

**THIRD AMENDMENT TO  
DECLARATION OF GRANTS, COVENANTS, CONDITIONS AND  
RESTRICTIONS  
FOR HERITAGE CROSSING AT THE GONDOLA CONDOMINIUMS**

THIS THIRD AMENDMENT TO DECLARATION OF GRANTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR HERITAGE CROSSING AT THE GONDOLA CONDOMINIUMS (the "Third Amendment") shall be effective (the "Effective Date") upon recordation in the Office of the Clerk and Recorder of San Miguel County, State of Colorado (the "Official Records"). Unless otherwise defined herein, all capitalized words shall have the meaning ascribed in the Declaration (as hereinafter defined).

**RECITALS**

A. Wildair, LP, a Texas limited partnership ("Declarant") previously filed that certain Declaration of Grants, Covenants, Conditions and Restrictions for Heritage Crossing at the Gondola Condominiums on March 26, 2002, under Reception No. 347962 of the Official Records, that certain First Amendment to Declaration of Grants, Covenants, Conditions and Restrictions for Heritage Crossing at the Gondola Condominiums on April 19, 2002, under Reception No. 348542 of the Official Records, and that certain Second Amendment to Declaration of Grants, Covenants, Conditions and Restrictions for Heritage Crossing at the Gondola Condominiums on May 30, 2002, under Reception No. 349375 of the Official Records (collectively, the "Declaration").

B. Pursuant to the Rights Reserved by Declarant, Declarant has the right to amend the Declaration for the purposes stated herein, and Declarant desires to amend the Declaration as provided herein.

**AMENDMENT**

1. **Definitions.** Except as otherwise provided in this Amendment, capitalized terms used herein shall have the same meaning as given such terms in the Declaration.

2. **Definition of Association.** Section 2.1.10 of the Declaration is hereby amended in its entirety and is replaced with the following:

**"2.1.10. "Association"** means Heritage Crossing at the Gondola Condominium Owners Association, Inc., a Colorado nonprofit corporation, and its successors and assigns."

3. **ARTICLE XXVI.** Article XXVI of the Declaration is hereby amended in its entirety and is replaced with the following:

**“ARTICLE XXVI  
ENFORCEMENT AND REMEDIES; DISPUTE RESOLUTION**

**26.1 Enforcement.** Subject to the provisions of Sections 26.2 and 26.3 regarding the mediation, arbitration and resolution of certain disputes, enforcement of the covenants, conditions, restrictions, easements, reservations, rights-of-way, liens, charges and other provisions contained in this Declaration, the Articles, Bylaws or Rules and Regulations, as supplemented and amended, may be by any proceeding at law or in equity against any Person(s) (including, without limitation, the Association and any Owner) violating or attempting to violate any such provision. Subject to the provisions of Sections 26.2 and 26.3, the Association and any aggrieved Owner shall have the right to institute, maintain and prosecute any such proceedings.

**26.1.1.** In addition to the foregoing, with regard to each provision of this Declaration and/or the Condominium Map that (i) imposes obligations on an Owner, or (ii) limits the powers or restricts the rights of an Owner, for so long as an Owner fails to comply with any such provision, the Association, in its sole discretion, may exclude such Owner from voting in Association matters and/or prohibit or limit such Owner's and the Owner Related Parties' use of portions of the Common Elements, if any, devoted to recreational purposes.

**26.1.2.** In addition to the rights and remedies described herein and notwithstanding the provisions of Section 26.2 below, if an Owner fails to perform or observe any covenant or condition to be performed or observed by such Owner under this Declaration, the Condominium Map or any other Condominium Document or agreement by which such Owner is bound, the Association shall have the following rights and remedies:

A. The Association may, but is not obligated to, cure such failure to comply at such Owner's sole cost and expense. If the Association cures any such failure to comply, such Owner shall pay to the Association all costs incurred by the Association in connection therewith within thirty (30) days after such Owner receives a written invoice therefor from the Association.

B. The Association may, after notice and an opportunity to be heard, fine such Owner, as a Default Assessment, in an amount not to exceed \$500 for each violation, per day, and such Owner shall pay any such fine to the Association within thirty (30) days after such Owner receives a written invoice therefor from the Association.

C. In the case of such Owner's failure to pay timely an installment of any Assessment, the Association may accelerate the due date for the payment of the full amount of the Assessment.

D. The Association shall have all other rights and remedies available to it under this Declaration and the other Condominium Documents, at Law or in equity. All rights and remedies of the Association shall be cumulative, and the exercise of any one right or remedy shall not preclude the exercise of any other right or remedy.

**26.2 Mediation/Arbitration of Disputes.** For the purposes of this Section 26.2, “Dispute” shall mean any dispute, action, claim or controversy, whether sounding in law, equity, contract or tort (excluding, however, tort claims arising from physical bodily injury) between the Declarant, the Association and/or any one or more Owners that: (i) concerns or requires the application of any provision of this Declaration, the Bylaws, or any related agreements or documents (collectively the “Arbitration Documents”); (ii) concerns or requires the application of any provision of the Act; (iii) arises from any act, omission, transaction or occurrence in any Unit or in or on any Common Element; or (iv) concerns any Unit or Common Element or any improvement or item of tangible personal property in or on a Unit or Common Element, but shall expressly exclude: (v) any action by any party to seek or obtain a temporary restraining order, preliminary injunction or similar equitable order or decree; (w) any action by any party to compel arbitration or enforce a temporary restraining order, preliminary injunction, permanent injunction or similar equitable order or decree, or any award or decision of any arbitration conducted pursuant to this Section 26.2; (x) any action by the Association to assess or collect any Assessments or to enforce or foreclose any lien for such Assessments; (y) any action by the Association to enforce any use restrictions; or (z) any action pursuant to the provisions of the Declaration concerning mechanics liens. Upon the written demand of any Owner, Declarant or the Association (for purposes of this Section 26.2, each of which is called a “party” and any two or more of which are called “parties”), any Dispute shall be resolved by mediation, or if mediation is not successful, by binding arbitration in accordance with the terms of this Section 26.2, but in the case of a Construction Dispute (as defined below), only after compliance with the requirements of Section 26.3.

**26.2.1.** A written demand for mediation shall be made within a reasonable time after the Dispute has arisen, or in the case of a Construction Dispute, within sixty (60) days after the party becomes entitled to submit the Construction Dispute to mediation. The Dispute shall be mediated by a mutually acceptable mediator to be chosen by the parties within thirty (30) days after the demand for mediation. No party may unreasonably withhold consent to the selection of a mediator, and each party shall share the cost of mediation equally. If the parties are unable to resolve the Dispute by mediation within one hundred twenty (120) days after the demand for mediation, then any party may make a demand for the resolution of the Dispute by arbitration in accordance with the terms of this Section 26.2.

**26.2.2.** No proceedings for arbitration of a Dispute, or a Construction Dispute as hereinafter defined (or litigation of the same in the event that any judicial proceeding is allowed or had) shall be commenced by the Association unless prior to the initiation of the arbitration, such action is approved by the vote of Owners holding at least fifty-one percent (51%) of the voting power of the Owners entitled to vote.

**26.2.3.** A demand for the resolution of a Dispute by arbitration must be made in writing within a reasonable time after the party becomes entitled to submit the Dispute to arbitration. The demand for arbitration shall be delivered to the other party(ies) and the American Arbitration Association (the "AAA") before the date when commencement of legal or equitable proceedings based on the Dispute would be barred by the applicable statute of limitations. In no event shall the demand for arbitration of a Dispute be made after the date when institution of legal or equitable proceedings based on such Dispute would be barred by the applicable statute of limitations. Any party who fails to submit to binding arbitration regarding a Dispute following a lawful demand by the opposing party shall bear all costs and expenses, including reasonable attorneys' fees, incurred by the opposing party in compelling arbitration of such Dispute. Except as otherwise provided in this Section 26.2 or by the express written agreement of the parties, the AAA shall administer all aspects of arbitrations conducted pursuant to this Section 26.2, including selection of arbitrators, pursuant to the AAA's Commercial Arbitration Rules. Except as provided below with respect to enforcing the decision of the arbitrator(s), once a Dispute is submitted to arbitration, the claims involved cannot later be brought, filed or pursued in any court.

**26.2.4.** All arbitration of Disputes shall be conducted in Denver, Colorado. Except with respect to any Dispute involving, in the aggregate, claims and counterclaims of less than Ten Thousand Dollars (\$10,000), arbitration hereunder shall be before a three (3) person panel of neutral arbitrators consisting of persons from either of the following categories, but at least one (1) from each category: (i) an attorney who has practiced in the area of real estate transactional law for at least ten (10) years or a retired judge at the district court or an appellate court level; or (ii) a person with at least ten (10) years experience in the residential and commercial construction industries. Any Dispute involving, in the aggregate, claims of less than Ten Thousand Dollars (\$10,000) shall be resolved before a single arbitrator meeting the qualifications set forth in clause (i) of the preceding sentence. The AAA shall submit a list of persons meeting the criteria outlined above for each category of arbitrator, and the parties shall select one (1) person from each category in the manner established by the AAA. Arbitrations conducted pursuant to the terms of this Section 26.2 will be governed by Colorado law.

**26.2.5.** Multiple Disputes or party claims not consolidated or administered as a class action pursuant to the following sentence will be subject to, and will be arbitrated individually pursuant to the terms of, this Section 26.2. Only

with the written request of all parties involved, but not otherwise, the arbitrator(s) may (i) consolidate in a single arbitration proceeding any multiple Disputes or party claims that are substantially identical; and (ii) arbitrate multiple Disputes as a class action in accordance with Rule 23 of the Colorado Rules of Civil Procedure. A party will state as a counterclaim any claim that relates in any way to a Dispute and does not require the presence of a third party who could not be joined as a party in the proceeding. The decision of the arbitrator(s) shall be in writing and shall specify the factual and legal basis for the decision. Except as provided below with regard to awards of attorneys' fees and expenses, no party shall be entitled to receive any award of damages in connection with the arbitration of a Dispute, other than such party's actual damages, and Declarant, the Association and any Owner shall be deemed to have waived their right to receive any damages in a Dispute, including, without limitation, a Construction Dispute, other than actual damages, including, without limitation, special damages, consequential damages and punitive or exemplary damages.

**26.2.6. BY TAKING TITLE TO A UNIT, EACH OWNER ACKNOWLEDGES AND AGREES THAT SUCH OWNER HAS WAIVED AND SHALL BE DEEMED TO HAVE WAIVED THE RIGHT TO ANY AWARDS OF DAMAGES IN CONNECTION WITH THE ARBITRATION OF A DISPUTE, OTHER THAN SUCH OWNER'S ACTUAL DAMAGES.**

**26.2.7.** The arbitrator(s) shall make an award of attorneys' fees and expenses, including the fees and expenses of the arbitrator(s) to the prevailing party; provided, however, if the decision of the arbitrator(s) is not wholly in favor of one party, the arbitrator(s) shall allocate such fees and expenses between the parties. The results of any arbitration conducted pursuant to this Section 26.2 shall be binding and final, and the decision of the arbitrator(s) may be filed, converted and enforced as a judgment, order or decree in the District Court of San Miguel County, Colorado.

**26.3 Construction Disputes.** Any Dispute which relates to or arises out of the physical condition of the Common Elements or the Units and involves the Declarant in a position adverse to the Association and/or any Owner(s) shall be deemed a "Construction Dispute," and shall be subject to the provisions of this Section 26.3, in addition to the provisions of Section 26.2 above. Prior to invoking binding arbitration under subsection (a) above, the Association or the Owner, as applicable (the "Initiating Party") shall deliver written notice (a "Dispute Notice") to the Declarant specifying the particular defects that are the subject of the Construction Dispute, together with copies of all studies, surveys, reports and other documents relating thereto. The Dispute Notice shall contain the current mailing address for the Initiating Party.

**26.3.1.** Within forty-five (45) days after receiving the Dispute Notice, the Declarant may deliver to the Initiating Party a written notice (the "Response Notice") designating a time and place for a meeting between the Declarant and the

Initiating Party to discuss the Construction Dispute; provided, however, that such meeting shall take place within the Project or at the Declarant's principal place of business, and shall occur not less than seven (7) nor more than thirty (30) days after delivery of the Response Notice. The Declarant may make on-site inspections of the Project, including investigative testing of those areas and components identified in the Dispute Notice. Upon delivery of the Response Notice, all statutes of limitations applicable to the claim against the Declarant shall be tolled. If the Declarant does not deliver the Response Notice within the forty-five (45) day period, the Initiating Party may institute mediation and then binding arbitration, if necessary, pursuant to this Article XXVI. Within thirty (30) days after receipt of the Response Notice, the Association and the Owners shall make available for inspection and testing all Common Elements and Units identified in the Dispute Notice. The Declarant shall pay all costs to restore any portions of the Project damaged by Declarant's inspection and/or testing to its original condition and shall indemnify the Association for any damages arising from the inspection and/or testing. All inspections and testing shall be completed within one hundred fifty (150) days after delivery of the Response Notice, unless otherwise mutually agreed upon by the parties. At any time after delivering the Response Notice the Declarant may terminate the tolling of the statute of limitations provided in this Section 26.3.1 by delivery of thirty (30) days prior written notice thereof (the "Termination Notice") to the Initiating Party.

**26.3.2.** Within two hundred ten (210) days after delivery of the Response Notice, the Declarant may submit a written statement to the Association setting forth the Declarant's proposed settlement of the Construction Dispute (an "Offer") and stating whether the Declarant proposes to perform the remedial work or to pay the Initiating Party a cash sum, or a combination thereof. If the Offer is accepted, the Declarant and its partners, members, officers, agents, representatives, employees and contractors shall be provided full access to the Project, including the Units, to take and complete the corrective action set forth in the Offer. If the Declarant does not deliver an Offer within two hundred ten (210) days after delivery of the Response Notice or if the Offer is rejected, the Initiating Party may proceed to mediation and binding arbitration as provided in Section 26.2.

**26.3.4.** Upon delivery of the Termination Notice, the Initiating Party shall be relieved of all further obligations to satisfy the conditions of this Section 26.3 and may initiate Arbitration pursuant to Section 26.2. Notwithstanding the provisions of this Section 26.3, the tolling of any statute of limitations shall automatically cease two hundred forty (240) days following the delivery of the Response Notice. If the Initiating Party desires to assert another Dispute not set forth in any prior Dispute Notice delivered to the Declarant by the Initiating Party, the Initiating Party shall be required to satisfy all of the conditions and requirements of this Section 26.3 with respect thereto.

**26.4 Notices.** All notices, demands, or other communications required or permitted to be given to Declarant hereunder shall be in writing, and any and all such items shall be deemed to have been duly delivered (i) on the date of service personally, or (ii) on the date of delivery pursuant to confirmed facsimile transmission, or (iii) on the date of delivery if delivered by a nationally recognized overnight courier, or (iv) within three (3) business days after mailing if mailed to Declarant by first-class mail or registered mail or certified mail, return receipt requested, postage prepaid, and properly addressed to Declarant at 8121 Bee Caves Road, Suite 105, Austin, Texas 78746, with a copy to Ms. M'Lou Patton Bell, Munsch Hardt Kopf & Harr, P.C., 111 Congress Avenue, Suite 2010, Austin, Texas 78701. All notices, demands, or other communications required or permitted to be given to hereunder shall be given pursuant to Section 27.1 below.

**26.5. Nonwaiver.** No failure by Declarant or the Association to enforce any covenant, condition, restriction, reservation, easement, assessment, charge, lien or other provision of this Declaration or any other Condominium Document or related agreement shall be deemed to be a waiver of the right to do so thereafter.

**26.6. Attorneys' Fees.** In any action to enforce or contest any provision of this Declaration, the Condominium Map or any other Condominium Document (exclusive of the Easements), or to obtain a declaration of the rights or responsibilities of any Person hereunder or thereunder, the prevailing party shall be entitled to recover all costs and expenses reasonably incurred by such party in connection with such action, including, without limitation, reasonable attorneys', accountants', engineers', appraisers' and other professional fees incurred by the prevailing party.

**26.7 Choice of Law.** This Declaration and all Condominium Documents shall be construed and interpreted in accordance with the laws of the State of Colorado.

**26.8 Late Charges.** In addition to interest payable hereunder, the Association may also establish, charge, levy and collect late charges on past due amounts.

**4. No Other Amendments; Conflicts.** Except as otherwise provided herein, all other terms and provisions of the Declaration, and each and every other Sheet of the Condominium Map, shall remain in full force and effect. In the event of any conflict between the terms and provisions of this Amendment and the Declaration, the terms and provisions of this Amendment shall control.

5. **Severability.** If any of the provisions of this Amendment or any paragraph, sentence, clause, phrase or word or the application thereof in any circumstances be invalidated, such invalidity shall not affect the validity of the remainder of this Amendment and the application of any such provision, paragraph, sentence, clause, phrase or word in any other circumstances shall not be affected thereby.

6. **Applicable Law.** This Amendment is filed in the Official Records, and it is agreed that the proper jurisdiction and venue of any action pertaining to the interpretation or enforcement of this Amendment shall be in the District Court of San Miguel County, Colorado.

7. **Interpretation.** The provisions of this Amendment shall be liberally construed to effectuate the purposes set forth in the Recitals hereof. This Amendment shall be construed and governed under the Laws of the State of Colorado.

8. **Captions; Number and Gender.** All captions and titles used in this Amendment are intended solely for convenience of reference and shall not enlarge, limit or otherwise affect the meaning of the text set forth in any paragraph, section or article hereof. Unless the context otherwise requires, the singular shall include the plural, and the plural shall include the singular, and the use of any gender shall include all genders.

9. **Binding Agreement.** The provisions of this Amendment shall run with the Project and shall be binding on Declarant, its successors and assigns.

**IN WITNESS WHEREOF**, Declarant has executed this Amendment effective as of this 1st day of June, 2002.

WILDAIR, LP,  
a Texas limited partnership  
By: Wildair Management, LLC,  
a Texas limited liability company  
General Partner

By: Trish Kunz  
Trish Kunz, Authorized Agent



THE STATE OF TEXAS §  
§  
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the 25<sup>th</sup> day of June, 2002, by Trish Kunz, Authorized Agent of Wildair Management, LLC, a Texas limited liability company, General Partner of Wildair, LP, a Texas limited partnership, known to me by her Texas drivers license, on behalf of said partnership.

Elizabeth T. Moore

Notary Public in and for the State of Texas

Elizabeth T. Moore

(Printed Name of Notary)

My Commission Expires: 8/21/05

