

**DECLARATION OF COVENANTS, CONDITIONS,
AND RESTRICTIONS FOR
CEDAR CREEK SUBDIVISION**

RECITALS:

Whereas, Declarant is the owner of certain property in the County of Sandoval, State of New Mexico, which is more particularly described on Exhibit "A" attached hereto and incorporated herein by reference, and

Whereas, it is the desire and intent of the Declarant to create and establish this Declaration of Covenants, Conditions and Restrictions to help maintain the authenticity and retain the natural beauty of the area for the mutual benefit, the quiet enjoyment and the protection of purchasers and residents of lots within the above described properties, therefore,

KNOW ALL MEN BY THESE PRESENTS, that the Declarant hereby declares that all of the Properties described above shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, which are for the purpose of protecting the value and desirability of and which shall run right, title or interest in the described properties or any part thereof, their heirs, successors and assigns, and shall inure the benefit of and be enforceable by each Owner thereof.

ARTICLE I

DEFINITIONS

1. "Association" shall mean and refer to CEDAR CREEK HOMEOWNERS ASSOCIATION, INC., a non-profit corporation, its successors and assigns.
2. "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 Properties, excepting sellers under real estate contracts but including purchasers under real estate contracts after execution of such real estate contracts and continuing so long as such real estate contract is not in default, but excluding those having such interest merely as security for the performance of any obligation.
3. "Properties" shall mean and refer to that certain real property described on Exhibit "A" attached hereto and such additions thereto as may hereinafter be made subject to this Declaration of Covenants, Conditions and Restrictions.
4. "Lot" shall mean and refer to any numbered plot of land shown upon the recorded plat of the Properties filed in the office of the County Clerk of Sandoval County, New Mexico, on April 13, 1988.
5. "Declarant" shall mean and refer to Cedar Creek, Inc., its successors and assigns, who by this instrument, as owners of the majority of the land described above, shall subject such land to the terms of this declaration.
6. "Architectural Control Committee" (ACC) shall mean and refer to a group composed of three persons appointed by the Board of Directors of the CEDAR CREEK HOMEOWNERS

ASSOCIATION, its successors or assigns, who shall have the power, duties, and authority to approved plans, specifications and modifications to any structures, improvements and construction located on any Lot as is more fully set out below.

ARTICLE II

MEMBERSHIP AND VOTING RIGHTS

1. **Member.** Every owner of any lot which is subject to assessment shall be a member of the Association, membership shall be appurtenant to and may not be separated from ownership of any Lot which is subject to assessment.

2. **Votes.** The Association shall have two classes of voting membership:

Class A. Class A members shall be all owners, with the exception of Declarant, and shall be entitled to one vote for each lot owned. When more than one person holds an interest in any Lot, all such persons shall be members. The vote for such Lot shall be exercised as they determine, but in no event shall more than one vote be cast with respect to any Lot.

Class B. The Class B member(s) shall be the Declarant and shall be entitled to three (3) votes for each Lot owned. The Class B membership shall cease and be converted to Class A membership on the happening of either of the following events, whichever occurs earlier:

(a) when the total votes outstanding in the Class A membership equal the votes outstanding in the Class B membership, or

(b) on January 1, 2003

ARTICLE III

COVENANT FOR MAINTENANCE ASSESSMENTS

1. **Creation of the lien and personal obligation of assessments.** The Declarant for each Lot owned within the Properties, hereby covenants; and each Owner of any Lot by acceptance of a deed therefore, and each real estate contract purchaser by execution of such real estate contract, whether or not it shall be so expressed in such deed or real estate contract, is deemed to covenant and agree to pay to the Association:

(a) Annual assessments or charges; and

(b) Special assessments for capital improvements, road maintenance and legal fees, such assessments to be established and collected as hereinafter provided.

The annual and special assessments, together with interest, costs and reasonable attorneys fees, shall be a charge on the lot and shall be a continuing lien upon the lot against which each such assessment is made. Each such assessment, together with interest, costs, and reasonable attorneys fees, shall also be the personal obligation of the person or entity who was the owner of such property at the time when the assessment fell due. The personal obligation of or

delinquent assessments shall not pass to successors or assigns in title unless expressly assumed by them.

2. **Purpose of Assessment.** The assessments levied by the Association shall be used exclusively to promote the privacy, safety, and welfare of the residence and the properties.
3. **Maximum Annual Assessment.** The annual assessment shall be determined by the Board of Directors of the Association, but until January 1, 1990, the maximum annual assessment shall be \$25.00 per acre.
 - (a) From and after January 1, 1990, the maximum annual assessment may not be increased more than five percent (5%) above the maximum assessment for the previous year, unless such increase is approved by the affirmative vote of two-thirds of all votes cast by members in person or by proxy, at a meeting duly called for this purpose.
 - (b) The Board of Directors may fix the annual assessment at an amount not in excess of the maximum. The Board of Directors may elect to have the annual assessment paid in annual, semi-annual, quarterly or monthly installments.
4. **Special Assessments.** In addition to the annual assessments authorized above, the Association may levy in any assessment year a special assessment applicable to that year only for the purpose of defraying, in whole or in part, the following: (a) the cost of any construction, reconstruction, repair, or replacement of capital improvements, including the cost of road maintenance; and (b) the cost of any legal action, including legal fees, incurred by the Association while enforcing the provisions of this Declaration or protecting the property rights of the Association and/or its members, whether legal or equitable, against claims or infringements by property owners adjoining the Properties, provided that any such assessment shall have the assent of two-thirds (2/3) of the person or by proxy at a meeting duly called for this purpose. The Board of Directors may elect to have a special assessment paid in annual, semi-annual, quarterly, or monthly installments.
5. **Notice and Quorum for any Action Authorized Under Sections 3 & 4.** Written notice of any meeting of members of the Association which is required for the purpose of taking any action under Sections 3 or 4 shall be sent to all members, not less than 15 days or more than 30 days in advance of such meeting in the manner provided in the By-Laws of the Association. At the first meeting called, the presence of members or holders of proxies entitled to cast 60% of all votes shall constitute a quorum. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be 50% of all votes of the members of the Association. No such subsequent meeting shall be held more than 60 days following the preceding meeting.
6. **Uniform Rate of Assessment.** Both annual and special assessments must be fixed at a uniform rate and based upon the number of acres and tenths of acres within each Lot as they bear to the total number of acres in the Lots.
7. **Date of Commencement of Annual Assessments: Due Dates.** The annual assessments provided for herein shall commence as to all Lots on the first day of the month following the filing of the Articles of Incorporation of the Association. The first annual assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of

Directors of the Association shall fix the amount of the annual assessment against each Lot at least 30 days in advance of the annual assessment. Written notice of the annual assessment shall be established by the Board of Directors of the Association. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer of the Association setting forth whether the assessments on a specific Lot have been paid.

8. **Effect of Nonpayment of Assessments:** Remedies of the Association. Any assessment not paid within 30 days after the due date shall bear interest from the due date at the rate of ten percent (10%) per annum. The Board of Directors of the Association may do any or all of the following:
- (a) File a lien for any unpaid assessment by recording an affidavit of such fact in the office of the County Clerk of Sandoval County, New Mexico.
 - (b) Bring on action at law against the owner personally obligated to pay the same, or
 - (c) Foreclose the lien against the property.

In the event any of the foregoing actions are taken by the Association, then the Owner shall be obligated to pay to the Association reasonable attorneys fees and necessary costs incurred by the Association in enforcing its rights and taking such action. No owner may waive or otherwise escape liability for assessments provided for herein by abandonment of his Lot.

9. **Subordination of the Lien to Mortgages.** The lien of the assessments provided herein shall be subordinate to the lien of any first mortgage granted by an Owner of a Lot. Sale or transfer of any Lot shall not affect the assessment lien. NO such sale or transfer or foreclosure of first mortgage or proceeding in lieu thereof shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.
10. **Right of Access.** The Association or its agents may enter upon any Lot when necessary and in connection with any maintenance or construction for which the Association is responsible. Such entry shall be made with as little inconvenience to the owners as practicable, and any damage caused thereby shall be repaired by the Association.

Article IV

Architectural Control and Use Restrictions

1. Architectural Control

- a) No building, structure, fence, wall, or other substantial improvement, including but not limited to windmills, water tanks, permanent signs, antenna over ten (10) feet high, solar heating systems, outbuildings, or garages (collectively referred to as "Structure) shall be commenced, erected, or maintained upon the Properties nor shall any exterior addition to or change or alteration therein be made until the preliminary plans and specifications showing the nature, kind, shape, height, materials, and location of the structure shall have been

submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the ACC.

- i. In the event the ACC fails to approve or disapprove such design and location within fifteen (15) days after the said preliminary plans and specifications have been submitted to it, no further approval of said plans and specifications will be required and Article IV (1) (i) will be deemed to have been fully complied with where the preliminary plans and specifications have been placed on file.
- ii. Upon approval of preliminary plans by the ACC as provided for above, two complete sets of the final plans and specifications for said projects shall be submitted to the ACC and no structure shall be commenced, erected, or maintained upon the properties, nor shall any exterior addition to or change or alteration therein be made, unless and until the final plans and specifications therefore have been submitted to and approved in writing by the ACC or have been deemed approved under the provisions of this Article. Such plans and specifications must include foundation plans, floor plans, exterior elevations, plot plans showing dimensions of the house, access routes, and easements, location of driveway, fences, walls, septic system, power line distribution, wells and water meters, and temporary structures, together with proposed color scheme for roofs and exteriors, including materials for the same by description or submission of samples.
- iii. The ACC shall approve or disapprove final plans and specifications in writing within thirty (30) days from the submission thereof. One set of plans and specifications with the ACC's approval or disapproval endorsed thereon shall be returned to the owner and the other copy thereof shall be retained by the ACC.
- iv. In the event the ACC fails to approve or disapprove such design and location within thirty (30) days after said final plans and specifications have been submitted to it, no further approval of said final plans and specifications will be required and Article IV (1) (i) will be deemed to have been fully complied with and construction may begin without further review.
- v. In the event that substantial changes are made in said final plans and specifications following approval by the ACC, the revised plans and specifications must be resubmitted for approval. The approval process for said revised plans and specifications will be in accordance with Article IV (1) (i), (ii), (iii), and (iv).
- vi. The decision of the ACC shall be final, except that the decision of the ACC regarding the final plans and specifications may be appealed to the Board of Directors of the Association. The fee for an appeal of the ACC's decision to the Board of Directors of the Association shall be one hundred dollars (\$100.00) payable in advance to the Cedar Creek Homeowner's Association. The Board of Directors of the Association, upon receipt of the one hundred dollar (\$100.00) fee, shall consider the appeal no later than the next regular meeting of the Board of Directors. The decision of the ACC may be reversed by a majority vote of the Board of Directors of the Association.
- vii. Neither the ACC nor its individual members shall be responsible in any manner whatsoever for any defect in any approved final plans or specifications as originally

submitted or as revised by the review process, or for any work done pursuant to the original or revised plans and specifications.

- viii. Upon the initiation of a written complaint by any member or member of the ACC setting forth with a reasonable degree of particularity that a restricted use, such requirement found in Paragraph 2A – Use Restrictions, or any other restriction, covenant, or condition required under these Restrictive Covenants, a written notice with a copy of the complaint shall be mailed by regular mail to the member(s) alleged to be violating these covenants. The notice shall set forth the date, time, and place for a hearing before the ACC to determine the validity of the complaint.
- ix. After hearing all the evidence, using as a general guide the rules of the American Arbitration Association, a majority vote of the ACC shall rule upon the validity of the complaint, and shall set forth in writing the findings of the ACC, which shall be binding upon all members. The ACC may in its sole discretion find out that there is no violation, find that the violation is *de minimus* such that no corrective action need to be taken to correct that violation, or find that there is a violation of the Restrictive Covenants and require the violations be remedied and abated to the satisfaction of the ACC within a reasonable period of time, which time is to be determined in the sole discretion of the ACC. Thereafter the ACC shall give notice of a time, place, and date of a second hearing within which the violating member(s) must demonstrate to the reasonable discretion of the ACC that the violation has been so remedied and abated. Upon the member's failure to correct and abate the violations, the AAC may seek a declaratory judgment , seek specific endorsement of the Restrictive Covenants, or seek any other remedy it shall deem necessary under the New Mexico common law or statutory law to enforce its decision. The ACC shall file suit in its name and/or under the name of Cedar Creek Homeowner's Association, Inc., a New Mexico corporation.
- x. The ACC and the Cedar Creek Homeowner's Association, Inc., shall recover all costs of litigation, to include reasonable attorney's fees and all other costs and expenses necessary to support the ACC's decision. The Cedar Creek Homeowner's Association shall indemnify the individual ACC members for any personable liability arising out of any litigation set forth above, together with all costs and reasonable attorney's fees.

2. Use Restrictions

- a) All lots shall be known and described as residential lots. This property shall be used for residential purposes only, except as provided in paragraph (k) hereafter.
- b) Use and occupancy of the premises or structures upon the premises shall be subject to zoning, building, health, sewage disposal, and sanitation regulations of the State of New Mexico, and all governmental agencies having jurisdiction of such matters.
- c) Easements as depicted on the recorded plat of the Properties are hereby reserved unto public utility companies and to the Association for construction, installation, and maintenance of any and all utilities such as underground power, gas lines, drains, sewers, roads, water supply lines, underground telephone and telegraph or the like, which may be necessary or desirable. Such easements and rights of way shall include to a seven (7) foot width along all four sides

of each lot and/or along each side of every street, road, or highway. All drainage easements shall be kept free and clear of permanent structures, except as may be authorized by the ACC.

- d) No building shall be located on any lot nearer than seventy-five (75) feet to the center of any road running along the front or side lot lines. No building shall be located on any lot nearer than twenty-five (25) feet from any side lot line. No building shall be located on any lot nearer than one-hundred (100) feet to any building conforming to these covenants, situated on any adjacent lot, except with the written consent of the record owner of said adjacent lot, which shall be filed with the ACC. The developer retains the right to allow structures to be built within fifty (50) feet from the center line of the road on those lots where the amount of usable building space on the lot is limited. No structure of any kind shall be erected, placed, or allowed to remain within any portion of a lot which is reserved for an easement or right of way.
- e) The floor area of the main structure on any lot (except tract A-1), exclusive of porches and garages, shall be no less than fifteen hundred (1500) square feet. The maximum building height shall be nineteen (19) feet, exclusive of chimneys, measured from the natural ground at the highest point adjacent to the building, except that higher structures will be permitted with written consent of the record owners of all adjacent lots and all lots across the street, which consent shall be filed with the ACC.
- f) All buildings on all lots shall be of good architectural design of Western style, typical of New Mexico, including Pueblo, Territorial, Adobe, and Spanish styles. Plans for building must be submitted to the Cedar Creek ACC for written approval prior to commencing construction. Garages and out-buildings shall conform to the main building in both construction and design.
- g) Any building erected on any lot shall present a good appearance on all streets. It shall be the responsibility of owner lots, vacant or otherwise, to keep said lots, and all easement areas encompassed within exterior boundaries of said lot, clear of trash, rubbish, noxious materials, or abandoned vehicles.
- h) No temporary structures shall be stored, used, erected, or constructed on any lot. In no case shall any of the above mentioned structures be used as a residence, either temporarily or permanently. No mobile home or trailer home may be permitted either temporarily or permanently on any lot. In addition, no structure for which the installation of integral systems and finish work of both interior and exterior surfaces is completed off-site and on which the electrical meter must, by law, be mounted elsewhere than on the structure itself, and is of a type which may be readily removed from the site and relocated may be permitted either temporarily or permanently on any lot. No modular or other off-site manufactured home shall be permitted to be constructed, erected, or placed on any lot.
- i) All buildings are to be finished as to exterior within nine (9) months from start of construction.
- j) Exterior finishes of all residences, structures, and improvements shall be Southwestern/New Mexico architecture utilizing adobe and/or stucco, and shall be natural earth tone (brown) colors which shall not clash with homes in immediately adjoining lots.

- k) No business, industrial activity or commercial trade shall be carried on upon any residential lot, nor any activity done on any lot, which may be or become an annoyance or nuisance to the neighborhood. The foregoing provision shall not prevent the conduct of Arts and Crafts studios or Professional Offices that will not result in frequent multiple vehicular traffic, noise or other annoyance. No gas or oil drilling or mining gravel or quarry operation of any kind shall be permitted on any lot; and no billboards, motor vehicle storage, unsightly objects or nuisances shall be erected, placed, or permitted to remain on any lot, except as may be authorized by the ACC.
- l) Propane tanks and water storage tanks must conform to state regulations and shall be screened from view by fence or wall or located so as to be screened from the view of neighbors or passersby.
- m) Garbage cans, clotheslines, and other similar items shall be located in enclosed places so as to be screened from the view of neighbors or passersby. Garbage and waste shall be kept in a covered container and shall be stored and disposed of in a manner approved by the Environmental Improvement Division of the State of New Mexico.
- n) Outdoor privies are forbidden and each residence shall be provided with a method of sewage disposal meeting all requirements contained in the Federal Housing Administration Minimum Standards in effect at the time of Bernalillo County Health Department (for Bernalillo and Sandoval Counties). Garbage and waste shall be kept in a covered waterproof container and shall be stored and disposed of in a manner approved by the Bernalillo County Health Department. No trash, garbage, refuse or household rubbish shall be burned within Cedar Creek Subdivision. Without limiting the generality of the foregoing, the burning of trash in piles, barrels, drums, or other types of containers, or in firepits or fireplaces, is specifically forbidden. Periodic or seasonal burning of tumbleweeds or other nuisance plants is permitted provided that such burning is permitted by and complies with all applicable laws, regulations, and ordinances. Recreational use of firepits or exterior fireplaces in which only firewood is burned is permitted.
- o) No birds, poultry, or livestock, or other except recognized household pets which may be kept in reasonable numbers as pets for the pleasure and use of the occupants, but not for any commercial use or purpose, shall be kept on the premises, except as herein stated. In no case will a nuisance of any type be permitted. Owners will comply with all animal ordinances promulgated by Sandoval County, New Mexico. Boarding and breeding of horses will be permitted on residential lots up to two horses per lot. Any variance to the above paragraph (o) must be authorized by the ACC in writing.
- p) Riding or exercising horses, dogs, etc. shall be restricted to the owner's premises or to designated roads and trails. Proper restraint of animals shall be maintained at all times.
- q) Pens, corrals, stables and other animal enclosures shall not be located nearer than seventy-five (75) feet to the center line of any road and shall not be located nearer than twenty-five (25) feet from any side or rear lot line, except with the written consent of the record owner of the adjacent lot.

- r) No windmills or wind chargers will be erected on any lot without the written permission of the Cedar Creek ACC.
- s) Natural vegetation will be left undisturbed, except for access to property, clearing of building sites, or establishment of lawns and gardens within the immediate vicinity of the dwelling.
- t) No residential lot (except tract A-1) may be subdivided nor may a portion of a residential lot be sold unless the lot contains three (3) or more acres and any parcel resulting from the division contains at least 1.5 acres.
- u) No on-street parking shall be permitted and owners shall provide adequate parking for residents and guests. Storage and parking of commercial vehicles, equipment or machinery, motor homes, truck campers, trailers, etc. shall be provide in fenced or walled enclosures so they will be screened from the view of neighbors or passersby. Setback for parking spaces shall be the same as required elsewhere herein for the dwelling structure.
- v) No structure shall be erected, altered, placed or permitted to remain on any residential lot (except tract A-1) other than one (1) detached single family dwelling and related outbuildings, except this provision shall not prevent the combination of (2) adjoining lots for one such building.
- w) In the event that a structure is destroyed wholly or partially by fire or other casualty, said structure shall be properly rebuilt or repaired to conform to this Declaration or the remaining structure, including the foundation, and all debris shall be removed from the Lot within 90 days from the destruction, unless additional time is allowed by the ACC.
- x) The Declarant shall be entitled, with the approval of a majority vote of the members of the Association, to modify or amend the recorded plat of the properties provided that such amendment or replat shall not be in conflict with the development of the Properties contemplated herein.
- y) No chain link, barbed wire, welded wire, or welded pipe fence shall be permitted on any lot except as authorized by the ACC.
- z) The ACC and individual members of the ACC shall be indemnified by the Owners against all claims, damages, losses or expenses and liabilities, including attorneys' fees, reasonably incurred by or imposed upon them in connection with any proceeding to which they may be a party, or in which they may become involved by reason of their being or having been a member of the ACC, or any settlement thereof, including the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee; or the giving of or the failure to give directions or instructions by the indemnitee, or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property, whether or not they are a member of the ACC at the time such expenses are incurred, except in such cases wherein the member of the ACC is adjudged guilty of willful misfeasance, or malfeasance in the performance of his or her duties.

zz) All applications for approval to the ACC will use the attached Exhibit B application form accompanying their preliminary plans and specifications. Only completed and signed applications will be reviewed by the ACC.

zzz) Residents shall make every effort to diminish or eliminate ambient lighting emanating from their homes. Exterior lighting shall only utilize incandescent bulbs, and shall not utilize such other bulb types as fluorescent, mercury vapor, high-pressure sodium, or similar types of lighting. Exterior lights must be shielded so as to deflect light downward. Exterior lights must be installed on the exterior walls or porches of homes, or on walls attached to homes, unless such lights are used for the localized illumination of walkways, driveways or landscaping. No exterior lights shall be installed above the height of the parapet of the associated home, and no lights shall be installed in trees or on poles. Landscape or decorative lighting shall be permitted; however, landscape or decorative lighting shall not be designed for continuous operation (i.e., timers or other means shall be utilized to insure that decorative lighting is in operation for only a few hours each night), and landscape or decorative lighting must meet the shielding criteria described above.

Holiday lighting shall be permitted during the period commencing on Thanksgiving Day and ending on the following January 15th. Holiday lighting (such as Christmas lights, luminarias, or other lighted displays) must be temporary and shall be removed prior to and subsequent to the aforementioned period.

No exterior lighting shall be installed within the Cedar Creek Subdivision unless plans and specifications for such exterior lighting have first been submitted to and approved by the Architectural Control Committee in accordance with Article I, Section 1 of the Declaration. The foregoing shall not apply to holiday lighting that satisfies the requirements of the preceding paragraph. The Architectural Control Committee shall approve or disapprove all exterior lighting plans (except holiday lighting) as to design, intensity and use.

ARTICLE V GENERAL PROVISIONS

1. **Enforcement.** The Association, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the Association or any owner in enforcing any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.
2. **Severability.** Invalidation of any one of these covenants, conditions, or restrictions by judgment or a court order shall in no way affect any other provision which shall remain in full force and effect.
3. **Term.** The covenants, conditions, and restrictions of this Declaration shall run with and bind the land until January 1, 1999, after which time they shall be automatically extended for successive periods of 10 years except that this Declaration may be amended by an instrument signed by not less than a majority of the votes of the membership of the Association. Any such amendment must be recorded in the same manner as this Declaration.
4. **Annexation.**

- a) Additional lots may be added to the Properties and thereby made subject to this Declaration of Covenants, Conditions, and Restrictions upon the affirmative vote of two-thirds of members of the Association.
 - b) Additional lots may be added to the Properties and thereby made subject to this Declaration of Covenants, Conditions, and Restrictions without the consent of the members of the Association at any time on or before January 1, 1999, by the recordation of any Addendum to this Declaration which shall describe such additional lots; provided such additional lots are in near proximity to the Properties and provided further that the development plan of such additional lots is in accord with the general plans adopted in this Declaration of Covenants, Conditions, and Restrictions.
5. **Variance.** Upon a written request for a variance from a certain restricted use or requirements of the Restrictive Covenants, notice of the variance request, setting forth the time, place and date of the variance hearing before the ACC shall be sent to each member of the association. A restricted use may be varied only upon a showing of changed neighborhood or community conditions. A variance from a particular restriction, condition, or requirement set forth within a restricted use may be varied only upon a showing that the variance will not materially impair an adjacent landowner's use and enjoyment of his or her property. A majority of the ACC members shall determine in their sole discretion whether a variance is acceptable under the criteria set forth above, and the ACC determination shall be binding on the Association members.