

C O N S T I T U T I O N

BIG BAY RESIDENTIAL ESTATE HOME OWNERS ASSOCIATION

a body corporate established
in terms of Section 29 of the Land Use
Planning Ordinance, No 15 of 1985

1. ESTABLISHMENT IN TERMS OF STATUTE

Big Bay Residential Estate Home Owners Association is constituted as a body corporate in terms of Section 29 of the Land Use Planning Ordinance, No 15 of 1985 (as amended) in accordance with the conditions imposed by the City of Cape Town when approving in terms of Sections 25(1) and 42 of the said Ordinance of the subdivision of Erf 213 Big Bay and shall come into existence simultaneously with the registration in the Deeds Office of the first of the erven in the development.

2. INTERPRETATION

In these presents:

2.1 the following words shall, unless the context otherwise requires, have the meanings hereinafter assigned to them:

2.1.1 “Association” means the Big Bay Residential Estate Home Owners Association;

2.1.2 “auditors” means the auditors of the Association;

2.1.3 “Big Bay Master Property Owners Association” means the Big Bay Master Property Owners Association which has been established in terms of Section 29 of the Land Use Planning Ordinance of 1985 for the entire Big Bay development which shall have as members the registered owners of all properties (including sectional title units) within the Big Bay development and also including the owners of those properties arising from the subdivision of the land comprising the development, the constitution of which is annexed hereto marked “E”.

2.1.4 “business day” means weekdays other than Saturdays, Sundays and public holidays;

2.1.5 “chairman” means the chairman of the trustee committee;

2.1.6 “common areas” mean the following:

2.1.6.1 Erf 467 Big Bay (the private road); and

2.1.6.2 Erf 467 Big Bay (the private open spaces);

and includes all common areas designated as such in any further phase/s of the development;

2.1.7 “Council” means the City of Cape Town or its successor/s;

- 2.1.8 "contractors agreement" means the agreement to be entered into between a member and the Association appointed to construct an improvement on an erf in accordance with the specimen contractors agreement annexed hereto marked "H "
- 2.1.9 "design guidelines" means the design guidelines to control all aspects of design and landscaping of the development and annexed hereto (**marked "C" & "D"**), as amended from time to time in terms of this constitution or as required by the Council from time to time;
- 2.1.10 "Developer" means City of Cape Town who may be represented by the appointed development facilitator, Rabcav Joint Venture, a joint venture between Cavcor (Pty) Ltd (registration no. 1994/006764107) and Rabie Property Projects (Pty) Ltd (registration no. 05/021313/07) and includes its successor/s in title or assigns;
- 2.1.11 "developer trustee" means a trustee appointed by the Developer;
- 2.1.12 "development" means the proposed residential estate to be established on the subdivision of Erf 213 Big Bay to be known as Blouberg Hills Estate and includes all such additional area/s as may be incorporated as further phases into the development in terms of clause 41.1 below;
- 2.1.13 "development period" means the period from the incorporation of the Association until all the erven in the development have been sold and transferred by the Developer, including all such additional area/s as may be incorporated as further phases into the development in terms of clause 41.1 below;
- 2.1.14 "erven" mean the erven in the development comprising the following:
- 2.1.14.1 such erven arising from the subdivision of the properties numbered 1 – 6 on the plan annexed hereto (marked "A") which may be incorporated as further phases in the development in terms of clause 41.1 below
- 2.1.14.2 the erven arising from the subdivision of Erf 213 Big Bay (as reflected in the proposed plan of subdivision annexed hereto (marked "B") being Erven 408 to 467 (both inclusive) comprising the first phase of the development;
- but excluding the common areas and reference to an "erf" shall have the corresponding meaning;

- 2.1.15 "estate rules" means the rules imposed by the Developer or the Trustees from time to time relating to the management of the development;
 - 2.1.16 "in writing" means written, printed or lithographed or partly one and partly another, and other modes of representing or producing words in a visible form;
 - 2.1.17 "member" means a member of the Association and includes the Developer in respect of any erf in respect of which the Developer is the registered owner;
 - 2.1.18 "member trustee" means a trustee appointed by the members;
 - 2.1.19 "month" means calendar month;
 - 2.1.20 "occupation right" means a right of occupation in respect of any dwelling in the development which is registered in the Deeds Office as a registered life right in terms of a retirement scheme or registered leasehold right;
 - 2.1.21 "office" means the registered office of the Association;
 - 2.1.22 "sectional title unit" means a dwelling unit in a sectional title scheme in the development, but excludes a unit designated for other purposes, e.g. a garage, maidsroom or storeroom;
 - 2.1.23 "single residential erf" means an erf in the development on which only one dwelling house is lawfully permitted;
 - 2.1.24 "special resolution" means a resolution passed at a special general meeting in accordance with the provisions of clause 32 below;
 - 2.1.25 "these presents" means this constitution and regulations and by-laws of the Association from time to time in force;
 - 2.1.26 "trustee committee" means the board of trustees of the Association;
 - 2.1.27 "trustee" means one of the trustee committee;
 - 2.1.28 "vice-chairman" means the vice-chairman of the trustee committee;
 - 2.1.29 "year" means calendar year;
- 2.2 unless the context otherwise requires, any words importing the singular shall include the plural, and *vice versa* and words importing any one gender only shall include the other two genders.

3. **PURPOSE DESCRIBING MAIN BUSINESS**

The main business of the Association is to carry on the promotion, advancement and protection of the interests of the members of the Association from time to time and the maintenance and control of the common areas.

4. **MAIN OBJECT**

The main object of the Association is:

4.1 the control over:

4.1.1 all buildings, and/or structures erected or to be erected in the development;

4.1.2 the maintenance of all buildings and/or structures, outer perimeter walls/fences excluding painting on the interior of such outer walls/fences erected or to be erected in the development; and

4.1.3 the maintenance of all buildings, roads, services, common landscaping, irrigation and amenities on the common areas; and

4.1.4 the compliance with the design guidelines;

4.2 the promotion, advancement and protection of the communal and group interests of the members generally, including security;

4.3 to take title to the common areas simultaneously with the first separate registration of an erf;

4.4 to enter into services agreements with the local authority or any other authority or supplier of services in regard to the supply of services in the development, including refuse removal and security services.

5. **FINANCIAL YEAR END**

The financial year end of the Association is 30 June of each year or such other date as the trustees may decide from time to time.

6. **MEMBERSHIP OF THE ASSOCIATION**

6.1 Membership of the Association shall be compulsory for every registered owner of a single residential erf, sectional title unit or occupation right.

6.2 Such membership shall commence simultaneously with registration of such single residential erf, sectional title unit or occupation right (as the case may be) into the name of the transferee in the Deeds Office.

- 6.3 Membership of the Association shall be limited to the registered owners of a single residential erf, sectional title unit or an occupation right provided that:
- 6.3.1 a person who is entitled to obtain a certificate of registered title to any single residential erf, sectional title unit or occupation right shall be deemed to be the registered owner thereof;
- 6.3.2 where any such owner is more than one person, all the registered owners of a single residential site, sectional title unit or occupation right shall be deemed jointly and severally to be one member of the Association and nominate one owner to represent them and vote at meetings of the Association.
- 6.4 When a member ceases to be the registered owner of a single residential erf, sectional title unit or an occupation right, he shall *ipso facto* cease to be a member of the Association.
- 6.5 A member shall not be entitled to:
- 6.5.1 sell or transfer a single residential erf, sectional title unit or occupation right, unless it is a condition of the sale and transfer that:
- 6.5.1.1 the transferee becomes a member of the Association;
- 6.5.1.2 the registration of transfer (or cession, as the case may be) of such single residential erf, sectional title unit or occupation right into the name of that transferee shall *ipso facto* constitute the transferee as a member of the Association;
- 6.5.1.3 he first obtains the written consent of the Association which consent shall be given provided the purchaser, transferee or cessionary (as the case may be) of such single residential erf, sectional title unit or occupation right (as the case may be) agrees in writing to abide by the rules of the constitution of the Association and provided further that such member has paid all levies and any other amounts owing by him to the Association as at the date of transfer or cession (as the case may be) of such single residential erf, sectional title unit or occupation right (as the case may be); and that such member has completed with all his obligations in terms of the constitution.
- 6.5.2 without the prior written approval of the trustees and without signature of the contractors agreement having regard to the design guidelines:

6.5.2.1 erect any new buildings and/or structures of any nature whatsoever on any erf in the development;

6.5.2.2 make any changes or alterations to existing buildings and/or structures on any erf in the development, including changes to the external colour scheme.

6.6 The approval of the trustees as contemplated in clause 6.5.2 shall only be given:

6.6.1 after detailed plans of the proposed work has been submitted to the trustees, or any competent person nominated by the trustees (who may be an architect, registered with the South African Council of Architects or the Institute of South African Architects); and

6.6.2 the trustees or their nominee are satisfied that the proposed work is in accordance with the design guidelines for the purposes of which the trustees or their nominee shall be the sole arbiter and their decision shall be final and binding on the member, subject to the right of such member to refer their decision to arbitration in terms of clause 37 below; and

6.6.3 the member has made payment of any costs which may be incurred in obtaining this approval, including the costs of the trustees or their nominee;

6.6.4 the member has paid to the trustees a deposit in such amount as the trustees may from time to time determine as security for any damage to any of the common areas which amount shall be held in trust by the trustees subject to the provisions of clause 23 below;

provided the foregoing shall not be interpreted as detracting from the sole and final responsibility of the Council to approve or reject building plans.

6.7 A member shall not without the prior written approval of the Trustees be entitled to:-

6.7.1 consolidate 2 or more erven into 1 erf. A member shall remain liable for the payment of levies in respect of each of the erven which form part of the consolidated erf.

6.7.2 subdivide an erf into 2 or more portions. A member shall be liable for the payment of levies in respect of each new erf which shall come into existence as a result of the subdivision of the erf.

6.8 The registered owner of a single residential erf, a sectional title unit or an occupation right may not resign as a member of the Association and shall remain a member for as long as such owner is the registered owner thereof.

- 6.9 The trustee committee may, by regulation, provide for the issue of a membership certificate, which certificate shall be in such form as may be prescribed by the trustee committee.
- 6.10 The rights and obligations of a member shall not be transferable and every member shall:
- 6.10.1 to the best of his ability further the objects and interests of the Association;
- 6.10.2 observe all by-laws and regulations made by the Association or the trustee committee,
- provided that nothing contained in this constitution shall prevent a member from ceding his rights in terms of this constitution as security to the mortgagee of the single residential erf, sectional title unit or occupation right of such member, as the case may be.
- 6.11 The Developer or its nominee/s shall be entitled on behalf of the Association to sign all such documents as may be necessary in order to enable the Developer to give transfer of erven sold by the Developer to the purchaser thereof.
- 6.12 No member ceasing to be a member of the Association for any reason shall, (nor shall any such member's executor, curators, trustees or liquidators) have any claim upon or interest in the funds or other property of the Association, but this clause shall be without prejudice to the rights of the Association to claim from such member or his estate any arrears of subscriptions or other sums due from him to the Association at the time of his so ceasing to be a member.

7. LEVIES PAYABLE BY THE MEMBERS

- 7.1 The trustee committee shall from time to time, make levies upon the members for the purpose of meeting all the expenses which the Association has incurred, or to which the trustee committee reasonably anticipates the Association will be put by way of maintenance, repair, improvement and keeping in order and condition of the common areas including, specifically landscaping, all township services, sewage treatment, the security systems to be installed on the common areas and/or for payment of all rates , refuse collection and other charges payable by the Association in respect of the common areas, and/or for the services rendered to it, and/or for payment of all expenses necessary or reasonably incurred in connection with the management of the Association, the common areas and the Association's affairs. In calculating levies the trustee committee shall take into account, income, if any, earned by the Association.
- 7.2 The trustee committee shall estimate the amount which shall be required by the Association to meet the expenses during each year, together with such estimated deficiency, if any, as shall result from the preceding year, and shall make a levy upon

the members equal as nearly as is reasonably practical to such estimated amount. The trustee committee may include in such levies an amount to be held in reserve to meet anticipated future expenditure not of an annual nature. Every such levy shall be made payable by equal monthly instalments due in advance on the first day of each and every succeeding month of such year.

- 7.3 If a member disposes of or alienates an erf at any time, he shall upon registration of transfer of the erf into the name of the new purchaser, or upon receipt of the purchase price or any part thereof, pay in cash to the Association an endowment levy of 0.5% of the purchase price. In the event of a dispute as to whether the purchase price is in accordance with the fair market value of the property, such fair market value shall be determined by the aggregate of two sworn appraisements. The association shall have the right to nominate one sworn appraiser and the member the other sworn appraiser.
- 7.4 The trustee committee, may from time to time, make special levies upon the members in respect of all such expenses as are mentioned in clause 7 (which are not included in any estimate made in terms of clause 7.2), and such levies may be made in the sum or by such instalments and at such time or times as the trustee committee shall think fit.
- 7.5 Any amount due by a member by way of a levy shall be a debt due by him to the Association. The obligation of a member to pay a levy shall cease upon his ceasing to be a member of the Association, without prejudice to the Association's right to recover arrear levies. No levies paid by a member shall under any circumstances be repayable by the Association upon his ceasing to be a member. A member's successor in title to a single residential erf, sectional title unit or occupation right (as the case may be) shall be liable as from the first day of the month following the date upon which he becomes a member pursuant to the transfer thereof, to pay the levy attributable thereto.
- 7.6 The monthly levy payable by the members on the first day of any month in terms of clause 7.2 above shall be payable and apportioned as follows:
- 7.6.1 the registered owners of a single residential erf as at the first day of any month shall pay the same levy;
- 7.6.2 the registered owners of a sectional title unit or an occupation right as at the first day of any month shall pay 50% of the levy payable by the registered owner of a single residential erf as at the first day of such month.
- 7.7 A member shall make payment of the monthly levies by virtue of a debit order drawn on the member's banker.
- 7.8 Any special levies imposed by the trustees in terms of clause 7.3 shall be apportioned between the members in the same proportion as *mutatis mutandis* as provided for in clause 7.6 above.

- 7.9 The Developer shall not be liable for the payment of levies in respect of any unsold erven arising from the subdivision of the properties referred to in clause 41.1 hereof.
- 7.10 The trustee committee shall at all times ensure that the maintenance and control of the common areas and the expenditure incurred in respect thereof is carried out in a manner which is fair and equitable to all the members of the Association.
- 7.11 No member shall be entitled to any of the privileges of membership including voting at any meeting unless and until he shall have paid every subscription and other sum (if any) which shall be due and payable to the Association in respect of his membership thereof.

8. **BIG BAY MASTER PROPERTY OWNERS ASSOCIATION**

- 8.1 It is recorded that:
- 8.1.1 the Big Bay Master Property Owners Association (the "MPOA") has been established for the benefit of all owners of erven or sectional title units within the entire Big Bay development, which association is to control and maintain security, internal public roads, public and private open spaces, nature reserves, road reserves and other services and amenities within the Big Bay development;
- 8.1.2 the City of Cape Town has indicated that it will provide certain services to the areas of the development referred to aforesaid which services may not be sufficient to maintain the relevant areas and facilities in the same condition as they will be upon completion of the Big Bay development;
- 8.1.3 one of the functions of the MPOA will be to appoint the City of Cape Town and/or private contractors to offer such additional services as may be required for the relevant areas within the development to be maintained in the same state and condition as they will be on completion thereof.
- 8.2 A member of the Association shall become a member of the MPOA against transfer of an erf and agrees to remain a member for as long as the member is the registered owner thereof.
- 8.3 The levy to become payable by the member to the MPOA will be determined as a percentage of the annual rates and taxes to be payable by the member in respect of the erf, which percentage shall be determined by the trustees of the MPOA having regards to the total amount of rates and taxes to be payable by all owners of properties (including sectional title units) to form part of the Big Bay development and the total

annual budgeted amount to be collected from all such owners to cover the estimated annual expenditure of the association.

9. DESIGN GUIDELINES

- 9.1 The trustees may in liaison and with the consent of the Council amend, amplify, clarify or add to the provisions of the design guidelines.
- 9.2 In the event of the provisions of the design guidelines being amended or added to and such amendment or addition will materially affect any further development of any of the erven, the trustees shall by written notice inform all members of the amendment or addition to the design guidelines.
- 9.3 All buildings and other structures erected on any erf shall comply with the provisions of the design guidelines.
- 9.4 Any member who has not completed building as per the approved plans on his erf within 36 months after the registration of transfer of the erf into his name or who has failed to complete a building on his erf within 12 months after the commencement of the erection thereof, such member shall pay the Association a monthly penalty levy equivalent to 4 times the current monthly levy. This levy shall be payable in addition to the monthly levies referred to in clause 7.
- 9.5 The penalty levy shall be paid in addition to the levy payable by the member in terms of clause 7 hereof and in the event of a dispute arising as to whether a building is completed for purposes of the provisions of this clause, the chairman shall determine such dispute and his decision shall be final and binding.
- 9.6 The Trustees shall be entitled to:-
- 9.6.1 Perform such acts as are necessary to accomplish the purposes expressed or implied herein, which acts shall include, *inter alia*, the examination and endorsement of the relevant building plans as are necessary for any construction, renovation and/or alterations within the scheme;
- 9.6.2 Appoint such advisors as are necessary to scrutinize the relevant plans referred to herein;
- 9.6.3 Impose a scrutiny fee on members for the services as mentioned herein.
- 9.7 The provisions of this clause shall not be applicable in relation to any of the works to be undertaken by the Developer prior to the completion of the scheme.

10. DEPOSIT FOR DAMAGE

- 10.1 Each member shall, when submitting to the trustees for approval the detailed plans for the construction of any building and/or improvements, or alterations or additions to existing improvements in the development in terms of clause 6.5.2, pay to the trustees a deposit in an amount to be determined from time to time by the trustees which amount shall be retained by the trustees in trust until completion by the member and/or its contractors of such work, the interest on which deposit shall accrue to the association.
- 10.2 Upon completion of all such building and other activities, the trustees shall if they are satisfied that no damage has been effected by the member or any of its contractors to the common areas and/or landscaped areas within the development and that the work has been constructed in accordance with duly approved plans, release the building deposit to the member, excluding any interest thereon which will accrue to the Association less any fines or penalties payable in terms of the contractors agreement.
- 10.3 In the event of any landscaped area and/or the common areas having damage due to such work, the member shall within 15 days of having been requested to do so in writing by the trustees, rectify the damage to the satisfaction of the trustees, failing which, the trustees shall be entitled to appoint an independent contractor to repair the damage and the amount paid to the trustees as a building deposit shall be utilised to defray the expenses of the independent contractor. If, however, the damage caused is not sufficient to cover the cost of such repairs, the trustees shall be entitled to recover the shortfall from the member.

11. DEALING WITH THE COMMON AREAS

Neither the whole nor any portion of the common areas shall be:

- 11.1 sold, let, alienated, otherwise disposed of, subdivided or transferred; or
- 11.2 mortgaged; or
- 11.3 subjected to any rights, whether registered in a deeds registry or not, of use, occupation or servitude, (save those enjoyed by the members in terms hereof and any servitudes in favour of the Council as required in terms of any condition of subdivision);

without the specific prior written consent of the Council and the sanction of a special resolution of the Association (and no member shall be entitled to unreasonably vote against any such special resolution which may be proposed); or

- 11.4 built upon, improved or enhanced in value by the construction of buildings, erections, facilities or amenities, without the sanction of a special resolution of the Association, save and except for the construction of the gatehouse and any construction relating to the electrical substation or transformer, the construction of the private road and the landscaping of the private open spaces.

12. **RESPONSIBILITY FOR THE COMMON AREAS**

- 12.1 The Association shall take title to the common areas in each phase simultaneously with the first separate registration of an erf in such phase.
- 12.2 The Association acknowledges that the Council shall not be responsible for, and the Association shall be solely responsible for the care, repair, maintenance, cleaning, upkeep, improvement and property control of the common areas, all services therein and any structure or thing erected on or contained therein, including the private road and parking thereon.

13. **VERGES AND CARRIAGE CROSSINGS**

The registered owner/s of each erf shall at his cost maintain:

- 13.1 the carriage crossing between his erf and the road;
- 13.2 the landscaping, grass, plants and flowers on the verge between his erf and the road and/or any other adjacent common area/s;

and shall at all times keep the carriage crossing and the verge in a clean, neat and tidy condition.

14. **ENCROACHMENTS**

- 14.1 It is recorded that the erven which are situated on the outer perimeter of the development and on the outer perimeter of the development(s) which might take place on the properties referred to in clause 41.1 hereof shall be subject to the following encroachments in favour of the Association:
- 14.1.1 the erection of outer perimeter walls/fences within the boundary of the erven;
- 14.1.2 the installation of security communication ducts on the outer perimeter walls/fences and the installation of manholes.
- 14.2 The Association shall have the right of access to the erven referred to in clause 14.1 for the purpose of the installation, upkeep, repair and maintenance of the encroachments referred to in clause 14.1.1 and 14.1.2.

15. **ESTATE RULES**

15.1 The Trustees and/or the Developer may from time to time, but shall not be obliged to do so, make rules relating to the management of the development, all of which rules shall be binding on the member.

15.2 The Trustees are empowered to amend, amplify, substitute or repeal any such rule (*inter alia* the rules relating to the design guidelines and the contractors agreement) with the approval of not less than three fourths of the Trustees. In the absence of such approval any trustee shall be entitled to call a general meeting where the proposed change to such rules shall be voted upon in terms of clause 31 hereof.

16. **SIGNAGE**

16.1 Any signage displayed on or near an erf shall comply with the estate rules.

17. **MANAGING AGENT**

17.1 The trustees shall appoint a managing agent from time to time to control, manage and administer the common property and to exercise such powers and duties as may be entrusted to the managing agent, including the power to collect levies and to appoint a supervisor.

17.2 The developer shall be entitled to appoint the managing agent for the development period or for a period of 3 years after the establishment of the association, whichever period is the longest.

18. **CONTRACTS, REGULATIONS AND ACCESS**

18.1 The trustee committee may from time to time:

18.1.1 make regulations governing *inter alia*:

18.1.1.1 the members' rights of use, occupation and enjoyment of the common areas;

18.1.1.2 the external appearance of and the maintenance of the common areas and the buildings or other improvements erected thereon;

- 18.1.1.3 the erection of any buildings and/or structures of any nature whatsoever, and the alteration, modification and renovation to such buildings and/or structures in the development,
 - 18.1.2 enter into agreement(s) with the local authorities governing the matters set out in clause 18.1.1 and any other incidental matters.
- 18.2 Each member undertakes to the Association that he will comply with:
 - 18.2.1 the provisions of this constitution;
 - 18.2.2 any regulations made in terms of clause 18.1.1;
 - 18.2.3 any agreements referred to in clause 18.1.2 insofar as those agreements may directly or indirectly impose obligations on him.
- 18.3 All officials, employees and contractors employed by the Association, local authority and/or any public service company shall, at all times, have reasonable access to the erven and common areas for purposes of inspecting and/or maintaining all services supplying and/or traversing any part thereof.

19. **BREACH**

- 19.1 Should any member:
 - 19.1.1 fail to pay on due date any amount due by that member in terms of this constitution or any regulation made thereunder and remain in default for more than 7 days after being notified in writing to do so by the trustees;
or
 - 19.1.2 commit any other breach of any of the provisions of this constitution or any regulation made thereunder and fail to commence remedying that breach within a period of 7 days after the receipt of written notice to that effect by the trustees and complete the remedying of such breach within a reasonable time;

then and in either such event, the trustees shall be entitled on behalf of the Association, without prejudice to any other rights or remedies which the trustees or the Association or any other member may have in law, including the right to claim damages:

 - 19.1.3 to institute legal proceedings on behalf of the Association against such member for payment of such overdue amount or for performance of his obligations in terms of this constitution or any regulation made thereunder, as the case may be; or
 - 19.1.4 to suspend all or any services to the erf owned by that member; and/or

19.1.5 in the case of clause 19.1.2, to remedy such breach and immediately recover the total cost incurred by the trustees or the Association in so doing from such member.

19.2 Should the trustees institute any legal proceedings against any member pursuant to a breach by that member of this constitution or any regulation made thereunder, then without prejudice to any other rights which the trustees or the Association or any other member may have in law, the trustees shall be entitled to recover from such member all legal costs incurred by the trustees or the Association, including attorney/client charges, tracing fees and collection commission.

19.3 Without prejudice to all or any of the rights the trustees or the Association granted under this constitution, should any member fail to pay any amount due by that member on due date, then such member shall pay interest thereon at the publicly quoted prime rate of interest charged by the Association's bankers from time to time calculated from the due date for payment until the actual date of payment of such amount.

20. **TRUSTEE COMMITTEE**

20.1 There shall be a board of trustees of the Association which shall consist of not less than 3 and not more than 7 members.

20.2 Every trustee must be a member of the Association or an authorised representative of the member where the member is not a natural person.

20.3 The trustees of the Association shall for the development period be divided into two classes, namely developer trustees and member trustees. Upon expiry of the development period there shall only be member trustees.

20.4 During the development period, the majority of the trustees may be appointed by the Developer and the remainder of the trustees shall be appointed by the members provided that after the development period, all trustees shall be appointed by the members.

20.5 Until the first trustees of the Association are appointed, the Developer shall be entitled to carry out all the functions and duties of the trustees in terms of this constitution.

21. **REMOVAL AND ROTATION OF TRUSTEE MEMBERS**

21.1 Save as set forth in clause 20.3, each trustee, except for the developer trustees who shall not be required to rotate on an annual basis, shall continue to hold office until the annual general meeting next following his said appointment, at which meeting each trustee shall be deemed to have retired from office as such, and shall be eligible for re-election to the trustee committee at such meeting.

21.2 A trustee shall be deemed to have vacated his office as such upon:

- 21.2.1 his estate being sequestrated, whether provisionally or finally, or his surrendering his estate;
- 21.2.2 his making any arrangement or compromise with his creditors;
- 21.2.3 his conviction for any office involving dishonesty;
- 21.2.4 his becoming of unsound mind or being found lunatic;
- 21.2.5 his resigning from such office in writing delivered to the secretary;
- 21.2.6 his death;
- 21.2.7 his being removed from office by a special resolution of the members,

provided that anything done in the capacity of a trustee in good faith, by a person who ceases to be a trustee, shall be valid until the fact that he is no longer a trustee has been recorded in the minute book of the trustee committee.

- 21.3 Upon any vacancy occurring on the trustee committee prior to the next annual general meeting, the vacancy in question shall be filled by a person nominated by those remaining for the time being of the trustee committee. Whilst developer trustees are in office the remaining developer trustees shall nominate a person to fill any such vacancy in their number.
- 21.4 The Developer may at any time and from time to time remove and replace any developer trustee at any time on written notice to the remaining trustees.

22. OFFICE OF TRUSTEES

- 22.1 The trustees shall appoint from amongst themselves, a chairman and vice-chairman.
- 22.2 The first chairman, and vice-chairman, may be appointed by the Developer, and such office bearers shall hold their respective offices until the first annual general meeting following the date of their appointment, provided that any such office shall *ipso facto* be vacated by the trustee holding such office upon his ceasing to be a trustee for any reason.
- 22.3 Within 14 days of the holding of such annual general meeting, the trustee committee shall meet and shall elect from its own number the chairman and vice-chairman, who shall hold their respective offices until the annual general meeting held next after their said appointment, provided that the office of the chairman or vice-chairman shall *ipso facto* be vacated by the trustee holding such office upon his ceasing to be a trustee for any reason. No one trustee shall be appointed to more than one of the aforesaid offices. In the event of any vacancy occurring in any of the aforesaid offices at any time, the trustee committee shall meet to appoint one of their number as a replacement in such office.

- 22.4 Save as otherwise provided in these presents, the chairman shall preside at all meetings of the trustee committee, and all general meetings of members, and shall perform all duties incidental to the office of chairman and such other duties as may be prescribed by the trustee committee or of members, and to allow or refuse to permit invitees to speak at any such meetings, provided however, that any such invitees shall not be entitled to vote at any such meetings.
- 22.5 The vice-chairman shall assume the powers and duties of the chairman in the absence of the chairman, or his inability or refusal to act as chairman, and shall perform such other duties as may from time to time be assigned to him by the chairman or the trustee committee.
- 22.6 Trustees shall be entitled to be repaid all reasonable and *bona fide* expenses incurred by them respectively in or about the performance of their duties as trustees and/or chairman, vice-chairman, as the case may be, but save as aforesaid, shall not be entitled to any other remuneration fees or salary in respect of the performance of such duties.

23. **FUNCTIONS AND POWERS OF THE TRUSTEE COMMITTEE**

- 23.1 Subject to the express provisions of these presents, the trustee committee shall manage and control the business and affairs of the Association, shall have full powers in the management and direction of such business and affairs and, save as may be expressly provided in these presents, may exercise all such powers of the Association, and do all such acts on behalf of the Association as may be exercised and done by the Association, and as are not by these presents required to be exercised or done by the Association in general meeting, subject nevertheless to such regulations as may be prescribed by the Association in general meeting from time to time, provided that no regulation made by the Association in general meeting shall invalidate any prior act of the trustee committee which would have been valid if such regulation had not been made.
- 23.2 The trustee committee shall have the right to vary, cancel or modify any of its decisions and resolutions from time to time.
- 23.3 The trustee committee shall have the right to co-opt onto the trustee committee any member or members chosen by it. A co-opted trustee shall enjoy all the rights and be subject to all the obligations of the trustees.
- 23.4 The trustee committee may should it so decide, investigate any suspected or alleged breach by any member or trustee of these presents, in such reasonable manner as it shall decide from time to time.
- 23.5 The trustee committee may make regulations and by-laws, not inconsistent with this constitution, or any regulations or by-laws prescribed in the Association in general meeting:

- 23.5.1 as to disputes generally;
 - 23.5.2 for the furtherance and promotion of any of the objects of the Association;
 - 23.5.3 for the better management of the affairs of the Association;
 - 23.5.4 for the advancement of the interests of members;
 - 23.5.5 for the conduct of trustee committee meetings and general meetings; and
 - 23.5.6 to assist it in administering and governing its activities generally,
- and shall be entitled to cancel, vary or modify any of the same from time to time.

24. **PROCEEDINGS OF THE TRUSTEE COMMITTEE**

- 24.1 The trustee committee may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, subject to any provisions of these presents.
- 24.2 Meetings of the trustee committee shall be held at least once every 12 months, provided that if all the trustees shall in writing have waived the above requirement in respect of a particular 12 months, then no meeting of the trustee committee need be held for that period.
- 24.3 The quorum necessary for the holding of any meeting of the trustee committee shall be 3 trustees, provided that during the development period at least 2 developer trustees shall be necessary at all meetings of trustees to form a quorum.
- 24.4 The chairman shall preside as such at all meetings of the trustee committee, provided that should at any meeting of the trustee committee the chairman not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairman shall act as chairman at such meeting, provided further that should the vice-chairman also not be present within 5 minutes of the time appointed for the holding of such meeting, those present of the trustees shall vote to appoint a chairman for the meeting, who shall thereupon exercise all the powers and duties of the chairman in relation to such meeting.
- 24.5 Minutes shall be taken at every trustee committee meeting, although not necessarily verbatim. These minutes shall be reduced to writing without undue delay after the meeting has and shall then be certified correct by the chairman of the meeting. All minutes of trustee committee meetings shall after certification as aforesaid be placed in a trustee committee minute book to be kept in accordance *mutatis mutandis*, with the provisions of the law relating to the keeping of minutes of meetings of directors of companies. The trustee committee minute book shall be open for inspection at all reasonable times by a trustee, the auditors, and the members.

- 24.6 All competent resolutions recorded in the minutes of any trustee committee meeting shall be valid and of full force and effect as therein recorded, with effect from the passing of such resolutions, and until varied or rescinded, but no resolution or purported resolution of the trustee committee shall be of any force or effect, or shall be binding upon the members or any of the trustees unless such resolution is competent within the powers of the trustee committee.
- 24.7 Save as otherwise provided in these presents, the proceedings at any trustee meeting shall be conducted in such reasonable manner and form as the chairman of the meeting shall decide.
- 24.8 A resolution signed by all the trustees shall be valid in all respects as if it had been duly passed at a meeting of the trustee committee duly convened.

25. **GENERAL MEETINGS OF THE ASSOCIATION**

- 25.1 The Association shall within 3 calendar months after each financial year of the Association, hold a general meeting as its annual general meeting, in addition to any other general meetings, during such financial year, and shall specify the meeting as such in the notices, in terms of clause 26.1 below calling it.
- 25.2 Such annual general meeting shall be held at such time and place, subject to the foregoing provisions, as the trustee committee shall decide from time to time.
- 25.3 All general meetings other than annual general meetings shall be called special general meetings.
- 25.4 The trustee committee, may, whenever they think fit, convene a special general meeting.
- 25.5 General meetings of the Association shall take place at such place/s as shall be determined by the trustee committee from time to time.

26. **NOTICE OF MEETINGS OF THE ASSOCIATION**

- 26.1 An annual general meeting and a meeting called for the passing of a special resolution, shall be called by 21 days' notice in writing at the least, and a special general meeting, other than one called for the passing of a special resolution, shall be called by 14 days' notice in writing at the least. In each case, the notice shall be exclusive of the day on which it is dispatched, and shall specify the place, the day and the hour of the meeting and, in the case of special business, in addition to any other requirements contained in these presents, the general nature of that business, and in the case of a special resolution, the terms and effect of the resolution and the reasons for it shall be given in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the trustee committee to such persons as are under these presents entitled to receive such notices from the Association; provided that a general meeting of the Association

shall, notwithstanding that it is called by shorter notice than that specified in these presents, be deemed to have been duly called if it is so agreed:

26.1.1 in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat; and

26.1.2 in the case of a special general meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 75% of the total voting rights of all members.

26.2 The accidental omission to give notice of a meeting or of any resolution, or to give any other notification, or present any document required to be given or sent in terms of these presents, or the non-receipt of any such notice, notification or document by any member or other person entitled to receive the same, shall not invalidate the proceedings at, or any resolution passed at, any meeting.

27. **QUORUM FOR GENERAL MEETINGS**

27.1 No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business. The quorum necessary for the holding of any general meeting shall be such of the members entitled to vote in person or by proxy, as together for the time being, represent one-half of the total votes of all members of the Association entitled to vote, for the time being save that not less than 3 members must be personally present and provided further that during the development period the Developer is represented at such meeting.

27.2 If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting, if convened on the requisition of members, shall be dissolved, in any other case it shall stand adjourned to the same day in the next week, at the same place and time, or at such other place as the chairman of the meeting shall appoint, and if at such adjourned meeting a quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall be a quorum.

28. **AGENDA AT GENERAL MEETINGS**

In addition to any other matters required by these presents to be dealt with at an annual general meeting, the following matters shall be dealt with at every annual general meeting:

28.1 the consideration of the chairman's report;

28.2 the election of the trustee committee;

28.3 the consideration of any other matters raised at the meeting including any resolutions proposed for adoption by such meeting, and the voting upon any such resolutions;

- 28.4 the consideration of the balance sheet of the Association for the last financial year of the Association preceding the date of such meeting;
- 28.5 the consideration of the report of the auditors;
- 28.6 the consideration of the total levy (as referred to in clause 7) for the calendar year during which such annual general meeting takes place; and
- 28.7 the consideration and fixing of the remuneration of the auditors for the financial year of the Association preceding the annual general meeting.

29. **PROCEDURE AT GENERAL MEETINGS**

- 29.1 The chairman shall preside as such at all general meetings, provided that should he not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairman, shall act as chairman at such meeting, provided further that should the vice-chairman also not be present within 5 minutes of the time appointed for the holding of such meeting, then the members present at such meeting entitled to vote, shall vote to appoint a chairman for the meeting, who shall thereupon exercise all the powers and duties of the chairman in relation to such meeting.
- 29.2 The chairman may, with the consent of any general meeting at which a quorum is present (and if so directed by the meeting) adjourn a meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.
- 29.3 Whenever a meeting is adjourned for 10 days or more, notice of the adjourned meeting shall be given in the same manner as of an original meeting. Save as aforesaid, the members shall not be entitled to any notice of adjournment, or of the business to be transacted at an adjourned meeting.
- 29.4 Except as otherwise set forth in these presents, all general meetings shall be conducted in accordance with generally accepted practice.

30. **PROXIES FOR GENERAL MEETINGS**

- 30.1 A member may be represented at a general meeting by a proxy, who need not be a member of the Association. The instrument appointing a proxy shall be in writing signed by the member concerned or his duly authorised agent in writing, but need not be in any particular form, provided that where a member is more than one person, any one of those persons may sign the instrument appointing a proxy on such member's behalf, where a member is a company, the same may be signed by the chairman of the board of directors of the company or by its secretary, and where an Association of persons, by the secretary thereof.

- 30.2 The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a copy certified by a commissioner of oaths thereof shall be deposited at the office at any time before the time appointed for the commencement of the meeting, or adjourned meeting, at which the person named in the instrument is proposed to vote. No instrument appointing a proxy shall be valid after the expiration of 12 months from the date of its execution.
- 30.3 A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal or revocation of the proxy, provided that no intimation in writing of the death or revocation shall have been received by the trustee committee at least one hour before the time fixed for the holding of the meeting.
- 30.4 Should a member be absent from the recorded domicilium address which the trustees may have for such member for a continuous period in excess of 3 weeks, a proxy must be appointed by such member prior to his absence in accordance with clauses 30.1 and 30.2, failing which a member shall not be entitled to vote, at any special general meeting, called during such member's absence.

31. **VOTING AT GENERAL MEETINGS**

At every general meeting, every member in person or by proxy and entitled to vote shall have the following votes:

- 31.1 where no member is the registered owner of a sectional title unit or occupation right, every member shall have 1 vote for each single residential erf registered in his name;
- 31.2 where the members are registered owners of a single residential erf, sectional title and/or occupational right, then in that event:
- 31.2.1 every member shall have 2 votes for each residential erf registered in his name;
- 31.2.2 every member shall have 1 vote for each sectional title unit or occupation right registered in his name;

provided that if a single residential erf, sectional title unit or occupation right is registered in the name of more than one person, then they shall jointly exercise such rights in respect thereof.

- 31.3 Save as expressly provided for in these presents, no person other than a member duly registered, and who shall have paid every levy and other amount (if any) which shall be due and payable to the Association in respect of or arising out of his membership, and who is not under suspension, shall be entitled to be present or to vote on any question, either personally or by proxy, at any general meeting.

- 31.4 During the development period, the Developer shall be entitled on a poll to the same number of votes of all the other members of the Association, in addition to the number of votes to which the Developer is entitled as a member in terms of this constitution.
- 31.5 At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless either prior to or on the declaration by the chairman of the result of the show of hands, a poll is demanded by any person entitled to vote at such meeting.
- 31.6 Notwithstanding the provisions of clause 31.5 aforesaid, voting on the election of a chairman of a general meeting (if necessary) or on any question of adjournment, shall be decided on a show of hands by a majority of the members present in person or by proxy, and entitled to vote, unless a poll is (before or on the declaration of the result of the show of hands) demanded by the chairman or any of the members in terms of clause 31.7 below.
- 31.7 When a poll is demanded regard shall be had, in computing the majority on the poll, to the number of votes cast for and against the resolution.
- 31.8 An ordinary resolution (that is a resolution other than a special resolution) or the amendment of an ordinary resolution, shall be carried on a simple majority of all the votes cast thereon, and an abstention shall not be counted as a vote for or against the resolution in question. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the general meeting shall be entitled to a casting vote in addition to his deliberative vote.
- 31.9 Unless any member present in person or by proxy at a general meeting shall have objected to any declaration made by the chairman of the meeting as to the result of any voting at the meeting, whether by show of hands or by poll, or to the propriety of validity of the procedure at such meeting, such declaration shall be deemed to be a true and correct statement of the voting, and the meeting shall in all respects be deemed to have been properly and validly constituted and conducted, and an entry in the minutes to the effect that any motion has been carried or lost, with or without a record of the number of votes recorded in favour of or against such motion, shall be conclusive evidence of the vote so recorded if such entry conforms with the declaration made by the chairman of the meeting as to the result of any voting at the meeting. The chairman of the meeting shall be obliged to announce the result of any voting either at the meeting or as soon as reasonably possible thereof.

32. **SPECIAL RESOLUTION**

- 32.1 A resolution by the Association shall be a special resolution if at a general meeting of which not less than 21 clear days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it and at which members holding in aggregate not less than one-fourth

of the total votes of all the members entitled to vote thereat, are present in person or by proxy, the resolution has been passed, on a show of hands, by not less than three-fourths of the number of members of the Association entitled to vote on a show of hands at the meeting who are present in person or by proxy or, where a poll has been demanded, by not less than three-fourths of the total votes to which the members present in person or by proxy are entitled.

32.2 If less than one-fourth of the total votes of all the members entitled to attend the meeting and to vote thereat are present or represented at a meeting called for the purpose of passing a special resolution, the meeting shall stand adjourned to a date not earlier than 7 days and not later than 30 days after the date of the meeting and the provisions of clause 29.3 shall apply in respect of such adjournment.

32.3 At the adjourned meeting, the members who are present in person or by proxy and are entitled to vote may deal with the business for which the original meeting was convened and a resolution passed by not less than three-fourths of such members shall be deemed to be a special resolution even if less than one-fourth of the total votes are represented at such adjourned meeting.

33. **OTHER PROFESSIONAL OFFICERS**

Save as specifically provided otherwise in this constitution, the trustee committee shall at all times have the rights to engage on behalf of the Association, the services of accountants, auditors, attorneys, advocates, architects, engineers, any other professional person or firm and/or any other employee/s whatsoever, for any reasons thought necessary by the trustee committee and on such terms as the trustee committee shall decide, subject to any of the provisions of these presents, provided that any expenditure incurred in respect of the above, shall not exceed 5% of the total annual levy for the year in question unless authorised by a special resolution.

34. **ACCOUNTS**

34.1 The Association in general meeting or the trustee committee, may from time to time make reasonable conditions and regulations as to the time and manner of the inspection by the members of the accounts and books of the Association, or any of them, and subject to such conditions and regulations, the accounts and books of the Association shall be open to the inspection of members at all reasonable times during normal business hours.

34.2 At each annual general meeting the trustee committee shall lay before the Association a proper income and expenditure account for the immediately preceding financial year of the Association, or in the case of the first account, for the period since the incorporation of the Association, together with a proper balance sheet made up as at the last financial year end of the Association. Every such balance sheet shall be accompanied by proper and extensive reports of the trustee committee and the auditors if appointed, and there shall be attached to the notice sent to members convening each

annual general meeting, as set forth in clause 26.1 above, copies of such accounts, balance sheet and reports and of any other documents required by law to accompany the same.

- 34.3 Should the trustees or the majority of the members so require, the accounts of the Association shall be examined and the correctness of the income and expenditure account and balance sheets ascertained by the auditors at least once a year.

35. SERVICE OF NOTICES

- 35.1 A notice shall be in writing and shall be given or served by the Association upon any member, either personally or by post in a prepaid registered letter, properly addressed to the member at the address of the erf owned by him.
- 35.2 No member shall be entitled to have a notice served on him at any address not within the Republic of South Africa, but any member may require the Association, by notice, to record an address within the Republic of South Africa which shall be deemed to be his address for the purpose of the service of notices.
- 35.3 Any notice by post shall be deemed to have been served at the time when the letter containing the same was posted, and in proving the giving of the notice by post, shall be sufficient to prove that the letter containing the notice was properly addressed and posted.
- 35.4 The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings of that meeting.

36. INDEMNITY

- 36.1 All trustee members shall be indemnified out of the funds of the Association against any liabilities *bona fide* incurred by them in their respective said capacities and in the case of a trustee member, in his capacity as chairman or vice-chairman, whether defending any proceedings, civil, criminal or otherwise, in which relief is granted to any such person/s by the court.
- 36.2 Every trustee member, every servant, agent and employee of the Association, shall be indemnified by the Association against (and it shall be the duty of the trustee committee out of the funds of the Association to pay) all costs, losses and expenses (including travelling expenses) which such person or persons may incur or become liable for by reason of any contract entered into, or any act or deed done, by such person or persons in the discharge of any of his/their respective duties, including in the case of a trustee member, his duties as chairman or vice-chairman. Without prejudice to the generality of the above, the Association shall specifically indemnify every such person against all losses of whatsoever nature incurred arising out of any *bona fide* act, deed or letter done or written by him jointly or severally in connection with the

discharge of his duties, provided that any such act, deed or letter has been done or written in good faith.

- 36.3 A trustee member shall not be liable for the acts, receipts, neglects or defaults of the auditors or of any of the other trustee members, whether in their capacities as trustee members or as chairman or vice-chairman, or for any loss or expense sustained or incurred by the Association through the insufficiency or deficiency of title to any property acquired by the trustee committee for or on behalf of the Association, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Association shall be invested, or for any loss or damage arising from the insolvency or tortuous act of any person with whom any monies, securities or effects shall be deposited, or for any loss or damage occasioned by any error of judgment or oversight on his part, or for any other loss, damage or misfortune whatever which shall happen in the execution of any of the duties of his office/s or in relation thereto, unless the same shall happen through lack of *bona fides* or breach of duty or breach of trust.

I have perused a number of constitutions of other homeowners associations. None of these constitutions make provision for an indemnity by the association in respect of financial loss, etc- incurred by a member. (The association obviously needs to limit the claims which can be made against it). I suggest the insertion of the following clause:

Any person who enters the development does so entirely at his own risk.

37. **ARBITRATION**

- 37.1 Any dispute, question or difference arising at any time between member or between members and trustees out of or in regard to:

37.1.1 any matters arising out of this constitution; or

37.1.2 the rights and duties of any of the parties mentioned in this constitution;
or

37.1.3 the interpretation of this constitution,

shall be submitted to and decided by arbitration on notice given by any party to the other parties who are interested in the matter in question.

- 37.2 Arbitration shall be held in Cape Town informally and otherwise upon the provisions of the Arbitration Act No 42 of 1965 (as amended or replaced from time to time) it being intended that if possible it shall be held and concluded within 21 business days after it has been demanded.

- 37.3 Save as otherwise specifically provided herein, the Arbitrator shall be, if the question in dispute is:

37.3.1 primarily an accounting matter - an independent accountant;

37.3.2 primarily a legal matter - a practising counsel or attorney of not less than 10 years standing;

37.3.3 any other matter - an independent and suitably qualified person appointed by the auditors;

as may be agreed upon between the parties to the dispute.

37.4 If agreement cannot be reached on whether the question in dispute falls under clauses 37.3.1, 37.3.2 or 37.3.3 or upon a particular arbitrator in terms of clause 37.3.3, within 3 business days after the arbitration has been demanded, then:

37.4.1 the President for the time being of the Law Society of the Cape of Good Hope or its successor/s shall determine whether the question in dispute falls under clauses 37.3.1, 37.3.2 or 37.3.3; or

37.4.2 the President for the time being of the Law Society of the Cape of Good Hope shall nominate the arbitrator in terms of clause 37.3.1 within 7 business days after the parties have failed to agree so that the arbitration can be held and concluded as soon as possible within the 21 business days referred to in clause 37.2 above.

37.5 The arbitrator shall make his award within 7 days after completion of the arbitration and shall in giving his award, have regard to the principles laid down in terms of this constitution. The arbitrator may determine that the cost of the arbitration may be paid either by one or other of the disputing parties or by the Association as he in his sole discretion may deem fit.

37.6 The decision of the arbitrator shall be final and binding and may be made an order of the Cape Provincial Division of the High Court of South Africa or its successor/s upon the application of any party to the arbitration.

37.7 Notwithstanding anything to the contrary contained in clauses 37.1 to 37.7 inclusive, the trustees shall be entitled to institute legal proceedings on behalf of the Association by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions.

38. **AMENDMENTS TO CONSTITUTION**

This constitution, or any part thereof, shall not be repealed or amended, and no new rules shall be made, save by a special resolution adopted at an annual general meeting or a general meeting of the members and subject further to the prior written consent of the Council being obtained for the amendment of this clause and clauses 1, 2, 3, 4, 6, 7, 11, 12, 40 and 41 of this constitution and subject further to the prior written consent of the Developer during the development period being obtained for the amendment of this clause and clause 41 of this constitution.

39. **EFFECTIVE DATE**

This constitution shall come into force when the first erf in the development is registered in the deeds office.

40. **STATUS OF DEVELOPER**

During the development period, the following provisions shall apply in addition to the conditions in these presents:

40.1 the Developer shall be entitled:

40.1.1 to nominate and appoint the majority of the trustees to the board of trustees;

40.1.2 to a number of votes equal to the number of erven registered in its name at any time plus the number of votes referred to in clause 31.4 at any meeting of members or the trustee committee;

40.1.3 to require that the trustee committee enforces the rights granted to it in terms of these presents against any member who in the opinion of the Developer is not complying with his obligations as a member, and in particular, without restricting the generality of the foregoing, has failed to maintain all buildings and other improvements on its erf by giving such member written notice in which his failure to comply with the particular provisions of these presents is detailed and calling upon him to remedy such failure within a prescribed period of not more than 30 days, failing which, the Developer shall be entitled at the sole cost of that member to carry out all such work as may be required to maintain such building and other improvements on its erf;

40.1.4 the Developer shall be entitled to erect such signage, flagpoles, messages and/or other forms of notices or advertising on the development including the common areas, the private road area and/or the exterior walls (if any) of the development, subject to the regulations and by-laws of the Council appertaining to signage from time to time;

40.2 neither the trustee committee nor any member of the Association shall prevent or hinder in any way the Developer from:

40.2.1 gaining access to and egress from the development;

40.2.2 continuing any building operations at the development;

40.2.3 marketing and selling any of its unsold erven, including the advertisement of the sale of such erven on the common areas and/or at the development;

provided that the provisions of this clause 40 shall not be interpreted as allowing the Developer access onto any of the erven already transferred to a member unless 48 hours prior written notice has been given to the member concerned. The Developer shall make good any subsequent damage to plants, property or improvements thereon to the satisfaction of the member. No member shall be entitled to refuse the Developer access if the required notice has been given;

40.3 no consent shall be given by the board of trustees as contemplated in clause 6.5.2 unless the developer trustees or their nominee/s have voted in favour of such consent granted;

40.4 upon the transfer of the last erf from the Developer to a member, the rights of the Developer in terms of the provisions of this clause 40 shall immediately terminate *ipso facto* and no longer be of any force and effect.

41. **INCORPORATION OF FURTHER PHASES**

The Developer has a continuing and permanent interest to ensure that certain basic provisions are entrenched in perpetuity to ensure the success of the development. Accordingly, none of the following provisions may be deleted or varied in any way in terms of clause 38, without the prior written consent of the Developer:

41.1 the Developer has the right at any time and from time to time to extend or alter the area or composition of the development by requiring the Association to incorporate into the development any of the properties numbered 2 to 6 on plan "A" annexed hereto from time to time as further phases of the development which the Developer shall be entitled to develop as it may deem fit;

41.2 should any further property be incorporated into the development, the Developer shall be entitled to require that the first and all subsequent owners of erven therein become owners of the Association in respect of those parts from such date as the Developer may determine, and on the same terms and conditions as are applicable to the other members of the Association. The members shall be bound by any such requirement of the Developer.

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