



APPLEGARTH  
HOUT BAY

**CONSTITUTION**  
**of the**  
**APPLEGARTH ESTATE**  
**OWNERS' ASSOCIATION**

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## 1. DEFINITIONS

In these presents:

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

1.1.1 "Annual General Meeting" means an annual meeting held by the Members of the Applegarth Estate Owner's Association within 6 (six) months of the end of each financial year;

1.1.2 "Applegarth Estate" and "Estate" means the infrastructure, services, gate house, perimeter security fence, common areas and the Residential Erven and Dwellings developed on Erf 2407 Hout Bay;

1.1.3 "Architect" means COA Proprietary Limited and its successor/s as appointed from time to time by the Developer during the Development Period and the Association thereafter;

1.1.4 "Association" means the Applegarth Estate Owner's Association also referred to herein as the EOA;

1.1.5 "Auditors" means the Auditors of the Association;

1.1.6 "Builders' Code of Conduct" means the Builder's Code of Conduct annexed hereto as Annexure "D" as may be amended from time to time;

1.1.7 "Business Day" means weekdays other than Saturdays, Sundays and public holidays;

1.1.8 "By-Law" means City of Cape Town Municipal Planning By-Law, 2015;

1.1.9 "Chairperson" means the Chairperson of the Trustee Committee;

1.1.10 "City" means the City of Cape Town;

1.1.11 "Common Areas" means Erf 10366 – 10368, and 10370 Hout Bay as indicated on the General Plan attached hereto as Annexure "A";

1.1.12 "Constitution" means the Constitution of the Applegarth Estate Owners' Association;

1.1.13 "DEADP" means the provincial Department of Environmental Affairs and Development Planning;

1.1.14 "Design Manual" means the Design Manual annexed hereto as Annexure "B" as may be amended from time to time;

- 1.1.15 "Design Review Committee" means the committee referred to in clause 7 below which shall, together with the Architect, govern compliance with the Design Manual;
- 1.1.16 "Developer" means Applegarth Developments (Pty) Ltd, Registration No. 2015/267154/07 or its successor in title as the Developer of the Estate;
- 1.1.17 "Developer Trustee" means a Trustee of the Association who is nominated by the Developer;
- 1.1.18 "Development Management Scheme" has the meaning assigned thereto in the By-Law;
- 1.1.19 "Development Period" means the period starting on 31 May 2017 and ending when the last Residential Erf is transferred from the Seller, or an earlier date upon which the Developer notifies the Association in writing that the development period has ended;
- 1.1.20 "Dwelling Unit" means:
- 1.1.20.1 a Unit capable of being occupied by a separate family unit,
  - 1.1.20.2 a Unit which contains a kitchen separate from other Units on a Residential Erf;
  - 1.1.20.3 excludes a Section in a Sectional Title Scheme, staff quarters and a granny flat which for purposes of this document shall mean a Unit occupied by no more than one person that forms part of a family unit occupying another Unit on the same Residential Erf;
- 1.1.20 "ECO" / "ESO" and "EMP" / "OEMP" / "CEMP" means the Environmental Control / Site Officer and the Environmental Management Plan / Operational Environmental Management Plan / Construction Phase Environmental Management Plan details of which are available from the Developer during the Development Period and the Association thereafter;
- 1.1.21 "Gate house" means the gatehouse and associated structures to be constructed at the entrance to the Estate;
- 1.1.22 "General Meeting" means a meeting of all Members other than the Annual General Meeting;
- 1.1.23 "General Plan" means a plan of the layout of the Estate annexed hereto as Annexure "A";
- 1.1.24 "in writing" means written or printed and other modes of representing or producing words in a visible form for example to e-mail correspondence and text messages;
- 1.1.25 "Land" means Erf 2407 Hout Bay, depicted by and containing the plots shown on Annexure "A";

- 1.1.26 "Landscaping Design Principles and Guidelines" means the Landscaping Design Principles and Guidelines annexed hereto as Annexure "E" as may be amended from time to time;
- 1.1.27 "Landscaping Plan" means the Plan approved by the City in terms of which the Landscaping in the Estate shall be implemented by the Developer;
- 1.1.28 "Land Unit" shall bear the same meaning as "Residential Erf";
- 1.1.28 "Levies" as referred to in clause 8 below shall for purposes of the collection method referred to in clause 8.4 refer to all amounts collected by the Association including but not limited to normal levies, utility amounts and fines.
- 1.1.29 "Member(s)" means a member(s) of the Association;
- 1.1.30 "Members' Code of Conduct" means the Members' Code of Conduct annexed hereto as Annexure "C" as may be amended from time to time;
- 1.1.31 "month" means a calendar month;
- 1.1.32 "NEMA" means the National Environmental Management Act, Act 107 of 1998;
- 1.1.33 "Office" means the registered office of the Association;
- 1.1.34 "Owner" means the registered owner of any Residential Erf in the Estate or Sectional Title Section or separate Dwelling Unit;
- 1.1.35 "Resident" for purposes hereof means any person (excluding a Member as defined herein) residing with a Member in the Estate due to his relationship with the Member or as a tenant of the Member;
- 1.1.36 "Residential Erf" or "Residential Erven" means Erf 10336 – Erf 10365 Hout Bay;
- 1.1.37 "Resolution by the Members" means a decision taken by a majority of the Members present at an Annual General Meeting or at a Special General Meeting;
- 1.1.38 "Resolution by the Trustees" means a decision taken in accordance with the Powers and Functions of the Trustee Committee at a meeting of the Trustee Committee convened in terms of the Constitution;
- 1.1.39 "Services" means such services as may be provided to the Estate, including (but not limited to) electricity, road services, stormwater, water, sewage and waste removal;
- 1.1.40 "Sectional Title Section" means a Section as defined in the Sectional Title Schemes Management Act 8 of 2011;

1.1.40 "Special Resolution" means a resolution required for the removal of a Trustee from office in terms of clause 16.2.7 or the amendment of the Constitution in terms of clause 36.1;

1.1.41 "These presents" means this Constitution and the regulations and by-laws of the Association from time to time in force, and shall include all annexures thereto;

1.1.42 "Trustee" means one of the Trustee Committee;

1.1.43 "Trustee Committee" means the Committee of Trustees of the Association;

1.1.44 "year" means a calendar year.

1.2 Unless the context otherwise requires, any words importing the singular number only shall include the plural, and vice versa and words importing any one gender only shall include the other genders.

## **2. PREAMBLE AND CREATION OF THE ASSOCIATION**

The name of the Association is the Applegarth Estate Owners' Association, which is an Association to be established in accordance with the provisions of Section 61 of the City of Cape Town Municipal Planning By-Law 2015. The Association will be created upon transfer of the first Land Unit.

## **3. STATUS OF THE ASSOCIATION**

3.1 The Association will:

3.1.1 have legal personality and be capable of suing and being sued in its own name; and

3.1.2 not operate for profit, but for the benefit of the Members.

3.2 No Member shall have any right, title or interest in or to the funds or assets of the Association in his personal capacity, all of which shall vest in the Association.

## **4. OBJECT OF THE ASSOCIATION**

4.1 The sole object of the Association must be and remain to manage the collective interest common to all Members, which includes expenditure applicable in the common immovable property and the collection of levies for which the Members are liable and more specifically to: -

4.1.1 regulate the design and construction of and any alterations to all buildings, and/or structures erected or to be erected on the Residential Erven in accordance with the Design Manual (Annexure "B"), Builders' Code of Conduct (Annexure "C"), the Subdivision Plan (Annexure "A"), and any other plan, manual, policy, contract and the

like of any authority to which the Estate may be presently subject or which may hereafter be imposed thereon;

- 4.1.2 comment to the City on whether building plans comply with the approved Design Manual;
  - 4.1.3 promote, advance and protect the communal and group interests of the Members and to generally promote harmonious living within the Estate and compliance with the Members' Code of Conduct (Annexure "C");
  - 4.1.4 take transfer of the Common Areas and where applicable, pay rates and taxes for such areas to the City;
  - 4.1.5 maintain the Common Areas and to assume liability for the electrical distribution and street lightning infrastructure and amenities and improvements in the Estate;
  - 4.1.6 manage the landscaping of the Common Areas in line with the Landscaping Plan and the Landscaping Design Principles and Guidelines (Annexure "E");
  - 4.1.7 to regulate Dwelling Units and Sections contained in Sectional Title Schemes on Residential Erven by requiring that the Owners of such Sections become Members of the Association when a Certificate of Registered Sectional Title is issued to such owner.
- 4.2 The Design Manual may not introduce more restrictive development rules or land uses than provided for in the Development Management Scheme.

## 5. **FINANCIAL YEAR END**

The financial year end of the Association is the end of February of each year.

## 6. **MEMBERSHIP**

- 6.1 For the duration of the Development Period or for so long as the Developer owns any of the Residential Erven, the Developer shall be a Member of the Association.
- 6.2 Membership of the Association shall be limited to and compulsory for all Owners provided that: -
- 6.2.1 a person who is entitled to obtain a certificate of registered title to any such Residential Erf or Sectional Title Section shall be deemed to be the Registered Owner thereof;
  - 6.2.2 where any Owner comprises more than one person, all the Owners of that erf shall be deemed jointly and severally to be one Member;
  - 6.2.3 Membership in terms of clause 6.2 shall commence simultaneously with the transfer of the Residential Erf or Sectional Title Section into the name of the Owner;

- 6.2.4 When a Member ceases to be an Owner, or to be entitled to a Certificate of Registered Title, he shall cease to be a Member of the Association.
- 6.3 An Owner may not resign from membership of the Association.
- 6.4 The Trustee Committee may provide for the issue of a membership certificate, which certificate shall be in such form as may be prescribed by the Trustee Committee.
- 6.5 The rights and obligations of a Member shall not be transferable and every Member shall:
- 6.5.1 to the best of his ability further the objects and interests of the Association; and
- 6.5.2 abide by the Constitution.
- 6.6 A Member shall not let his Residential Erf or Sectional Title Section without obtaining the written approval of the Association in terms of the Members' Code of Conduct.
- 6.7 A Member shall be liable for the acts or omissions of all persons occupying his Residential Erf or Sectional Title Section, whether lawfully or unlawfully, including but not limited to tenants, guests, employees, invitees, contractors and agents.
- 6.8 A Member shall not be entitled to alienate or transfer his Residential Erf or Sectional Title Section or to sell any interest in a juristic person that owns such Residential Erf or Sectional Title Section, which sale effectively constitutes a transfer of the property, unless it is a condition of the alienation and transfer that: –
- 6.8.1 the registration of transfer of such Residential Erf or Sectional Title Section into the name of the transferee constitutes the transferee as a Member of the Association;
- 6.8.2 The Member obtains a clearance certificate from the Association allowing him to transfer his residential erf or Sectional Title Section which shall be given provided:
- 6.8.2.1 the transferee of such Residential Erf or Sectional Title Section agrees to accept and abide by the Constitution of the Association;
- 6.8.2.2 the Member pays 1 (one) percent of the selling price of the Residential Erf or Sectional Title Section, including improvements thereon, or the selling price of any interest in a juristic person that owns such Residential Erf or Sectional Title Section and any improvements thereon, which sale effectively constitutes a transfer of the property, is paid to the Association upon registration of transfer;
- 6.8.2.3 all amounts owing by the Member to the Association have been paid or satisfactorily secured,
- 6.8.2.4 all obligations of the Member in terms of the Constitution have been complied with in full.



- 6.9 Any Power of Attorney to pass transfer shall include the following condition, which shall be carried forward into the relevant title deeds:

Subject to the following condition imposed by the City of Cape Town in terms of Section 61 of the City of Cape Town Municipal Planning By-Law (2015) when approving the subdivision of the Land forming Applegarth Estate:

*“The subject property may not be alienated without the prior written consent of the Applegarth Estate Owners’ Association of which the transferee and his successors in title shall become a member.”*

## 7. APPROVAL FOR PROPOSED WORK

- 7.1 The Design Review Committee shall be established and maintained by the Developer during the Development Period and by the Trustee Committee thereafter, for the purposes of commenting to the local authority on whether the erection of improvements on the Estate is in accordance with the Design Manual.
- 7.2 The Design Review Committee shall comprise of not less than 3 persons including the Architect.
- 7.3 A Member desiring to erect any structures of any nature whatsoever, or to make any alterations, modifications or renovations to such structures ("the proposed work") on his Residential Erf or Sectional Title Section shall submit a full set of proposed building and landscaping plans (if applicable), which indicate both construction and design details, to the Design Review Committee in terms of the procedure in the Design Manual for written comments to the City, prior to submission of such plans to the City for approval.
- 7.4 The Design Review Committee shall only promote the proposed work for approval by the City:
- 7.4.1 if the proposed work complies with the requirements set out in the Design Manual; and
  - 7.4.2 if the Member has made payment of any costs which may be imposed by the Association in this approval, including the costs incurred by the Design Review Committee;
  - 7.4.3 in the event that the Member intends to open a Sectional Title Register on the Residential Erf, the following requirements must have been met:
    - 7.4.3.1 Such Members agrees to incorporate the conduct rules of the Association in the conduct rules of the Sectional Title Scheme as well as a clause that same cannot be amended without the consent of the Association;
    - 7.4.3.2 Such Member agrees to include a condition in the Certificate of Registered Sectional Title that the Section may not be transferred without the consent of the Association, which consent may not be unreasonably withheld;

7.4.3.3 Such Member agreeing that each recipient of a Certificate of Registered Sectional Title will abide by the terms of this Constitution, and any amendments thereto, and to include a clause to that effect in any deed of alienation of such Section or shares in the entity that owns such Section.

7.5 Only after obtaining the written comments from the Design Review Committee for the proposed building and landscaping plans (if applicable), the Member shall submit the relevant plans to the City for approval. Notwithstanding the above, it is acknowledged that the City is the sole authority for the approval of Building Plans in terms of the National Building Regulations and Building Standards Act, 1977.

7.6 After obtaining the approval of the City for the proposed work, the Member shall comply with all conditions, standards and requirements imposed by the City and the Association, including but not limited to, the Builders' Code of Conduct (Annexure "C").

7.7 The provisions of sub-clause 7.3 shall not apply to the Developer provided that the Developer shall comply with the Design Manual and any conditions imposed by the City.

## **8. LEVIES**

8.1 The Members shall be jointly liable for expenditure incurred by the Association.

8.2 The Trustee Committee shall from time to time, impose levies upon the Members for the purpose of meeting all the expenses incurred by the Association, or which the Trustee Committee reasonably anticipates the Association will incur in respect of facilities and services in connection with the Estate and the payment of all expenses necessarily or reasonably incurred in connection with the management of the Association and its affairs.

8.3 In calculating levies, the Trustee Committee shall take into account income, if any, earned by the Association.

8.4 A Member shall be liable to pay levies using the method prescribed by the Managing Agent appointed by the Association, with effect from the date upon which he becomes a Member, pro-rated where applicable or on the date that the City of Cape Town issues an occupation certificate for the occupation of a further dwelling Unit.

8.5 The Trustee Committee shall estimate the amount which shall be required by the Association to meet the expenses during each year, together with such estimated deficiency, if any, as shall result from the preceding year, and shall impose a levy upon the Members equal to or as near as is reasonably practical to such estimated amount. The Trustee Committee must include in such levies an amount to be held in reserve to meet anticipated future expenditure not of an annual nature. Every such levy shall be payable by equal monthly instalments due in advance on the first day of each and every succeeding month of such year and shall be paid by way of a debit order in favour of the Association or by any other method as determined by the Trustee Committee from time to time.

- 8.6 The Trustee Committee, may from time to time, impose special levies upon the Members in respect of all such expenses as are mentioned in clause 8.2, and such levies may be made in the sum or by such instalments and at such time or times as the Trustee Committee shall think fit.
- 8.7 Any amount due by a Member by way of a levy shall be a debt due by him to the Association. The obligation of a Member to pay a levy shall cease upon his ceasing to be Member of the Association, without prejudice to the Association's right to recover arrear levies. No levies paid by a Member shall under any circumstances be repayable by the Association upon his ceasing to be a Member. A Member's successor in title to a Residential Erf or Sectional Title Section shall be liable as from the date upon which he becomes a Member pursuant to the transfer of that erf, to pay the levy attributable to that erf.
- 8.8 Subject to clause 8.9, the total levy payable shall be borne jointly by the Members in equal shares.
- 8.9 Where there is more than one Dwelling Unit on a Residential Erf, regardless of whether such Residential Erf has been sectionalised or not, the Member shall be liable for a levy that shall constitute two thirds of the levy raised for a Residential Erf for each Dwelling Unit;
- 8.10 The Developer shall not be required to pay levies as contemplated in clause 8.8 above for the duration of the Development Period. The Developer shall, however, for the duration of the Development Period, pay the difference between the actual expenses incurred by the Association (as referred to in clause 8.1 above) but excluding any provisions for a reserve fund, and the aggregate of the levies payable jointly by the Members who are registered owners of Residential Erven each month from time to time. For the avoidance of any doubt, it is recorded that in determining the aggregate of individual levies payable by Members who are registered owners from time to time for the purposes of this clause, the aggregate shall include all levies payable by such Members, irrespective of whether or not such levies have actually been paid by those Members. In the event that there is a dispute as to the actual costs incurred by the Association at any time, the matter shall be referred to the Developer's auditor who, acting as an expert and not as an arbitrator, shall issue a certificate which shall be final and binding on the parties and who shall be entitled for this purpose to have access to all the records and books of account of the Association as and when required. The costs of the said auditor shall be borne by the Association.

- 8.11 Penalty levies as determined by the Trustee Committee are payable to the Association if a dwelling on the property is not completed within 3 (three) years from date of transfer of the property from the Developer on the basis that construction of the dwelling should commence within 2 (two) years from date of transfer of the property into the name of the Purchaser, and be completed within 1 (one) year from date of commencement of such construction process, which shall be undertaken on a continuous basis, unless an extended time period is approved by the Design Review Committee due to the complexity of the construction of the dwelling.
- 8.12 No Member shall be entitled to any of the privileges of membership unless he has paid all levies and any other amounts due by him to the Association.

### **8.13 THE LEVY STABILISATION FUND**

- 8.13.1 This Association must establish and maintain a levy stabilisation fund.
- 8.13.2 This levy stabilisation fund must be used and administered by the Trustees Committee in the manner contemplated in all applicable provisions of this Constitution.
- 8.13.3 The Association and the Trustee Committee must ensure that the levy stabilisation fund is used only to defray expenditure on the Applegarth Estate;
- 8.13.4 Every Member must pay into the levy stabilisation fund the contribution referred to in clause 6.8.2.3 of the Constitution. Although every Member will become liable for that contribution on admission as a Member, that contribution will become due and payable only when the Member sells the Residential Erf or Sectional Title Section in question.

## **9. DEALING WITH THE COMMON AREAS**

- 9.1 Neither the whole nor any portion of the Common Areas shall be: –
- 9.1.1 sold, let, alienated, otherwise disposed of, subdivided or transferred; or
- 9.1.2 mortgaged; or
- 9.1.3 subjected to any rights of use, occupation or servitude other than those contained in the present existing title deeds of the subdivided erven constituting the Land, or to be imposed in the title deed(s) of the Common Areas as required by any relevant authority or as contained in this Constitution, whether registered in a Deeds Registry or not.
- 9.2 The condition referred to in clause 9.1 above shall be carried forward into the title deed(s) of the Common Areas.

- 9.3 The Association shall take transfer of the Common Areas simultaneously with transfer of the first residential erf.
- 9.4 The Body Corporate of any Sectional Title Scheme in the Estate shall have the functions and powers as set out in the Sectional Titles Schemes Management Act 8 of 2011.
- 9.5 Each Body Corporate shall establish and maintain its own administrative fund to cover the estimated annual operating costs for (inter alia) the repair, maintenance, management and administration of the common property in the scheme, payment of rates and taxes and other local municipality charges, for the payment of insurance premiums relating to the buildings or the land and for the discharge of any duty or fulfilment of any other obligation of the body corporate.
- 9.6 Each Body Corporate shall establish and maintain its own reserve fund in such amounts as are reasonably sufficient to cover the costs of future maintenance and repair of common property in the scheme.
- 9.7 Each Body Corporate must prepare its own applicable maintenance, repair and replacement plan for the buildings and common property.
- 9.8 Subject to clause 9.5 above, each Body Corporate must be managed by Management Rules and Conduct Rules as required by the Sectional Titles Schemes Management Act, which rules shall be approved by the HOA.
- 9.9 Should there be less than 4 sections in the scheme, all owners/members will be trustees of the body corporate. If there are more than 4 sections, the owners must from time to time elect no less than 3 trustees.
- 9.10 Each Body Corporate in the Estate shall be obliged to appoint a Management Agent Accredited by the Association, to perform the functions and exercise the powers that would otherwise be performed and exercised by the trustees, as are provided for in section 28 of the Prescribed Management Rules in Annexure A to the Regulations issued in terms of the Sectional Titles Schemes Management Act.
- 9.11 It is the duty of the Management Agent to ensure that each Body Corporate complies with its duties and perform the functions assigned to it in terms of the Sectional Titles Schemes Management Act.
- 9.12 The Management Agent is entitled to a Management fee in respect of the management of each and every separate Body Corporate.
- 9.13 Each Body Corporate shall enter into a separate Management Agreement with the Management Agent chosen by the Association.

- 9.14 It is envisaged that the Association appoints a designated Trustee of the Association to coordinate and oversee the compliance with the sectional title legislation by the body corporates in the scheme.

## 10. SERVICES

With effect from the date upon which the Association is created in terms of clause 2, the Association shall be obliged to provide the Services to the extent that the Services are not provided by the City. Provision of the Services shall include the maintenance and repair of any infrastructure required to provide the Services.

## 11. SECURITY AND ACCESS TO THE ESTATE

The Association shall implement and maintain adequate security measures and systems for controlled access to the Estate, including but not limited to: -

- 11.1 provision of guarding services at the entrance to the Estate on a continuous basis;
- 11.2 maintaining and controlling security booms and security gates at the entrance to the Estate; and
- 11.3 maintaining the security fence along the perimeter of the Estate.

## 12. CONTRACTS AND REGULATIONS

- 12.1 The Trustee Committee may from time to time: –

12.1.1 make rules and regulations (and vary and/or amend any existing rules and regulations) governing, inter alia: –

- 12.1.1.1 the Members' rights of use, occupation and enjoyment of the Common Areas;
- 12.1.1.2 the external appearance of and the maintenance of the Common Areas and the building or other improvements erected thereon;
- 12.1.1.3 the erection of any buildings and/or structures of any nature whatsoever, and the alteration, modification and renovation to such buildings and/or structures on Residential Erven, subject always to the Design Manual and the requirements of the City;
- 12.1.1.4 the conduct of Members in terms of the Member's Code of Conduct.

12.1.2 impose fines set out in Annexure "C" hereto against Members who are in default of any of their obligations in terms of the Constitution and Annexures thereto, including the terms of payment of fines. Proposal for change to such fines their amount, and for which specific default they are applicable are to be resolved at an Annual General Meeting. Proceeds of such fines are to be held in the levy stabilisation fund for the purpose set out in 8.12 above.

- 12.2 It is recorded that the Association shall be deemed to have adopted the Design Manual (Annexure "B"), The Builders' Code of Conduct (Annexure "C"), the Members' Code of Conduct (Annexure "D") and the Landscape Design Principles and Guidelines (Annexure "E"), upon formation of the Association.
- 12.3 Each Member undertakes to the Association that he shall comply with:
- 12.3.1 the provisions of the Constitution;
  - 12.3.2 any regulations made in terms of sub-clause 12.1.1;
  - 12.3.3 any agreements referred to in sub-clause 12.1.2 insofar as those agreements either directly or indirectly impose obligations on him.

### 13. **BREACH**

#### 13.1 Should any Member: –

- 13.1.1 fail to pay on due date any amount due by that Member in terms of this Constitution or any regulation made thereunder and remain in default for more than seven (7) days after being notified in writing to do so by the Trustees; or
- 13.1.2 commit any other breach of the provisions of this Constitution or any regulation made thereunder and fail to commence remedying that breach within a period of seven (7) days after the receipt of written notice to that effect by the Trustees and complete the remedying of such breach within a reasonable time; then and in either such event, the Trustees shall be entitled on behalf of the Association, without prejudice to any other rights or remedies which the Trustees or the Association or any other Member may have in law, including the right to claim damages:–
  - 13.1.2.1 to institute legal proceedings on behalf of the Association against such Member for payment of such overdue amount or for performance of his obligations in terms of this Constitution or any regulation made thereunder, as the case may be; or
  - 13.1.2.2 to take steps to remedy such breach or to rectify any consequential damages or harm caused and immediately recover the outstanding amount together with any expenses so incurred with interest as referred to below and costs on the scale as between attorney and own client incurred by the Trustees or the Association in so doing from such Member.

13.2 Should the Trustees institute any legal proceedings against any Member pursuant to a breach by that Member of the Constitution or any regulation made thereunder, then without prejudice to any other rights which the Trustees or the Association or any other Member may have in law, the Trustees shall be entitled to recover from such Member all legal costs incurred by the Trustees and the Association, including attorney/client charges reckoned on the non-litigious tariff recommended by the Law Society of the Cape of Good Hope (or its successors), tracing fees and collection commission.

13.3 Without prejudice to all or any of the rights granted to the Trustees of the Association under this Constitution, should any Member fail to pay any amount due by that Member on due date, then such Member shall pay interest thereon at 2% (two percent) above the publicly quoted prime rate of interest charged by the Association's bankers from time to time calculated from the due date of payment until the actual date of payment of such amount or be liable for a fine in an amount determined by the Trustees.

#### 14. **CESSATION OF MEMBERSHIP**

No Member ceasing to be a Member of the Association for any reason, nor any such Member's executor, curators, trustees or liquidators, shall have any claim upon or interest in the funds or other property of the Association, but this clause shall be without prejudice to the rights of the Association to claim from such Member or his estate any arrears of levies or other sums due from him to the Association at the time of his so ceasing to be a Member.

#### 15. **TRUSTEE COMMITTEE**

15.1 The Association shall have a Committee of Trustees which shall consist of no fewer than three (3) and no more than seven (7) Members.

15.2 A Trustee nominated by the Developer need not be a Member.

#### 16. **APPOINTMENT, REMOVAL AND ROTATION OF TRUSTEES**

16.1 The Developer shall nominate the first Trustees of the Association at the First General Meeting and any other Trustees nominated from time to time during the Development Period. Save as set forth in clause 16.2 below, each Trustee shall continue to hold office until the second Annual General Meeting following his appointment or election, at which meeting such Trustee shall be deemed to have resigned from office as such, and shall be eligible for re-election to the Trustee Committee at such meeting, subject however to the Developer's rights as set out in this clause.

16.2 A Trustee shall be deemed to have vacated his office as such upon: -

16.2.1 his estate being sequestrated, whether provisionally or finally, or his surrendering his estate;



- 16.2.2 his making any arrangement or compromise with his creditors;
  - 16.2.3 his conviction for any offence involving dishonesty;
  - 16.2.4 his becoming of unsound mind or being found lunatic;
  - 16.2.5 his resignation from such office in writing delivered to the Secretary of the Association;
  - 16.2.6 his death;
  - 16.2.7 once the Development Period has come to an end, his being removed from office by a Special Resolution of the Members;
  - 16.2.8 his alienating his Registered Erf in the event that he was a Registered Owner; provided that anything done in the capacity of a Trustee in good faith, by a person who ceases to be a Trustee, shall be valid until the fact that he is no longer a Trustee has been recorded in the Minute Book of the Trustee Committee.
- 16.3 Upon any vacancy occurring on the Trustee Committee prior to the next Annual General Meeting, the vacancy in question shall be filled by a person nominated by those remaining for the time being of the Trustee Committee, subject however to the rights of the Developer as set out in clause 16.1 above.
17. **OFFICE OF TRUSTEES**
- 17.1 Subject to clause 17.2, the Trustee Committee shall appoint from their own number, a Chairperson and Vice-Chairperson.
- 17.2 The Chairperson and Vice-Chairperson shall, for the duration of the Development Period, be appointed by the Developer. The Chairperson and Vice-Chairperson shall hold their respective offices until the First Annual General Meeting of the Association following the date of their appointment, provided that any such office shall ipso facto be vacated by the Trustee holding such office upon his ceasing to be a Trustee for any reason.
- 17.3 Subject to the rights of the Developer as set out in clause 17.2 above, within seven (7) days of the holding of such Annual General Meeting, the Trustee Committee shall meet and shall elect from its own number the Chairperson and Vice-Chairperson, who shall hold their respective offices until the Annual General Meeting held next after their appointment, provided that the office of the Chairperson or Vice-Chairperson shall ipso facto be vacated by the Trustee holding such office upon his ceasing to be a Trustee for any reason. No one Trustee shall be appointed to more than one of the aforesaid offices at any time. In the event of any vacancy occurring in either of the aforesaid offices at any time, the Trustee Committee shall immediately meet to appoint one of their number as a replacement in such office, subject however to the rights of the Developer as set out in clause 17.2 above.

17.4 Save as otherwise provided in these presents, the Chairperson shall preside at all meetings of the Trustee Committee, and all General Meetings of Members, and shall perform all duties incidental to the office of Chairperson and such other duties as may be prescribed by the Trustee Committee or of Members, and shall allow or refuse to permit invitees to speak at any such meetings, provided however, that any such invitees shall not be entitled to vote at any such meetings.

17.5 The Vice-Chairperson shall assume the powers and duties of the Chairperson in the absence of the Chairperson, or his inability or refusal to act as Chairperson, and shall perform such other duties as may from time to time be assigned to him by the Chairperson or the Trustee Committee.

17.6 Trustees shall be entitled to be repaid all reasonable and bona fide expenses incurred by them respectively in or about the performance of their duties as Trustees and/or Chairperson or Vice-Chairperson, as the case may be, but save as aforesaid, shall not be entitled to any other remuneration fees or salary in respect of the performance of such duties.

## 18. **FUNCTIONS AND POWERS OF THE TRUSTEE COMMITTEE**

18.1 Subject to the express provisions of this Constitution, including but not limited to this clause 18, the Trustee Committee shall manage and control the business and affairs of the Association, shall have full powers in the management and direction of such business and affairs and, save as may be expressly provided in these presents, may exercise all such powers of the Association, subject nevertheless to such regulation as may be prescribed by the Association in General Meeting from time to time, provided that no regulation made by the Association in General Meeting shall invalidate any prior act of the Trustee Committee which would have been valid if such regulation had not been made.

18.2 The Trustee Committee shall have the right to vary, cancel or modify any of its decisions and resolutions from time to time.

18.3 The Trustee Committee shall have the right to form sub-committees and co-opt onto the Trustee Committee any Member or Members chosen by it, provided that, for the duration of the Development Period, all Trustees shall be nominated by the Developer. A co-opted Trustee shall enjoy all the rights and be subject to all the obligations of the Trustees.

18.4 The Trustee Committee may, should it so decide, investigate any suspected or alleged breach by any Member or Trustee of these presents, in such reasonable manner as it shall decide from time to time.

18.5 The Trustee Committee may make regulations not inconsistent with this Constitution, or any regulations prescribed in the Association in General Meeting:

18.5.1 as to disputes generally;

- 18.5.2 for the furtherance and promotion of any of the objects of the Association;
- 18.5.3 for the better management of the affairs of the Association;
- 18.5.4 for the advancement of the interests of Members;
- 18.5.5 for the conduct of Trustee Committee meetings and General Meetings;
- 18.5.6 to assist it in administering and governing the Association's activities and generally shall be entitled to cancel, vary or modify any of the same from time to time.

**19. PROCEEDINGS OF THE TRUSTEE COMMITTEE**

- 19.1 The Trustee Committee may meet for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, subject to any provisions of these presents.
- 19.2 Meetings of the Trustee Committee shall be held at least once every quarter, provided that if all the Trustees shall in writing have waived the above requirement in respect of a particular quarter, then no meeting of the Trustee Committee need be held for that quarter.
- 19.3 The quorum necessary for the holding of any meeting of the Trustee Committee shall be three (3) Trustees.
- 19.4 The Chairperson shall preside as such at all meetings of the Trustee Committee, provided that should at any meeting of the Trustee Committee the Chairperson not be present within fifteen (15) minutes after the time appointed for the holding thereof, then the Vice-Chairperson shall act as Chairperson at such meeting, provided further that should the Vice-Chairperson also not be present within fifteen (15) minutes of the time appointed for the holding of such meeting, those present of the Trustees shall vote to appoint a Chairperson for the meeting provided that, for the duration of the Development Period, such Chairperson shall be appointed from the Trustees nominated by the Developer, and that Chairperson so appointed shall thereupon exercise all the powers and duties of the Chairperson in relation to such meeting.
- 19.5 Minutes of every Trustee Committee meeting shall be taken, although not necessarily verbatim, which minutes shall be reduced to writing without undue delay after the meeting will have closed and shall then be certified correct by the Chairperson of the meeting. All minutes of Trustee Committee meetings shall after certification as aforesaid be placed in a Trustee Committee Minute Book to be kept in accordance mutatis mutandis, with the provisions of the law relating to the keeping of minutes of meetings of directors of companies. The Trustee Committee Minute Book shall be open for inspection at all reasonable times by a Trustee, the Auditors, Members and the City.

- 19.6 All competent resolutions recorded in the minutes of any Trustee Committee meeting shall be valid and of full force and effect as therein recorded, with effect from the passing of such resolutions, and until varied or rescinded, but no resolution or purported resolution of the Trustee Committee shall be of any force or effect, or shall be binding upon the Members or any of the Trustees unless such resolution is competent within the powers of the Trustee Committee.
- 19.7 Save as otherwise provided in these presents, the proceedings at any Trustee Committee meeting shall be conducted in such reasonable manner and form as the Chairperson of the meeting shall reasonably decide.
- 19.8 A resolution signed by all the Trustees shall be valid in all respects as if it had been duly passed at a meeting of the Trustee Committee duly convened.

20. **FIRST AND FURTHER GENERAL MEETINGS AND ANNUAL GENERAL MEETING**

- 20.1 The first General Meeting of the Association shall be called by the Developer within 60 (sixty) days of the transfer of 60% of the residential erven arising from the subdivision or within 2 (two) years of the transfer of the first residential erf, whichever is earlier. The City shall be notified and provided with a copy of the minutes of the meeting within 60 (sixty) days of the meeting.
- 20.2 In addition, a first Annual General Meeting must be called by the Developer within 12 (twelve) months from the date of the first transfer of an erf.
- 20.3 The Association shall hold an Annual General Meeting within 6 (six) months after the end of each financial year.
- 20.4 Such Annual General Meetings shall be held at such time and place, subject to the foregoing provisions, as the Trustee Committee shall decide from time to time.
- 20.5 The Trustee Committee, may, whenever they think fit, convene a General Meeting.

**21. NOTICE OF MEETINGS**

21.1 An Annual General Meeting or a General Meeting called by the Trustee Committee or by the Trustee Committee at the behest of no less than 5 (five) Members, shall be called with at least twenty one (21) days' notice in writing. The notice shall be exclusive of the day on which it is given, and shall unless held electronically, specify the place, the day and the hour of the meeting and, in the case of special business, in addition to any other requirements contained in these presents, the general nature of that business the terms and effect of any resolution and the reasons for it shall be given in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the Trustee Committee to such persons as are under these presents entitled to receive such notices from the Association. Notwithstanding that it may be called by shorter notice than specified in these presents, it will be deemed to have been duly called if it is so agreed by Members at such General Meeting:

21.1.1 in the case of an Annual General Meeting, by a vote by all the Members; and

21.1.2 in the case of a General Meeting or an Annual General Meeting called for the passing of a Special Resolution, by the Developer (for the duration of the Development Period), and by a majority in number of the, being a majority together holding not less than 75% (seventy five percent) of the total number of votes (as provided for in clause 21.1 below) of all Members.

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

**22. VENUE OF MEETINGS**

Unless held electronically, General Meetings of the Association shall take place at such place/s as shall be determined by the Trustee Committee from time to time.

**23. QUORUM**

23.1 No business shall be transacted at any General Meeting unless a quorum is present when the meeting proceeds to business. The quorum necessary for the holding of any General Meeting shall be such of the Members entitled to vote representing 25% of the total votes of all Members of the Association entitled to vote, save that no fewer than three (3) Members must be personally or electronically present, and provided further that, for the duration of the Development Period, the Developer, in addition to those Members personally present is present in person or by proxy.

23.2 If within half an hour from the time appointed for the holding of a General Meeting a quorum is not present, the meeting, if convened on the requisition of Members, shall be dissolved, in any other case it shall stand adjourned to the same day in the next week, at the same place and time, or at such other place as the Chairperson of the meeting shall appoint, and if at such adjourned meeting a quorum is not present within half an hour from the time appointed for holding the meeting, the Members present shall be a quorum, provided that, for the duration of the Development Period, the Developer is present electronically, in person or by proxy.

23.3 A Member cannot dispute any quorums of previous General Meetings at any subsequent General Meeting.

#### 24. **AGENDA AT MEETINGS**

24.1 Agenda for the first General Meeting:

24.1.1 attendance;

24.1.2 membership;

24.1.3 adoption of Constitution duly approved in terms of the By-Law;

24.1.4 confirmation of Trustees appointed by a resolution of the Members;

24.1.5 proposed budget; and

24.1.6 appointment of Estate Manager.

24.2 In addition to any other matters required by these presents to be dealt with at an Annual General Meeting, at least the following matters shall be dealt with at every Annual General Meeting:

24.2.1 attendance;

24.2.2 approval of the minutes of the previous Annual General and General Meetings;

24.2.3 consideration of the Chairperson's Report;

24.2.4 election of Trustees;

24.2.5 the consideration and fixing of the remuneration of the Auditors and any other service providers for the following financial year.

24.2.6 subject to clause 31.2 below, the consideration of the Annual Financial Statements of the Association and approval of the levies.

**25. PROCEDURE AT GENERAL MEETINGS**

- 25.1 The Chairperson shall preside as such at all General Meetings, provided that should he not be present electronically or in person within 15 (fifteen) minutes after the time appointed for the holding thereof, then the Vice- Chairperson, shall act as Chairperson at such meeting, provided further that should the Vice- Chairperson also not be present electronically or in person within 15 (fifteen) minutes of the time appointed for the holding of such meeting, then the Members present at such meeting entitled to vote, shall vote to appoint a Chairperson for the meeting, who shall thereupon exercise all the powers and duties of the Chairperson in relation to such meeting. For the duration of the Development Period, the Chairperson shall be a Trustee who is nominated by the Developer.
- 25.2 The Chairperson may, with the consent of any General Meeting at which a quorum is present (and if so directed by the meeting) adjourn a meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place. Whenever a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given in the same manner as of an original meeting. Save as aforesaid, the Members shall not be entitled to any notice of adjournment, or of the business to be transacted at an adjourned meeting.
- 25.3 Except as otherwise set forth in these presents, all General Meetings shall be conducted in accordance with generally accepted meeting's practice.
- 25.4 Such meeting can in the discretion of the Trustees take place electronically.

**26. PROXIES**

A Member may be represented at a General Meeting by a proxy, who need not be a Member of the Association. The Proxy shall be entitled to vote at a General Meeting on behalf of that Member. The proxy shall be in writing signed by the Member concerned or his duly authorised agent.

**27. VOTING**

- 27.1 Subject to the provisions of clause 27.6 below, at every General Meeting every Member present electronically or in person or by proxy and entitled to vote shall have the number of votes for each Residential Erf or Sectional Title Section registered in his name, (except for in the case where there is an additional Dwelling Unit on such Residential Erf that has not been sectionalised in which event that Member shall have 1 vote for each Dwelling Unit for which he/she pays an additional levy) as set out below, provided that if a Residential Erf or Sectional Title Section is registered in more than one person's name, then they shall jointly have one vote.

- 27.2 Save as expressly provided for in these presents, no person other than a Member, and who shall have paid every levy and other sum which shall be due and payable to the Association in respect of or arising out of his membership 24 hours before the meeting, and who is not under suspension, shall be entitled to vote on any question, either electronically, personally or by proxy, at any General Meeting or Annual General Meetings.
- 27.3 At any General Meeting or Annual General Meeting, a resolution put to the vote of the meeting shall be decided on a show of hands or by any method as provided for by an electronic platform.
- 27.4 Unless the Trustees, for good reason declare a secret ballot, voting at a General Meeting on any matter shall be decided on a show of hands or by any method as provided for by an electronic platform by a majority of the Members present electronically, in person or by proxy, subject however to the Developer's rights in clauses 23.1 and 23.2.
- 27.5 Every resolution and every amendment of a resolution proposed for adoption by a General Meeting shall be seconded at the meeting and, if not seconded, shall be deemed not to have been proposed.
- 27.6 An ordinary resolution (that is a resolution other than a Special Resolution) or the amendment of an ordinary resolution, shall be carried on a simple majority of all the votes cast thereon as provided for in clause 27.1 above, for the duration of the Development Period, no vote shall be carried unless the Developer or its proxy votes in favour of any resolution including a Special Resolution. An abstention shall not be counted as a vote for or against a resolution. In the case of an equality of votes, the Chairperson of the General Meeting shall be entitled to a casting vote in addition to its deliberative vote.
- 27.7 Unless any Member present electronically, in person or by proxy at a General Meeting shall before closure of the meeting have objected to any declaration made by the Chairperson of the meeting as to the result of any voting at the meeting, or to the propriety or validity of the procedure at such meeting, such declaration by the Chairperson shall be deemed to be a true and correct statement of the voting, and the meeting shall in all respects be deemed to have been properly and validly constituted and conducted, and an entry in the minutes to the effect that any motion has been carried or lost, with or without a record of the number of votes recorded in favour of or against such motion, shall be conclusive evidence of the vote so recorded if such entry conforms with the declaration made by the Chairperson of the meeting as to the result of any voting at the meeting.
28. **CONDITIONS OF APPROVAL BY THE CITY OF CAPE TOWN AND THE WESTERN CAPE GOVERNMENT**
- 28.1 The Association shall comply with the relevant City conditions of approval notwithstanding what is stated elsewhere in the Constitution.
- 28.2 The Developer is required to include in the Development measures to improve energy efficiency to reduce the consumption of electricity. Owners shall conform to any conservation



and/or rationing programme or scheme introduced, adopted or implemented by a sphere of government or relevant regulating body by reducing their electricity consumption as required in terms of such programme or scheme.

- 28.3 No mature trees on the property indicated for retention on the Landscape Plan (compiled by Terra Landscape Architects, drawing no: 044-02.1, Rev. K, dated 2017-02-06, shall be lopped, topped, felled, removed or damaged in any way without the prior written approval of the Commissioner: Transport & Urban Development Authority or his/her delegate.
- 28.4 No direct vehicular access will be permitted onto Hout Bay Main Road.
- 28.5 The vehicular access gate is to be setback a minimum of 12m from the cadastral boundary of Erf 10370 Hout Bay with Roan Avenue to allow for stacking of a minimum of 2 vehicles at the entrance.
- 28.6 With reference to all residential erven abutting Erf 10366, 10367 & 10368 (Private Open Space), no fencing or walling is permitted on the servitude abutting Erf 10366, 10367 & 10368 unless it allows for the movement of small fauna.
- 28.7 The conditions in the Environmental Authorisation issued on 2016-10-03 with reference 16/3/3/1/A6/36/2009/16 by the Department of Environmental Affairs and Development Planning of the Western Cape Government in terms of the National Environmental Management Act No 107 of 1998 must be complied with unless subsequently amended.

## 29. **OTHER PROFESSIONAL OFFICERS**

Save as specifically provided otherwise in this Constitution, the Trustee Committee shall at all times have the rights to engage on behalf of the Association, the services of accountants, auditors, attorneys, advocates, property managers, architects, engineers, any other professional person or firm and/or any other employee/s whatsoever, for any reasons thought necessary by the Trustee Committee and on such terms as the Trustee Committee shall decide.

## 30. **MANAGER**

- 30.1 During the Development Period, the Developer shall be entitled to appoint a Manager and/or Managing Agent to manage the affairs of the Association. It shall be within the absolute discretion of the Developer to determine the terms and conditions of the appointment of such a Manager and/or Managing Agent including the market related fees and/or remuneration payable.
- 30.2 Any fees and /or remuneration payable to the Manager and/or Managing Agent shall be paid by the Association and not the Developer.

- 30.3 The appointment of the Manager and/or Managing Agent may extend beyond the Development Period, provided that the Developer shall endeavour to procure, when making such appointment, that the appointment may, if so required by the Association at a General Meeting, and subject to the requirements of the law, be terminated on reasonable notice after the end of the Development Period.
- 30.4 After the Development Period, the Association shall be responsible for the appointment of any successive Managers and/or Managing Agents, it being contemplated that the affairs of the Association shall at all times be entrusted to a professional manager with appropriate executive powers so as to conform to the requirements of good corporate governance.
- 30.5 Subject to this Constitution and the terms of his appointment, the Manager and/or Managing Agent shall have the power to manage and control the business and affairs of the Association, and may exercise all such powers of the Association and do all acts on behalf of the Association as may be delegated to him by the Association in writing, from time to time.

### **31. ACCOUNTS**

- 31.1 The Association in General Meeting or the Trustee Committee, may from time to time make reasonable conditions and regulations as to the time and manner of the inspection by the Members of the accounts and books of the Association, and subject to such conditions and regulations, such accounts and books shall be open for inspection by Members at all reasonable times during normal business hours.
- 31.2 At each Annual General Meeting the Trustee Committee shall lay before the Association a proper income and expenditure account for the immediately preceding financial year of the Association, or in the case of the first account, for the period since the incorporation of the Association, together with a proper balance sheet made up as at the last financial year end of the Association. Every such balance sheet shall be accompanied by proper and extensive reports of the Trustee Committee and the Auditors, and there shall be attached to the notice sent to Members convening each Annual General Meeting, as set forth in clause 21.1 above, copies of such accounts, balance sheet reports and any other documents required by law to accompany the same.

### **32. AUDIT**

At least once in every year the accounts of the Association shall be examined and the correctness of the income and expenditure account and balance sheets ascertained by the Auditors.

### **33. SERVICE OF NOTICES**

- 33.1 A notice shall be in writing and shall be given or served by the Association upon any Member, either personally, electronically or by post in a prepaid registered letter, properly addressed to the Member at the address of the Residential Erf or Sectional Title Section owned by him, or at such other address as may have been specified by him in compliance with clause 34.2 below.

- 33.2 No Member shall be entitled to have a notice served on him at any address not within the Republic of South Africa, but any Member may require the Association, by notice, to record an address within the Republic of South Africa which shall be deemed to be his address for the purpose of the service of notices.
- 33.3 Any notice given by post shall be deemed to have been served at noon on the fourth day after the day when it was posted and proof of such posting, shall be sufficient to prove that the notice was properly posted and the address was correct, unless compelling evidence to the contrary of such latter facts is presented. Any notice transmitted electronically shall be deemed to have been served at the time when it was transmitted.
- 33.4 The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice, shall not invalidate the proceedings of that meeting.
- 33.5 The Association appoints the physical address of the Managing Agents as its registered office at which address it will accept any formal notices.

34. **INDEMNITY**

- 34.1 Every Trustee and the Auditors shall be indemnified out of the funds of the Association against any liabilities bona fide incurred by them in their respective said capacities and in the case of a Trustee, in his capacity as Chairperson or Vice-Chairperson, when defending any proceedings, whether civil, criminal or otherwise, in which relief is granted to any such person/s by the Court.
- 34.2 Every Trustee, every servant, agent and employee of the Association, and the Auditors shall be indemnified by the Association against (and it shall be the duty of the Trustee Committee to pay out of the funds of the Association) all costs, losses and expenses (including travelling expenses) which such person/s may incur or become liable for by reason of any contract entered into, or any act or deed done, by such person/s in the discharge of any of his/their respective duties, including in the case of a Trustee Member, his duties as Chairperson or Vice-Chairperson. Without prejudice to the generality of the above, the Association shall specifically indemnify every such person against all losses of whatsoever nature incurred or arising out of any bona fide act, deed or letter done or written by him jointly or severally in connection with the discharge of his duties, provided that any such act, deed or letter has been done or written in good faith.
- 34.3 The Association and its Members indemnify the Developer against any claims against and costs incurred by the Developer arising after the Development Period and resulting from contravention by the Association or its Members of any conditions of approval, licenses and grants imposed upon the Development by any controlling authority. It is recorded that all such conditions are at the disposal of the Association and its Members.

34.4 A Trustee Member shall not be liable for the acts, receipts, neglects or defaults of the Auditors or of any of the other Trustee Members, whether in their capacities as Trustee Members or as Chairperson or Vice-Chairperson, or for any loss or expense sustained or incurred by the Association through the insufficiency or deficiency of title of any property acquired by the Trustee Committee for or on behalf of the Association, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Association shall be invested, or for any loss or damage arising from the insolvency or tortuous act of any person with whom any monies, securities or effects shall be deposited, or for any loss or damage occasioned by any error of judgement or oversight on his part, or for any other loss, damage or misfortune whatever which shall happen in the execution of any of the duties of his office/s or in relation thereto, unless the same shall happen through lack of bona fides or breach of duty or breach of trust.

34.5 The City is exempt from liability and indemnified against any claims for any damages that may be caused by its certification of this Constitution or any amendments thereto, or for the loss of the Constitution so lodged with the City.

### 35. **ARBITRATION**

35.1 Any dispute, question or difference arising at any time between a Member or Members and Trustees out of or in regard to: -

35.1.1 any matters arising out of this Constitution; or

35.1.2 the rights and duties of any of the parties mentioned in this Constitution; or

35.1.3 the interpretation of this Constitution; shall be submitted to and decided by arbitration on notice given by any party to the other parties who are interested in the matter in question.

35.2 Notwithstanding clause 35.1, a party declaring a dispute in respect of payment of levies, subject to clause 13, is not obliged to refer the dispute to arbitration and may institute court proceedings.

35.3 Arbitration shall be held in Cape Town informally and in terms of the provisions of the Arbitration Act No 42 of 1965 (as amended or replaced from time to time) it being intended that, if possible, it shall be held and concluded within twenty one (21) Business Days after it has been demanded.

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

35.4.1 primarily an accounting matter - an independent accountant;

- 35.4.2 primarily a legal matter - a practising counsel or attorney of not less than ten (10) years' standing;
- 35.4.3 any other matter - an independent and suitably qualified person appointed by the Auditors; as may be agreed upon between the parties to the dispute,
- 35.4.4 design / construction related matters - an independent architect with ten years' standing appointed by the Trustee Committee.
- 35.5 If agreement cannot be reached on whether the question in dispute falls under sub-clauses 35.4.1, 35.4.2, 35.4.3, or 35.4.4 or upon a particular arbitrator in terms of sub-clause 35.4.1, 35.4.2 or 35.4.3, within three (3) Business Days after the arbitration has been demanded, then:
- 35.5.1 the President for the time being of the Law Society of the Cape of Good Hope (or its successors) shall determine whether the question in dispute falls under sub-clauses 35.4.1, 35.4.2 or 35.4.3; or
- 35.5.2 the President for the time being of the Law Society of the Cape of Good Hope (or its successors) shall nominate the arbitrator in terms of clause 35.5 within seven (7) Business Days after the parties have failed to agree, so that the arbitration can be held and concluded as soon as possible within the twenty one (21) Business Days referred to in clause 35.3.
- 35.6 The arbitrator shall make his award within seven (7) days after completion of the arbitration and shall in giving his award, have regard to the principles laid down in terms of this Constitution. The arbitrator may determine that the cost of the arbitration may be paid either by one or the other of the disputing parties or by the Association as he in his sole discretion may deem fit.
- 35.7 The decision of the arbitrator shall be final and binding and may be made an Order of the Cape of Good Hope Provincial Division of the High Court of South Africa (or its successors) upon the application of any party to the arbitration.
- 35.8 Notwithstanding anything to the contrary contained in this clause 35, the Trustees shall be entitled to institute legal proceedings on behalf of the Association by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining, interdicting or prosecuting breaches of any of the provisions of this Constitution or of the presents.

**36. AMENDMENTS TO CONSTITUTION**

- 36.1 The Constitution, or any part thereof, as contained herein shall not be repealed or amended, and no new clauses shall be made, save by a Special Resolution adopted at an Annual or Special General Meeting.
- 36.2 Notwithstanding the notice procedure contained in clause 21.1 to call for an Annual General Meeting and a General Meeting called for consideration and voting on a Special Resolution, a meeting called for the passing of a Special Resolution to amend the Constitution shall require two (2) notices. The first notice shall be given no less than sixty (60) days before such meeting, and the second notice no less than thirty (30) days before such meeting and shall specify the place, the day and the hour of the meeting and, as is the case with any other Special Resolution shall specify the terms and effect of the resolution and the reasons for it.
- 36.3 Further to clause 36.1 above, any amendment or alteration to clauses 1, 2, 4, 6, 7, 8.1, 9, 10, 20, 28, 34.5, 36.3, 36.4, 37 of the Constitution or any other clause concerning a matter in section 62(1)(a) of the By-Law shall only become effective once certified by the City.
- 36.4 Amendments referred to in clause 36.3 above must be lodged with the City and only upon certification thereof by the City shall they become operative provisions of the Constitution. Any other amendments to the Constitution, together with the latest copy thereof, must be lodged with the City.
- 36.5 This clause 36 shall not apply to amendments to the annexures referred to in the table of contents above.
- 36.6 Any amendments to the Constitution must be submitted to the Commissioner for the South African Revenue services.

**37. ASSOCIATION FAILS TO MEET ITS OBLIGATIONS OR CEASES TO FUNCTION**

- 37.1 If the Association fails to comply with any of its obligations in terms of the By Law and the City believes that the community is adversely affected by such failure, the City may take appropriate action to rectify the failure at the risk and cost of the Association.
- 37.2 The City may recover any expenditure in respect of the action contemplated above from the Association and/or its Members, who are jointly liable.
- 37.3 The amount of any expenditure so recovered from the Association and/or its Members is considered to be expenditure incurred by the City on behalf of the Association as a result of its failure to meet any of its obligations in the Constitution.
- 37.4 If the Association ceases to function effectively or to carry out its obligations, the City may give the Association a binding instruction to:
  - 37.4.1 hold a meeting and to reconstitute itself in terms of the conditions of approval; or

37.4.2 dissolve itself, subject to the amendment of the conditions of approval relating to an obligation to establish an owners' association and the removal of relevant provisions in the title deed.

37.5 In determining whether to act in terms of 37.4, the City must have regard to:

37.5.1 the purpose of the Association;

37.5.2 who will take over the maintenance of internal engineering services and other obligations for which the Association is responsible for, if at all;

37.5.3 the costs of upgrading the internal engineering services and other infrastructure if the City is to take over the infrastructure;

37.5.4 the impact of the dissolution of the Association on its members and the community; and

37.5.5 any written representations from the Association and its Members and any other interested and affected party.

37.6 If the Association is dissolved, the Members must jointly pay the costs of:

37.6.1 the transfer to the City of the Association's common property and facilities which comprise the internal engineering services, private open spaces; and

37.6.2 the upgrading of the internal engineering services to the standards of the City.

37.7 Only in the event that the Association has ceased to function and an owner of property within the Applegarth Estate wishes to transfer ownership of such property, the owner must obtain the consent the President of the Cape Law Society or anyone appointed by him/her, who shall grant consent to such transfer after determining that such owner is in compliance with the requirements of the Constitution and that the Association has ceased to function. Such consent shall be deemed to be the consent of the Association had the Association not ceased to function or failed to reconstitute itself. The consent cannot be withheld if the Owner complied with his obligations as contained herein or provided an undertaking acceptable in the sole discretion of the signatory of the Consent to do so. The cost of such consent shall be for the account of the owner who applied for such consent.

**CONSTITUTION DULY ADOPTED**

SIGNED:

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**CHAIRMAN AT THE GENERAL MEETING OF THE ASSOCIATION**

DATE:

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