

#31

**DECLARATION OF EASEMENTS, CONDITIONS AND RESPONSIBILITY**

THIS DECLARATION, made on the date hereinafter set forth by Thomas J. and Dorothy J. Costello, Husband and Wife hereinafter referred to as "Declarant".

**W I T N E S S E T H :**

WHEREAS, Declarant is the owner of real estate located in the County of Douglas, State of Nebraska, more particularly described as: Lot 39, Candlewood II, a subdivision as surveyed, platted and recorded in Douglas County, Nebraska, except the North 40.00 feet thereof.

NOW, THEREFORE, Declarant hereby declares that all of the real property described above shall be held, sold and conveyed subject to the following easements, responsibilities and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property and be binding on all parties having any right, title or interest in the described property or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

**ARTICLE I**  
**DEFINITIONS**

Section 1. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any lot which is a part of the property including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.

Section 2. "Property" shall mean and refer to that certain real property heretofore described.

Section 3. "Common Elements" shall include, but not necessarily be limited to, the following:

- (1) All foundations, roofs, bearing walls and columns, exterior walls of each building.
- (2) To the extent that the same are to be used in common and are not separate, independent or indigenous to one lot or another, all compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, central air conditioning and central heating (including, without limitation, the convectors located within each residential unit), reservoirs, water tanks and pumps, and the like:

- (3) In general, all divices or installations existing for common use; and
- (4) All other elements of the Property necessary to the existence, upkeep and safety of the Property.

The term "Common Elements" shall not mean or infer common ownership, it being understood that any of the Common Elements located on one Lot shall be owned by the Owner of such Lot. Each Owner shall have an easement as described herein with respect to the Common Elements on the adjoining Lot within the Property.

Section 4. "Building" shall refer to the structural improvements located on one or more Lots forming part of the Property and intended primarily for residential purposes.

Section 5. "Lot" shall refer to any portion of the Property which has been designated by Declarant for use by Owner as the location for a Building or a portion of a Building which will serve as a single common residence and shall include the area around the Building designated by Declarant to be related to such Building or portion of the Building and intended for the private use of the Owner thereof subject to this Declaration.

Section 6. "Common Expenses" shall mean and include all expenses of administration and management, maintenance, operation, repair or replacement of, and additions to the Common Elements; expenses agreed upon as a Common Expense by this Declaration. Common Expenses shall be the equal and shared responsibility of the Owners of the Lots. It is intended that the Owners shall work together and in cooperation for the accomplishment of those matters or items described herein as Common Expenses. Such matters or items may be accomplished by contracting with third parties or by the cooperative or individual efforts of the Owners as may be determined by agreement of the Owners. Any action taken by one Owner without the assent of the other Owner may result in Common Expense if such action is reasonably necessary to preserve, maintain or protect the Property.

Section 7. "Declaration" means this instrument as amended from time to time.

Section 8. "Declarant" shall mean and refer to DEVELOPERS DIVERSIFIED, INCORPORATED, a Nebraska Corporation, its successors and assigns.

Section 9. "Person" means a natural individual, corporation, partnership, trustee or other legal entity capable of holding title to real property.

ARTICLE II  
PAYMENT OF COMMON EXPENSES

The following shall apply to the obligation fo Owners to pay Common Expenses:

**Section 1. Common Expenses.** Each Owner, including the Declarant, shall have a personal obligation to pay his proportionate share of the Common Expenses. Except for its responsibilities as an Owner, as provided herein, the Declarant shall not have any responsibility for the maintenance, repair or replacement of any part of the Common Elements after the date this Declaration is recorded. Payment of Common Expenses, including any prepayment thereof required by contract for sale of a Building, or portion of a Building, shall be in such amounts and at such times as may be necessary to pay such Common Expenses in a timely and commercially reasonable manner. No Owner shall be exempt from payment of his proportionate share of the Common Expenses by waiver or nonuse or enjoyment of the Common Elements or by abandonment of his Lot. If any Owner shall fail or refuse to make any such payment of the Common Expenses when due, the amount thereof together with interest thereon at the maximum rate as may then be permitted under the laws of the State of Nebraska, accruing from and after the date that said Common Expenses become due and payable, shall constitute a lien on the interest of said Owner and the Property and his Lot.

**Section 2. Enforcement of Lien.** One Owner may bring a personal action at law against the Owner personally obligated to pay the same, for collection of his unpaid proportionate share of the Common Expenses, or foreclose a lien against the Lot owned by such delinquent Owner, and interest, costs and reasonable attorneys fees of any such action shall be added to the amount of such assessment. Each Owner, by his acceptance of a deed to a Lot, hereby expressly vests in the other Owner personally for the collection of such charges as a debt and to enforce the aforesaid lien by all methods available for the enforcement of such liens. The lien provided for in this Section shall be in favor of the other Owner.

**Section 3. Mortgage Protection.** The lien for Common Expenses payable by a Owner shall be subordinate to the lien of a prior recorded first mortgage on the interest of such Owner, except for the amount of the proportionate share of Common Expenses which become due and payable from and after the date in which the mortgagee thereunder either takes possession of the Lot enbumbered thereby, accepts a conveyance of any interest therein (other than as security) or files suit to foreclose its mortgage and causes a receiver to be appointed. This Section shall not be amended, changed, modified or rescinded without the prior written consent of all mortgagees of record holding a lien against all or part of the Property.

ARTICLE III  
MORTGAGES, TAXES AND INSURANCE

**Section 1. Mortgages.** Each Owner shall have the right, subject to provisions herein, to make separate mortgages for his respective Lot together with his respective easement interest in the Common Elements. No Owner shall have the right or authority to make or create or cause to be made or created

from the date hereof any mortgage or other lien on or affecting the Property or any part thereof, except only to the extent of his own Lot and his respective interest in the Common Elements appurtenant thereto.

**Section 2. Separate Real Estate Taxes.** Taxes, assessments and other charges of any taxing or assessing authority shall be separately assessed to each Owner for his Lot and his corresponding interest in the Common Elements. In the event that such taxes or assessments for any year are not separately assessed to each Owner, but rather are assessed on the Property as a whole, then each Owner shall pay his proportionate share thereof, and, in said event, such taxes or assessments shall be a Common Expense.

**Section 3. Insurance.** The Owners shall obtain insurance for the Property, exclusive of decorating of and improvements to the interior of the Building by the Owners, against loss or damage by fire, vandalism, malicious mischief and such other hazards as are covered under standard extended coverage provisions for the full insurable replacement cost of the Common Elements and the Building, and against such other hazards and for such amounts as the Owners may deem advisable. Insurable replacement costs shall be deemed the cost of restoring the Common Elements, the Building or any part thereof to substantially the same condition in which they existed prior to damage or destruction. Such insurance coverage shall be written in the name of, and the proceeds thereof shall be payable to, the Owners in equal shares, and the holders of Mortgages on the Lots, if any. Such policies of insurance should also contain, if possible, a waiver of subrogation rights by the insurer against individual Owners. The premiums for such insurance shall be a Common Expense.

Each Owner shall be responsible for obtaining his own insurance on the improvements and betterments to his portion of the Building and on the contents of his portion of the Building, as well as his decorations, furnishings and personal property therein, and his personal property stored elsewhere on the Property. In addition, in the event an Owner desires to insure against his personal liability and loss or damage by fire or other hazards above and beyond the extent that this liability, loss or damage is covered by the liability insurance and insurance against loss or damage by fire and such other hazards obtained for all Owners as part of the Common Expenses, as above provided, said Owner may, at his option and expense, obtain additional insurance.

#### **ARTICLE IV DAMAGE AND DESTRUCTION**

In case of fire, casualty or any other disaster, the insurance proceeds, if sufficient to reconstruct the Building, shall be applied to such reconstruction. Reconstruction of the



Building, as used in this Article, means restoring the Building to substantially the same condition in which it existed prior to the fire, casualty, or other disaster with the Building and the Common Elements having the same vertical and horizontal boundaries as before.

If insurance proceeds are insufficient to reconstruct the Building, damage to or destruction of the Building shall be promptly repaired and restored using proceeds of insurance, if any, on the Building for that purpose, and the Owners shall be liable for assessment for any deficiency. However, if three-fourths (3/4) or more of the Building is destroyed or substantially damaged and if either Owner shall determine within one hundred (100) days after such destruction or damage not to proceed with reconstruction, such Owner shall record a notice setting forth such facts, and upon the recording of such notice:

- (a) The Property shall be deemed to be owned in common by the Owners in equal shares.
- (b) Any liens affecting any of the Lots shall be deemed to be transferred in accordance with the existing priorities to the undivided interest of the Owner in the Property; and
- (c) The Property shall be subject to any action for partition at the suit of any Owner, in which event the net proceeds of sale, together with the net proceeds of the insurance on the Property, if any, shall be considered as one fund and shall be divided among the Owners in equal shares, after first paying out of the respective shares of the Owners, to the extent sufficient for such purposes, all liens on the undivided interest in the Property owned by each Owner.

#### ARTICLE V MAINTENANCE, REPAIRS AND REPLACEMENTS

Each Owner, at his own expense, shall furnish and be responsible for all maintenance of, repairs to and replacements within his own portion of the Building. Maintenance of, repairs to and replacements within the Common Elements shall be the responsibility of and shall be furnished by the Owners as a Common Expense. Each Owner is hereby declared to have an easement over, in and to the Common Elements and the use thereof in accordance with the terms and purposes of this Declaration. Such easement in the Common Elements corresponding to any Lot shall be deemed to be an unseverable appurtenance to such Lot and shall be deemed conveyed or encumbered with that Lot.

If, due to the act or neglect of an Owner, or his agent, servant, tenant, family member, invitee, licensee or

how  
to  
rep  
Com  
suc  
vis  
ill  
res  
ins

Exc  
Com  
be  
oth  
impl  
alte  
caus  
writ  
res  
the  
sult

pens  
with  
serv  
time  
clea  
curt  
Owne  
surf  
port  
inte  
be r  
ment  
prov  
such  
dama  
repl  
as p  
wind  
clea  
Owne  
tena  
port  
appe  
witho

household pet, damage shall be caused to the Common Elements or to a portion of a Building owned by others, or maintenance, repair or replacement is required which would otherwise be a Common Expense, then such Owner shall pay for such damage or such maintenance, repair and replacements. However, the provisions of this Article are subject to the provisions of Article III hereof providing for waiver of subrogation rights with respect to casualty damage insured against under the policies of insurance maintained hereunder.

#### ARTICLE VI ALTERATIONS AND DECORATING

Section 1. Alterations, Additions or Improvements. Except as provided in this Article 6, no alteration of any Common Elements or any additions or improvements thereto shall be made by any Owner without the prior written approval of the other Owner. Any Owner may make alterations, additions, or improvements within his portion of the Building (including minor alterations to the perimeter walls of his portion of the Building caused by nails, screws, staples and the like) without the prior written approval of the other Owner, but such Owner shall be responsible for any damage to other portions of the Building, the Common Elements, the Property, or any part thereof, resulting from such alterations, additions or improvements.

Section 2. Decorating. Each Owner, at his own expense, shall furnish and be responsible for all decoration within his own portion of the Building and Common Elements serving his portion of the Building, as may be required from time to time, including painting, wall papering, washing, cleaning, panelling, floor covering, draperies, window shades, curtains, lighting and other furnishings and decorating. Each Owner shall be entitled to the exclusive use of the interior surfaces of the perimeter walls, floors and ceilings of his portion of the Building, and such Owner shall maintain said interior surfaces in good condition at his sole expense, as may be required from time to time. Decorating of the Common Elements (other than interior surfaces within the Building as above provided) and any redecorating of the interiors, to the extent such redecorating of Building interiors is made necessary by damage to Building interiors caused by maintenance, repair or replacement of the Common Elements hereunder, shall be furnished as part of the Common Expenses. The interior surfaces of all windows forming part of a perimeter wall of a Building shall be cleaned and washed at the expense of the Owner of that Lot. No Owner shall decorate the portions of the Common Elements appurtenant to his portion of the Building visible from outside such portion of the Building in any manner which detracts from the appearance of the Building. The exterior color cannot be changed without prior written approval of each owner of the common elements.

#### ARTICLE VII ENCROACHMENTS AND USE RESTRICTIONS

Section 1. Encroachments. Each Lot and any Common

Elements are hereby declared to have an easement over the adjoining Lot and the Common Elements for the purpose of accommodating any encroachment due to engineering errors, errors in original construction, settlement or shifting of the Building, or any other similar cause, and any encroachment due to building overhang or projection. There shall be valid easements for the maintenance of said encroachments so long as they shall exist, and the rights and obligations of Owners shall not be altered in any way by said encroachment, settling or shifting; provided, however, that in no event shall a valid easement for encroachment be created in favor of an Owner if said encroachment occurred due to the willful act or acts with full knowledge of said Owner. In the event a Building is partially or totally destroyed, and then repaired or rebuilt, the Owner of each Lot agrees that minor unintentional encroachments over the adjoining Lot shall be permitted, and that there shall be valid easements for the maintenance of said encroachments so long as they shall exist.

Section 2. Use and Occupancy Restrictions. Subject to the provisions of this Declaration, no part of the Property may be used for purposes other than housing and the related common purposes for which the Property was designed. The Building shall be used as a residence or such other use permitted by this Declaration.

The Common Elements shall be used only by the Owners and their agents, servants, tenants, family members, customers, invitees and licensees for access, ingress to and egress from the Building and for other purposes incidental to use of the Lots. The use, maintenance and operations of the Common Elements shall not be restricted, damaged or unreasonably interfered with by any Owner.

#### ARTICLE VIII PARTY WALLS

Section 1. General Rules of Law to Apply. Each wall which is built as a part of the original construction of the Building upon the Property and placed on the dividing line between the Lots shall constitute a party wall, and, to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts of omissions shall apply thereto.

Section 2. Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of the party walls shall be shared by the Owners who make use of the wall in proportion to such use.

Section 3. Destruction by Fire or Other Casualty. If a party wall is destroyed or damaged by fire or other casualty,

any Owner who has used the wall may restore it, and if the other Owner thereafter makes use of the wall, he shall contribute to the cost of restoration thereof in proportion to such use without prejudice, however, to the right of any such Owner to call for a larger contribution from the other under any rule of law regarding liability for negligent or willful acts or omissions.

Section 4. Weather Proofing. Notwithstanding any other provision of this Article, and Owner by his negligence or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

Section 5. Right to Contribution Runs with Land The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall pass to such Owner's successors and title.

Section 6. Arbitration. In the event of any dispute arising concerning a party wall, or under the provisions of this Article, each party shall choose one arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision shall be by a majority of all the arbitrators.

#### ARTICLE IX REMEDIES

In the event of any violation of the provisions of this Declaration by any Owner (either by his conduct or by the conduct of any other occupant of his portion of the Building) the other Owner shall have each and all of the rights and remedies which may be provided for in this Declaration, or which may be available at law or in equity, and may prosecute an action or other proceeding against such defaulting Owner and/or others for enforcement of any lien and the appointment of a receiver for the ownership interest of such Owner, or for damages or injunction or specific performance, or for judgment for payment of money and collection thereof, or for any combination of remedies, or for any other relief.

#### ARTICLE X AMENDMENT

The provisions of this Declaration may be amended, modified or rescinded by a resolution setting forth such amendment, modification or rescission and duly adopted by the affirmative vote of each of the Owners, or by instrument in writing setting forth such amendment, modification or rescission and signed by each of the Owners and duly acknowledged before a Notary Public. All holders of a reported mortgage encumbering any one or more Lots shall be notified by certified mail of any such amendment, modification or rescission. No such amendment, modification or rescission shall change the boundaries of any Lot, the undivided interest in the Common Elements appurtenant



to any Lot, or the liability for Common Expenses appertaining to any Lot, except to the extent authorized by this Declaration. Any amendment, modification or rescission of this Declaration pursuant to this Article or any other provision of this Declaration shall be valid and effective only upon the recording thereof in the Office of the Register of Deeds of Douglas County, Nebraska.

**ARTICLE XI**  
**MISCELLANEOUS**

**Section 1. Notices.** Notices provided for in this Declaration shall be in writing, and shall be addressed to any Owner, at the address of the Lot owned by such Owner, or at such other address as hereinafter provided. Any Owner may designate a different address for notices to him by giving written notice to the other Owner. Notice addressed as above shall be deemed delivered when mailed by United States mail with postage prepaid, or when delivered in person.

Upon written request to the Owners, the holder of any recorded mortgage encumbering any Lot shall be given a copy of all notices permitted or required by this Declaration to be given to the Owner or Owners whose Lot is subject to such mortgage.

**Section 2. Severability.** If any provision of this Declaration, or any section, sentence, clause, phrase, word or the application thereof in any circumstance, is held invalid, the validity of the remainder of this Declaration and of the application of any such provision, section, sentence, clause, phrase, or word in any other circumstance shall not be affected thereby and the remainder of this Declaration shall be construed as if such invalid part was never included therein.

**Section 3. Perpetuities and Restraints on Alienation.** If any of the options, privileges, covenants or rights created by this Declaration shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provisions shall continue only until twenty-one (21) years.

**Section 4. Rights and Obligations.** Each grantee of the Declarant by the acceptance of the deed of conveyance from the Declarant, accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges and the jurisdiction, rights and powers created or reserved by this Declaration. All rights, benefits and privileges of every character hereby imposed shall be deemed and taken to be covenants running with the land, and shall bind any person having at any time any interest or estate in said land, and shall inure to the benefit of such grantee in like manner as though the provisions of this Declaration were recited and stipulated at length in each and every deed of conveyance or contract for conveyance.

Made and signed this

14<sup>th</sup> day of Feb. 1985

**OFFICIAL NOTICE - State of Nebraska**

LE 15 L\_KORTE

My Sub. to Exp. 14, 1982

Thomas J. Costello

Sadashige I. Costello

**ATTEST:**

*Dennis L. Kato*

Dorothy Costello

STATE OF NEBRASKA )

55.

COUNTY OF DOUGLAS )

On this 14<sup>th</sup> day of Feb, 1985, before me, a Notary Public in and for said county, personally appeared Thomas J. & Dorothy J. Costello to me known to be the individual who signed the foregoing instrument and acknowledged the execution thereof to be his voluntary act and deed.

2. GENERAL NOTARY - State of Nebraska

DL 13 L. KORTE

My Comm. Exp. 14, 1985

Notary Public

# Al A Misc

RECEIVED  
1985 MAY 22 PM 3:40  
DEPT. OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C. 20535

Book 779  
Page 456  
of Music

Fee 50.50 vs  
Del 8  
Index 211  
Compd 12  
N 79-151 J.A  
79-127 dec  
Compd 12  
M 8