Laws.

10.03 Conduct of Members shall be governed by rules and regulations, which from time to time may be adopted by the Board and adopted by committees appointed by the Board.

**ARTICLE XI**  
**RULES AND REGULATIONS**

11.01 The Board of Directors may adopt Rules and Regulations for the operation and use of the Property at any meeting of the Board of Directors; provided, however, that such Rules and Regulations are not inconsistent with the Articles and By-Laws. Copies of any Rules and Regulations promulgated, amended or rescinded shall be mailed to all owners at their last known address as shown on the books and records of the Association and shall not take effect until forty eight (48) hours after such mailing.

BOOK: 5193  
PAGE: 2179

**ARTICLE XII  
COMMITTEES**

12.01 The Board shall appoint the committees hereinafter named and such other committees as it deems appropriate to carry out its purposes. Committees shall consist of not less than three (3), nor more than nine (9) members and shall serve at the pleasure of the Board unless otherwise specified in the Declaration or these By-Laws.

12.02 Budget Committee.

The duties of this committee shall be as defined in these By-Laws and include establishing and maintaining the accounting policies and procedures of the Association, reviewing the financial condition of the Association at least semi-annually, reporting the financial condition to the Board, and recommending the annual budget to the Board.

12.03 Elections Committee.

The duties of this committee shall include designing and duplicating ballots for each election, controlling the distribution of ballots, verifying, counting and tabulating all ballots and certifying the results to the meeting. The chairman may receive ballots starting 48 hours prior to election.

12.04 Enforcement Committee.

The duties of this committee are set forth in Article XIII of these By-Laws.

**ARTICLE XIII  
ENFORCEMENT PROCEDURE**

13.01 The Association shall have the right to levy fines and Individual Lot Assessments against an Owner or its guests, relatives, or lessees, in the manner provided herein, which shall be collectible as any other assessment. The Association shall have a lien against the Owners and Units against which a fine has been assessed or levied.

13.02 Each Board of Directors (the "Appointing Board") shall have the power to create an "Enforcement Committee" to be comprised of three (3) members, one of which shall be a member of the Board of Directors, and one of which shall be designated as the Chairperson thereof. The Appointing Board shall also designate an Alternate Enforcement Committee Member to serve in the place of an absent member of the Enforcement Committee. The Enforcement Committee shall serve a term consistent with the term of its Appointing Board. Members of the Enforcement Committee may be replaced with or without cause by majority vote of the Appointing Board.

Book: 5193  
Page: 2180

13.03 Prior to hearing of the Enforcement Committee being called, alleged non-complying Members shall be notified by certified mail, return receipt requested, or by hand delivery, of the alleged non-complying condition and be given a reasonable opportunity thereafter to rectify the alleged Non-complying condition.

13.04 Conduct of Enforcement Hearing:

(a) Alleged Non-complying Members shall be notified by certified mail, return receipt requested, or by hand delivery, of a hearing at least fourteen (14) days in advance of said hearing. No alleged Non-complying Member shall be given notice of hearing before the Enforcement Committee unless said alleged Non-complying Member has first been given reasonable opportunity to rectify the alleged non-complying condition.

(b) The Chairperson of the Enforcement Committee may call hearings of the Enforcement Committee; hearings may also be called by written notice signed by any member of the Enforcement Committee.

(c) The Chairperson shall present each case before the entire Enforcement Committee, and the alleged Non-complying Member shall be given reasonable opportunity to be heard after the Chairperson's presentation. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern said proceedings.

(d) At the conclusion of the hearing, the Enforcement Committee shall issue an order affording the proper relief, if any, consistent with the powers granted herein. The order shall be by motion approved by at least two (2) members of the Enforcement Committee in order for the action to be official.

13.05 The Enforcement Committee shall have the power to:

- (a) Adopt rules for the conduct of its hearings;
- (b) Effectuate the provisions set forth in this provision;
- (c) Issue orders consistent with this provision; and

(d) Order Non-complying Members, adjudged so pursuant to the provisions of this paragraph, to pay a fine not to exceed twenty-five Dollars (\$25.00) for each day the violation continues past the date set by the Enforcement Committee for compliance, and not to exceed One Thousand Dollars (\$1,000.00) in the aggregate. A notarized copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the Unit owned by the Non-complying Member, collectible by the Association as a Special Assessment against such Unit in the manner set forth in the Declaration.

BOOK: 5193  
PAGE: 2181

**ARTICLE XIV**  
**PARLIAMENTARY RULES**

14.01 The then latest edition of Robert's Rules of Order shall govern the conduct of meetings of this Association; provided, however, if such rules and regulations are in conflict with the Articles, these By-Laws or the Declaration, then the Articles, By-Laws or Declaration, as the case may be, shall govern.

**ARTICLE XV**  
**AMENDMENT OF THE BY-LAWS**

15.01 Until such time as Owners, other than the Declarant, are entitled to elect the majority of the Board of Directors, Declarant reserves the right to amend, modify, alter or annul any of the provisions of these By-Laws.

15.02 At such time as Owners, other than Declarant, are entitled to elect the majority of the Board of Directors, these By-Laws may be amended by the affirmative vote of Members representing not less than seventy-five percent (75%) of the votes presented at an Annual Meeting or a special meeting of the Members and the affirmative approval of a majority of the Board of Directors at a regular or special meeting of the Board of Directors. A copy of the proposed amendment shall be sent to each Member along with the notice of the special meeting of the Members or Annual Meeting. An amendment may be approved at the same meeting of the Board of Directors and/or Members at which such amendment is proposed.

15.03 An amendment may be proposed by either the Board of Directors or by the Members, and after being proposed and approved by one of such bodies, it must be approved by the other as above set forth in order to become enacted as an amendment.

15.04 Amendments to these By-Laws shall be made with the requirements of the law and amendments thereto in effect at the time of amendment.

15.05 No modification or amendment to these By-Laws shall be effective which would affect or impair the priority or validity of a mortgage held by any Institutional Mortgagee or Declarant, without the Institutional Mortgagee's or Declarant's prior written consent.

**ARTICLE XVI**  
**CONFLICT**


16.01 In the event of any conflict between the provisions of the Declaration, the Articles and the provisions of these By-Laws, the provisions of the Declaration and/or Articles shall prevail.

BOOK: 5193  
PAGE: 2182

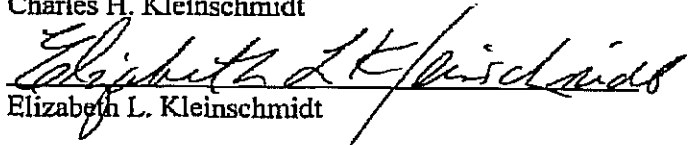
The foregoing By-Laws of Whispering Creek, Unit II Homeowners' Association, Inc., are hereby adopted by all of the Directors of Whispering Creek, Unit II Homeowners' Association, Inc., as and constituting the Board of Directors of said Association this 28<sup>th</sup> day of AUGUST, 2003.

  
\_\_\_\_\_

Diane Lapham

  
\_\_\_\_\_

Charles H. Kleinschmidt

  
\_\_\_\_\_

Elizabeth L. Kleinschmidt

Book: 5193  
Page: 2183  
Diane M. Matousek  
Volusia County, Clerk of Court

EXHIBIT "C"

WHISPERING CREEK, UNIT II  
MAXIMUM NUMBER OF HORSES PER LOT

UNIT II	<u>LOT #</u>	<u># OF HORSES ALLOWED</u>
	1	6
	2	4
	3	4
	4	4
	5	5
	6	6
	7	2
	8	4
	9	3
	10	4
	11	4
	12	3
	13	4
	14	3
	15	4
	16	4
	17	4
	18	4
	19	3
	20	2



2

12/18/2003 06:38 AM  
Instrument# 2003-318450  
Book : 5227  
Page : 3151

**SUPPLEMENTAL DECLARATION  
COMMITTING  
WHISPERING CREEK, UNIT III  
TO  
DECLARATION OF COVENANTS, CONDITIONS,  
RESTRICTIONS AND EASEMENTS FOR  
WHISPERING CREEK, UNIT II**

THIS SUPPLEMENTAL DECLARATION TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR WHISPERING CREEK, UNIT II ("Supplemental Declaration") is made this 12<sup>th</sup> day of November, 2003, by Ava & Rufus, Inc., a Florida corporation (the "Declarant").

**WITNESSETH:**

WHEREAS, a Declaration of Covenants, Conditions, Restrictions and Easements for Whispering Creek, Unit II (the "Declaration") was made by Ava & Rufus, Inc., and was recorded in Official Records Book 5193, at Page 2136, Public Records of Volusia County, Florida; and

WHEREAS, under the Declaration, Whispering Creek, Unit II (the "Property") was committed and subjected to the applicability, operation, effect, lien and encumbrance of the Declaration; and

WHEREAS, under Article II of the Declaration, the Declarant reserved unto itself the right to add additional real property to the Property subject to the Declaration, if such additional real property is adjacent to or abuts the Property which is subject to the Declaration; and

WHEREAS, under Article II of the Declaration, the Declarant reserved unto itself the right to commit additional real property to the Declaration, if such property is adjacent to or abuts the Property which is subject to the Declaration; and

WHEREAS, the real property described in Exhibit "A" to this Supplemental Declaration ("Whispering Creek, Unit III") is adjacent to and abuts Whispering Creek Unit, II; and

WHEREAS, Whispering Creek Unit II, Homeowners' Association, Inc. has agreed with and consents to the addition of the real property described in Exhibit "A" to this Supplemental Declaration and to the applicability of the Declaration to said real property.

NOW, THEREFORE, the Declarant, joined by the Whispering Creek Unit II, Homeowners' Association, Inc., hereby declare as follows:

1. Effective with the date of filing of this Supplemental Declaration, the real property described in Exhibit "A" hereto shall be added to the Property subject to the Declaration and shall be bound by the applicability, operation, effect, lien and encumbrance of the Declaration.

2. All references in the Declaration to "Whispering Creek, Unit II" or to the "Property" shall include and mean Whispering Creek, Unit III, where appropriate or necessary.

3. Paragraph 1.12 of the Declaration is amended to read as follows:

1.12 "*Homeowners' Association*" means Whispering Creek Units II and III, Homeowners' Association, Inc., a Florida nonprofit corporation, its successors and assigns.

4. Paragraph 1.18 of the Declaration is amended to read as follows:

1.18 "*Plat*" or "*Plats*" means the Plat of Whispering Creek, Unit II, a subdivision in Volusia County, Florida, filed for record on October 24, 2003, and recorded in Map Book 50, at page 65 of the PRVCF; and the Plat of Whispering Creek, Unit III, a subdivision in Volusia County, Florida, filed for record on DECEMBER 17, 2003, and recorded in Map Book 50, at pages 90-92 of the PRVCF; and the plat of any additional real property annexed to and made part of the Property, from time to time.

5. Paragraph 1.24 of the Declaration is amended to read as follows:

1.24 "*Subdivision*" or "*Subdivisions*" means the Whispering Creek, Unit II, subdivision and the Whispering Creek, Unit III, subdivision as defined in this Declaration and as graphically depicted and legally described in the Plats thereof.

6. Article I is amended to add the following Paragraph 1.27:

1.27 "*Whispering Creek, Unit III*" means Whispering Creek, Unit III, a subdivision in Volusia County, Florida, according to the Plat (as defined above).

7. Exhibit "C" to the Declaration is amended and replaced by Exhibit "C-1" attached hereto and hereby made a part of the Declaration.

8. The Whispering Creek Unit II, Homeowners' Association, Inc., has joined in this Supplemental Declaration to evidence its agreement with the addition of Whispering Creek, Unit III to the Property described in the Declaration; and its agreement to the commitment of Whispering Creek, Unit III to the applicability, operation, effect, lien and encumbrance of the Declaration.

9. All capitalized terms contained herein shall have the same definition and meaning for such capitalized terms as set forth in the Declaration, unless a different definition is provided herein or the context requires otherwise.

IN WITNESS WHEREOF, the Declarant has executed this Supplemental Declaration.

Witnessed:

AVA & RUFUS, INC.  
a Florida corporation

I. Doyle Tumbleson  
I. DOYLE TUMBLESON  
Print Name

By: Charles Kleinschmidt  
Charles Kleinschmidt  
As Vice President

Pam Clifton  
Pam Clifton  
Print Name

STATE OF FLORIDA }  
COUNTY OF VOLUSIA }

The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of November, 2003, by Charles Kleinschmidt, Vice President of Ava & Rufus, Inc., a Florida corporation, on behalf of the corporation, who is personally known to me or has produced \_\_\_\_\_ as identification.

I. Doyle Tumbleson  
Notary Public

(type or print name) I. Doyle Tumbleson  
My commission expires: Commission #DD262132 Expires: Dec 19, 2007  
Commission No. Bonded Through Atlantic Bonding Co., Inc.

**JOINDER AND CONSENT**

WHISPERING CREEK UNIT II, HOMEOWNERS' ASSOCIATION, INC., a Florida corporation not for profit, joins in, consents to and agrees to be bound by this Supplemental Declaration of Covenants, Conditions, Restrictions and Easements for Whispering Creek, Unit II, in Volusia County, Florida.

*Witnessed:*

**WHISPERING CREEK UNIT II,  
HOMEOWNERS' ASSOCIATION, INC.**  
a Florida corporation not for profit

J. Doyle Tumbleson

By: Diane Lapham President

J. DOYLE TUMBLESON  
Print Name

Pam Clifton

Pam Clifton  
Print Name

STATE OF FLORIDA     }  
COUNTY OF VOLUSIA   }

The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of November, 2003, by Diane Lapham, as President of Whispering Creek Unit II, Homeowners' Association, Inc., a Florida corporation not for profit, who is personally known to me or has produced \_\_\_\_\_ as identification..

J. Doyle Tumbleson  
Notary Public

(type or print name) J. Doyle Tumbleson  
My commission expires: Expires: Dec 19, 2007  
Commission No. \_\_\_\_\_  
Bonded Thru  
Atlantic Bonding Co., Inc.



JOINDER AND CONSENT

The undersigned, **SouthTrust Bank, N.A.**, hereby consents to and joins in this Supplemental Declaration of Covenants, Conditions, Restrictions and Easements for Whispering Creek, Unit II.

DATED this 12<sup>th</sup> day of November, 2003.

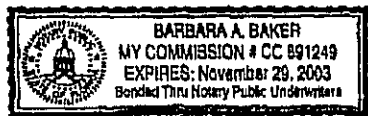
**SOUTHTRUST BANK, N.A.**

Cynthia L. Hart  
Printed Name: Cynthia L. Hart  
Barbara Baker  
Printed Name: BARBARA Baker

By: James A. Battle  
Print Name: James A. Battle  
Title: Vice President

STATE OF FLORIDA  
COUNTY OF VOLUSIA

The foregoing instrument was acknowledged before me this 12<sup>th</sup> day of November, 2003, by James A. Battle, as Vice President of **SouthTrust Bank, N.A.**, who is personally known to me or who has produced \_\_\_\_\_ as identification.



Barbara Baker  
Notary Public  
BARBARA Baker  
(type/print name)  
My commission expires: NOV 29, 2003  
Commission No.:

**EXHIBIT "A"**  
**WHISPERING CREEK, UNIT III**

A PART OF SECTION 34, TOWNSHIP 16 SOUTH, RANGE 32 EAST, VOLUSIA COUNTY, FLORIDA, DESCRIBED AS FOLLOWS:

FROM THE NORTHWEST CORNER OF WHISPERING CREEK, UNIT II, AS RECORDED IN MAP BOOK 50, PAGE 65, OF THE PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA, ALSO BEING THE POINT OF BEGINNING, FROM SAID POINT OF BEGINNING, THENCE S09°28'36"W, A DISTANCE OF 128.15 FEET; THENCE S73°38'17"W, A DISTANCE OF 119.59 FEET; THENCE S02°56'33"E, A DISTANCE OF 36.98 FEET; THENCE S08°20'56"W, A DISTANCE OF 83.95 FEET; THENCE S13°31'37"W, A DISTANCE OF 79.13 FEET; THENCE S50°01'09"W, A DISTANCE OF 65.00 FEET; THENCE S43°06'32"W, A DISTANCE OF 95.83 FEET; THENCE S23°23'09"W, A DISTANCE OF 34.44 FEET; THENCE S31°53'59"E, A DISTANCE OF 12.44 FEET; THENCE S27°33'35"E, A DISTANCE OF 131.87 FEET; THENCE N74°00'27"E, A DISTANCE OF 102.42 FEET; THENCE S01°47'26"E, A DISTANCE OF 448.28 FEET; THENCE S88°12'34"W, A DISTANCE OF 239.96 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTH HAVING A RADIUS OF 375.00 FEET AND A CENTRAL ANGLE OF 17°15'29"; THENCE WESTERLY ALONG THE ARC OF SAID CURVE, A DISTANCE OF 112.95 FEET; THENCE S35°02'54"E, A DISTANCE OF 304.12 FEET; THENCE S25°56'51"E, A DISTANCE OF 52.42 FEET; THENCE S46°35'20"W, A DISTANCE OF 78.30 FEET, THENCE S42°15'11"W, A DISTANCE OF 226.07 FEET; THENCE S42°46'10"W, A DISTANCE OF 114.51 FEET; THENCE S28°58'48"W, A DISTANCE OF 38.04 FEET; THENCE S01°30'46"E, A DISTANCE OF 584.15 FEET TO THE SOUTH LINE OF THE NORTHEAST ONE-QUARTER OF SAID SECTION 34; THENCE S88°29'14"W ALONG THE SOUTH LINE OF THE NORTHEAST ONE-QUARTER OF SAID SECTION 34, A DISTANCE OF 1944.11 FEET; THENCE DEPARTING SAID LINE, N02°28'51"W, ALONG THE EAST LINE OF THE NORTHWEST ONE-QUARTER OF SAID SECTION 34, A DISTANCE OF 2283.20 FEET; THENCE N88°34'56"E, A DISTANCE OF 2599.21 FEET ALONG THE BOUNDARY OF TOMOKA FARMS SUBDIVISION, AS OCCUPIED AND RECORDED IN MAP BOOK 6, PAGE 192, OF THE PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA, TO THE POINT OF BEGINNING. CONTAINING 116.61 ACRES, MORE OR LESS.

**EXHIBIT "C-1"****WHISPERING CREEK, UNITS II & III  
MAXIMUM NUMBER OF HORSES PER LOT**

<b>UNIT II</b>	<b><u>LOT #</u></b>	<b><u># OF HORSES ALLOWED</u></b>
	1	6
	2	4
	3	4
	4	4
	5	5
	6	6
	7	2
	8	4
	9	3
	10	4
	11	4
	12	3
	13	4
	14	3
	15	4
	16	4
	17	4
	18	4
	19	3
	20	2

<b>UNIT III</b>	<b><u>LOT #</u></b>	<b><u># OF HORSES ALLOWED</u></b>
	1	4
	2	4
	3	3
	4	5
	5	6
	6	3
	7	3
	8	5
	9	2
	10	2