

STATE OF NORTH CAROLINA

COUNTY OF CARTERET

KIRKMAN, KIRKMAN & JENKINS, P.A.

**AMENDED AND RESTATED**

**DECLARATION OF COVENANTS AND RESTRICTIONS**

**BRANDYWINE BAY DEVELOPMENT**

**(North Kerr Properties, Inc. Tract)**

THIS AMENDED AND RESTATED DECLARATION OF COVENANTS AND RESTRICTIONS, dated for purposes of reference only this 15th day of February, 1988 (as amended from time to time, the "New Declaration"), by NORTH KERR PROPERTIES, INC., a North Carolina corporation with offices in Carteret County, North Carolina, hereinafter called "Developer"; with joinder of JESSE W. HOWARD, Successor Trustee, and BRANCH BANNING AND TRUST COMPANY, Beneficiary, under that Deed of Trust recorded in Book 586, Page 431, Carteret County Registry, and with further joinder of OAK RIDGE COAT. CO., INC., a West Virginia corporation with offices in Carteret County, North Carolina, hereinafter called "Seller."

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

WHEREAS, Seller or its predecessor in interest has previously recorded a Declaration of Covenants and Restrictions in Book 435, Page 362, Carteret County Registry, and has further caused said Declaration to be amended, inter alia, by documents recorded in Book 440, Page 213, Carteret County Registry (rerecorded in Book 440, Page 392, Carteret County Registry), and in Book 494, Page 345, Carteret County Registry (such Declaration of Covenants and Restrictions, as amended from time to time, being hereinafter called the "Existing Declaration"); and

WHEREAS, the Existing Declaration contemplates and provides for making additional property subject thereto, by amendment, in order that all of the property described on Exhibit A attached to the Existing Declaration recorded in Book 435, Page 362, Carteret County Registry, would be subject to the option to be developed in accordance with the uniform plan and laid out in said Existing Declaration; and

WHEREAS, Seller has conveyed to Developer portions of the property above described, and has further transferred to Developer the right to amend the Existing Declaration to subject additional property to said Existing Declaration, in accordance with the terms contained within said Existing Declaration; and

WHEREAS, Successor Trustee and Beneficiary above have, at the request of Developer, agreed to join in the execution of this New Declaration solely for the purpose of subordinating that Deed of Trust recorded in Book 586, Page 431, Carteret County Registry, to the terms of this New Declaration; and

WHEREAS, Seller has, at the request of Developer, agreed to join in the execution of this New Declaration solely for the purposes of acknowledging its consent hereto; and

NOW, THEREFORE, the hereinafter set forth covenants, restrictions and easements shall, from the time of the recordation of this instrument, govern the use of all land described in Article I below.

## ARTICLE I

### Section i. Description.

This New Declaration shall apply to the property described in Exhibit A hereto and to any other portions of the "Properties" brought under this New Declaration by amendment hereto.

### Section ii. Designation.

The property described in Exhibit A hereto is hereby designated residential, single-family.

### Section iii. Effectiveness.

This New Declaration shall become effective upon the conveyance by Developer of the first Lot within the property described herein..

### Section iv. Application.

This New Declaration amends the Existing Declaration and restates the Existing Declaration except to the extent amended hereby. This New Declaration applies only to the property described on Exhibit A hereto.

## ARTICLE II

### Section i. Definitions.

- A. "Allowable Living Unit" shall mean and refer to a permissible but unconstructed Living Unit on a Parcel as hereinafter defined. The maximum number of Allowable Living Units per Parcel shall be as designated by this New Declaration or amendments hereto or by the recorded map of a section.
- B. "Association" shall mean and refer to Brandywine Owners Association, Inc.
- C. "Building" shall mean any structure built for the support, shelter or enclosure of persons, animals, chattels or property of any' kind. The term "building" shall be construed as if followed by the words "or parts thereof," including porches, decks, carports, garages, sheds, roof extensions and overhangs and other projections. Any extension or addition to an existing building shall be considered a part of the pre-existing building if, upon reasonable evaluation by the Architectural Control Committee established hereunder, it is determined that 'he roof ;is aesthetically compatible with the roof of the existing building, and the building materials utilized are identical to or aesthetically compatible with the pre-existing structure or building.
- D. "Constructed Living Unit" shall mean and refer to a living unit which has been fully constructed end is ready for occupancy. For purposes of this subparagraph a Living Unit shall be deemed "fully constructed" if a certificate of occupancy has been issued for said Living Unit by the appropriate authority. Twelve (12) months shall be considered adequate time to complete construction of building once construction has begun.
- E. "Family" shall mean and refer to one person living alone or two or more persons, whether related to each other by birth of not, and having common housekeeping facilities.

F. "Living Unit" shall mean or refer to a room or combination of rooms in an apartment house, condominium, cooperative residential building, multifamily house, patio home, cluster home, single-family dwelling or any other building intended for occupancy by one family on a temporary or permanent basis. "Living Unit" shall also refer to any rentable room or suite with sleeping facilities in a motel, hotel, guest lodge, inn, motor court, tourist home, or other building used commercially for lodging of guests.

G. "Lot" shall mean and refer to any individual plot of subdivided land shown upon a recorded subdivision map which is restricted by these covenants, or amendments hereto, to use for detached Single-Family Dwelling.

H. "Multifamily Buildings" shall mean and refer to any combination of two or more Constructed Living Units which have at least one common wall (including floor or ceiling).

I. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, holding the fee simple title to any Lot, Living Unit, or Parcel or combination of Lots, Living Units or Parcels situated in the property to which this New Declaration applies.

J. "Parcel" shall mean an area of land shown on a subdivision map and designated by this New Declaration for unified development as multifamily.

K. "Person" shall include any individual, partnership, corporation, trust or other entity.

L. "Properties" shall mean and refer to all properties which are or shall become subject to this New Declaration.

M. "Single-Family Dwelling" shall mean and refer to a building containing one, and only one, Living Unit.

N. "Section" shall mean and refer to each designated portion of the Properties which shall be developed and for which subdivision map or maps shall be recorded.

#### Section ii. Additions to Existing Property.

Additional lands may become subject to this New Declaration in the following manner:

As new Sections are developed, Developer may, by supplemental declaration to be filed in the Office of the Register of Deeds of Carteret County, make additional portions of the Properties subject to this Declaration so that owners of Lots, Living Units or Allowable Living Units within the added Sections will automatically become members of the Association and their lands subject to the restrictions and covenants herein provided, or provided in amendments hereto. It is the intent of this provision to grant to Developer the right to develop the Properties under a unified plan. Developer reserves the right to impose different types of covenants on additional Sections of the Properties by amendment hereto. Provided, however, that in no respect shall any amendment hereto affect the validity of these covenants as they would apply to the property described on Exhibit A.

## ARTICLE III

### Brandywine Owners Association, Inc.

#### Section i. Membership.

Each and every person having any fee ownership interest in a Living Unit, Lot or Allowable Living Unit in property to which this New Declaration, or amendments hereto, are applicable, shall be a member of the Association, excluding only persons holding such an interest as a security for the performance of an obligation. Further, lessees, regardless of the length of the term of the lease, shall not be members.

#### Section ii. Voting Rights.

Each member shall have the voting rights set forth in Article III, Section ii, of the Existing Declaration. Each member shall be bound by the provisions of said Existing Declaration relating to membership and voting right.: In said Association, including all amendments thereto relating to the Association. In addition, all members shall be bound by the By-Laws and the rules and regulations of said Association, as in effect from time to time.

#### Section iii. Use of Common Property.

All common property owned by the Association shall be available equally for the use and benefit of each member of the Association. However, nothing contained herein shall prevent the Association; from adopting reasonable rules and regulations governing the use of such facilities, including methods of selection for utilizing facilities which may not be able to accommodate all owners.

#### Section iv. Allowable Assessments.

The owner of every Lot, Allowable Living Unit and Constructed Living Unit is obligated and bound, whether or not expressly stated in any instrument of conveyance, to pay to the Association, FOR EACH LOT, ALLOWABLE LIVING UNIT or CONSTRUCTED LIVING UNIT OWNED:

- (a) annual charges or dues;
- (b) special assessments; and
- (c) charges for the services or facilities provided by the Association.

All such assessments, charges and dues, together with any interest thereon, shall be a debt of the Owner and charge on the land and shall be 'a continuing lien upon the property against which such assessments are made. The time for perfecting said liens shall be as established by the Association from time to time, but in no event more than 360 days from the due date of the charge or assessment.

The assessments levied by the Association shall be used exclusively for the purposes of promoting the recreation, health, safety, and welfare of the residents of the property,

and in particular, for the improvement and maintenance of common properties. Included, but not limited, is the payment of taxes and insurance on common properties, repairs and replacements and additions thereto, the cost of labor, equipment; materials and management and supervision thereof, and particularly, the cost of maintenance of streets, drainage, or other community facilities, such as security, as decided by the Association.

Section v. Amount of Assessments.

(a) Annual. The annual assessment shall be the assessment determined in accordance with Article III, Section vi, of the Existing Declaration.

(b) Special. A special assessment may, from time to time, be levied by the members present at any regular or special meeting, if two-thirds (2/3) of the total votes cast are in favor of such assessment, and upon approval thereof by the Board of Directors, likewise upon a two-thirds (2/3) vote. (c) Services. Charges for services or facilities shall be assessed by the Board of Directors of the Association on a nonprofit basis.

Section vi. organization.

The organization of the Association and the functioning of it shall be as established in the Articles of Incorporation and the By-Laws of the Association.

Section vii. Amendments.

All amendments to Article III of the Existing Declaration shall be binding on all members of the Association, including, without limitation, those members subject to the provisions of this New Declaration.

ARTICLE IV

Residential, single-family use restrictions. These restrictions shall apply to all Sections or portions of Sections to which this New Declaration apply and which are designated "Residential, single-family" by this New Declaration.

Section i. Residential.

All lots designated, "Residential, single-family" shall be restricted as to the use for residential, Single-Family Dwellings. No buildings shall be erected or permitted to remain on any lot other than one (1) detached Single-Family Dwelling not to exceed two and one-half stores in height including a private garage for not more than two (2) automobiles, or a carport for not more than two (2) automobiles. No Lot shall be used for any purpose other than single-family residential construction. No home business or home occupation shall be allowed which requires the posting of any signage on the premises, or which requires the construction of parking spaces more than would normally and routinely be permitted in a residential subdivision.

No Living Unit shall be constructed that does not contain a minimum of 1,600 square feet of enclosed, heated living space. Furthermore, no such Living Unit shall be permitted that does not contain a minimum of 100 square feet of storage space accessible from the outside of said dwelling. An enclosed garage shall be considered storage space.

Other than expressly permitted by this Article IV, Section i, no other building shall be permitted on any lot except that one (1) dog house may be constructed on any lot.

This prohibition includes, but is not limited to, pump houses, storage buildings, or other so called out buildings. Notwithstanding the above, swimming pools constructed primarily below -grade shall be permitted if a determination is made by the Architectural Control Committee that the location of the swimming pool is compatible with surrounding properties, and upon a determination that the swimming pool can be drained properly, without detriment to surrounding properties or to any drainage easement or waterway.

#### Section ii. Setbacks.

No building shall be erected or allowed to remain on any of the Lots in the subdivision which is located nearer the boundary line than the minimum setback line shown on the recorded plat. Further, no building shall be erected or allowed to remain which is less than ten (10) feet from any side lot line or thirty (30) feet from any rear lot line. As to corner lots, there shall be a side setback line of fifteen (15) feet on the side street.

#### Section iii. Fences.

No Owner shall construct, or allow to be constructed, planted or installed on his Lot any fence, barricade, or wall of any material, including shrubbery or vegetation, without the consent of the Architectural Control Committee applying the standard set out in Article V of this New Declaration. In no event shall the Architectural Control Committee approve the erection or plan g of such if the same exceeds five (5) feet to height, \_cep along the rear lot lines of McCabe Road and along t common property line between any of the Property and any property zoned for other than single family residential use, in which case the maximum height from general ground level shall be eight (8) feet.

#### Section iv. Signs.

No signage shall be permitted on any Lot unless expressly authorized by the terms of this New Declaration. The only signs authorized shall be a sign no larger than four (4) square feet in size, constructed of sandblasted and painted wood, which states only "For Sale" and includes a name and a telephone number. This provision shall not be deemed to exclude use by Developer, or its assigns, of advertising signs which :hall advertise the entire project. Any permitted "For Sale" sign shall be removed immediately after execution of a binding sales contract for the applicable Lot. The Architectural Control Committee may for good -cause shown, allow other signs in accordance with standards adopted by said Committee.

#### Section v. Redivision of Lots.

No Lot or Lots shall be divided or resubdivided unless such division or resubdivision yields a total number of lots which is equal to or less than the total number of Lots prior to division or resubdivision as shown on the recorded.

#### Section vi. Easements.

Developer hereby reserves an easement or right-of-way for purposes of installation of water lines, sewer lines, telephone lines, electric lines, poles, wires, cables and all other equipment necessary for the installation, use and maintenance of utilities, including water, sewage, electricity, telephone, or drainage. This easement shall further, be for the use of Developer, or the Association, where applicable, to dedicate additional road rights-of-way such that all road rights-of-way may be sixty (60) feet in width. The said easement or right-or-way across and upon said subdivision Lots shall be five (5) feet in width along every and all property lines which abut a street as shown on the platted map of the subdivision. No additional right-of-way shall be dedicated for purposes of road right-of-way unless it is determined that it is in the best interest of members of the Association that the streets and roads be dedicated to the general public and maintained by the State of North Carolina, or a subdivision thereof.

This determination shall be made only by vote of two-thirds (2/3) or more of the votes present, in person or by proxy, and by vote or two-thirds (2/3) or more of the Board of Directors, at a duly called regular or special meeting of the Association and Board of Directors of the Association.

Section vii. Trailers.

No mobile home or house type trailer shall be permitted on any Lot within the subdivision, except that a trailer may be utilized as a construction office in conjunction with, and during the period of construction of, any building on a Lot within the subdivision.

Section viii. Animals.

No animals other than cats and dogs or other generally accepted household pets shall be allowed on the Properties. No Owner shall be permitted to leave unattended outside the confines of his Lot any household pet unless secured by leash.

Section ix. Waste.

The disposal of all waste matter, including garbage, rubbish, etc., shall be in compliance with the regulations of the State Board of Health of North Carolina, the Board of Health of Carteret County, and all other governing authorities which have jurisdiction thereover. It is expressly prohibited that any rubbish, garbage, etc., shall be placed or permitted to drain into any of the drainage areas. All Living Units shall be equipped to contain an accepted garbage disposal system.

Section x. Tanks.

All tanks such as propane, fuel or other shall be buried underground, with the exception of portable tanks, which shall be allowed, if at all, in a place approved by the Architectural Control Committee.

Section xi. Mobile Vehicles and Buildings.

This New Declaration shall not be interpreted to allow inclusion on any Lot of a temporary building, including, but not limited to, a tent or other nonpermanent structure. In addition, no motor home, including camper trailers, boat trailer or boat shall be allowed on any Lot for a period of time exceeding one successive week; in addition, at least one week must elapse between the removal of any such motor home, camper trader, boat trailer, or boat, and the relocation on' the Lot for an additional one week of such mobile vehicle.

ARTICLE V

Architectural Control Committee

Section i. General.

There is hereby created an Architectural Control Committee. Said Committee shall consist of three (3) members. The members of the Committee shall be appointed by Developer until such time as plans for house construction have been approved on 808 of the Lots described on Exhibit A, or until such earlier time as the Developer shall elect one of the two options for transferring control of such Architectural Control Committee as more fully set out in subparagraph (a) and (b) below. At the time such termination by Developer is elected, Developer may elect either the following:

- (a) To cause an election to be made among property Owners within the Properties to select the members of the Architectural Control Committee, who shall be Lot Owners; or
- (b) The functions of the Architectural Control Committee may be transferred to the standing Architectural Control Committee of the Association.

Should Developer elect to cause an election to be made among the Owners within the Properties to select an Architectural Control Committee, voting shall be conducted at any annual meeting of the Association, or at any special meeting of the Owners within the Properties called by Developer. The three (3) members shall be selected as follows: one (1) for a one (1) year term, and two (2) for two (2) year terms. After the expiration of the initial terms, all members shall be elected for two (1) year terms. Any vacancy on the Architectural Control Committee may be filled until the expiration of the unexpired term by the remaining members or member of the Architectural Control Committee. Should there be no remaining member the replacement committee may be selected by Developer, or in the absence of a selection by Developer, the option set out in subparagraph (b) of this Article V, Section i, shall be deemed selected. A quorum is hereby deemed to be two (2) members present at any meeting, and decisions of the Committee shall be by simple majority vote. As to Sections made subject to this New Declaration, by amendment hereto, each Section shall have an identically constituted Architectural Control committee for such Section. upon approval of house plans for 808 of the lots in each such Section, Developer shall either merge such Section's Association with the one established under Article V, Section i(a), or elect the option set out in Article V, Section i(b).

All complaints pertaining to, or violations of, this New Declaration, whether regarding buildings, building additions, fences, shrubbery, animals, general appearance, or otherwise, should be reported promptly to the Developer and/or the Chairman of the Architectural Control Committee.

No building, fence or wall, sign or other structure shall be commenced, or erected or maintained upon a portion of the properties to which this New Declaration, or amendments hereto apply, nor shall any addition, change or alteration to any exterior be made until the plans and specifications showing the nature, kind, height, materials, color and locations of the same shall have been submitted to and approved in writing by the Committee.

#### Section ii. Plans.

It shall not be required that house plans be prepared by a registered architect licensed to practice in the State of North Carolina. All plans presented to the Architectural Control Committee must be of professional quality, must be complete, and must fairly depict the exterior appearance and site plan for the proposed improvements. All plans and specifications must be submitted to the Architectural Control Committee at least ten (10) days prior to application for a building permit;. The submissions shall show by plot plans, elevations, and perspective sketches all proposed improvements including locations, architectural features and landscaping in the event said Committee fails to act on a submission within thirty (30) days after sufficient plans have been submitted to it, this Article will be deemed to have been fully complied with.

#### Section iii. Approval.

The Committee will review and shall approve the plans and specifications if the proposed improvements meet all of the requirements of this New Declaration, if in its opinion, the exterior appearance of the property will be visibly compatible with other development in the subdivision or, at a minimum, will not be detrimental to future property sales or surrounding property values. No architectural "style" or materials will be excluded; however, all materials, features, and styles must be, in the opinion of the Committee, professionally and aesthetically acceptable.

By acceptance of a Deed, purchasers agree that the actions of the Committee are in the best interest of all owners within the subdivision and that they will abide by the decisions of the Committee. Developer, the Committee, or other Owners may seek injunctions to compel compliance with Committee decisions, or damages resulting from failure to act in accordance with directions of the Committee.



#### Section iv. Site Standards.

All Owners agree to leave all vegetation, trees, brooks, creeks, hillsides, springs, water courses, and ravines in as near their natural state as is compatible with good building and land use practices to the end that an attractive exterior lot appearance will be evident at each building site, and in keeping with surrounding properties. The locations of buildings and parking areas shall be preserved and land left undisturbed. All site plans must show existing elevations and tree covers so that the Architectural Control Committee may determine if this provision has been adequately considered.

#### Section v. Appeal.

Any owner submitting plans, as required by this New Declaration, to the Architectural Control Committee, shall be entitled to appeal to the Board of Directors of the Association any adverse ruling. In order to avail himself of this right of appeal, the aggrieved party must notify the Board of Directors, in writing, requesting a hearing said notification to be given to the Board of Directors within seven (7) days after his receipt of written notification of the adverse decision. The Association shall schedule the hearing within fourteen (14) days after receipt of said notice, shall give to the aggrieved Owner written notice of the date of said hearing, and shall give the Owner the right to appear and personally state his case. The decision of the Board of Directors of the Association shall be controlling in all such matters, and all Owners hereby agree to be bound by such decision. The Board shall overturn a decision of the Committee only if a finding is made that the decision of the committee was arbitrary, and without rational basis.

### ARTICLE VI

#### Utilities.

Developer covenants that either public or private water and sewer services will be available to purchasers or Lots in Sections to which these covenants, or amendments hereto, apply and that such services will be sufficient to serve all Lots. All users of such services agree to pay rates established by the proper authorities for the use of the services. Individual wells are prohibited except as used for swimming pools, landscape maintenance or air temperature control. No individual sanitary waste treatment facilities are permitted. Further, wastewater from cooling and/or heating systems shall not be discharged into the sanitary waste treatment system.

### ARTICLE VII

#### Buffers.

All those common areas set aside as buffers and/or designated as reserved on recorded maps of Sections shall be left in their natural state.

### ARTICLE VIII

#### Duration.

The provisions of this New Declaration shall run with the land and shall bind and inure to the benefit of Developer, purchasers and their respective heirs, personal representatives, successors and assigns, until January 1, 2008, after which time said provisions shall be automatically extended for periods of ten (10) years unless a majority of the then Owners of property to which this New Declaration, and amendments hereto apply, shall sign and record an agreement to change said provisions in whole or in part.

## ARTICLE IX

### Enforcement.

Enforcement of this New Declaration shall be by any proceeding in law or equity against any person violating or attempting to violate any provision hereof, whether to restrain a violation or to recover damages, and against the land to enforce any lien created by this New Declaration, and failure by the Association or any owner to enforce any provision herein contained shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any provision of this New Declaration by judgment or court order shall in no wise affect any other provision, and the same shall remain in full force and effect. The right of enforcement of these covenants is hereby decreed to be vested in any owner, or Developer, or the Association, acting either singularly or in concert.

## ARTICLE X

### Interpretation.

This New Declaration shall be interpreted in the spirit of reasonableness and, in the absence of authoritative court decisions, the interpretations placed thereon by Developer shall prevail.

## ARTICLE XI

### Dues.

No Lot Owner shall be required to pay dues to the Association (and no Lot Owner shall be entitled to vote as an Association member) until the earlier of the following:

- (a) Conveyance by Developer of record title to a third party at which time dues shall become payable for all lots described within the recorded plat upon which such lot is described; or
- (b) Expiration of twelve (12) months following recordation of a final subdivision plat.

## ARTICLE XII

### Joinder.

Branch Banking and Trust Company joins in the execution of this New Declaration for the sole purpose of consenting to the terms and conditions contained herein, and for the purpose of subordinating that Deed of Trust recorded in Book 586, Page 431, as the same may have been modified from time to time, to the provisions of this New Declaration and by affixing its duly authorized signature, under seal, hereto, Branch Banking and Trust Company does hereby specifically subordinate said Deed of Trust recorded in Book 586, Page 431, (including any modifications), to the terms of this New Declaration but except for said subordination, the lien of said Deed of Trust shall remain in full force and effect until released by Branch Banking and Trust Company by instrument duly recorded in the office of the Register of Deeds of Carteret County.

Oak Ridge Coal Co., Inc., joins in the execution of this New Declaration for the sole purpose of consenting to the terms and conditions contained herein.

IN TESTIMONY WHEREOF, said parties have caused this Declaration to be executed in their corporate names by their corporate officers, and their corporate seals to be hereto affixed, all by order of their Board of Directors first duly given, the day and year set out opposite each signature.

**EXHIBIT A**

Being Lots 328-341, The Honours At Brandywine Bay, as shown on that plat recorded in Map Book 26, Page 16, Carteret County Registry.