

10899683  
 2/18/2010 2:06:00 PM \$57.00  
 Book - 9804 Pg - 7616-7627  
 Gary W. Ott  
 Recorder, Salt Lake County, UT  
 US TITLE PARK CITY  
 BY: eCASH, DEPUTY - EF 12 P.

WHEN RECORDED RETURN TO:  
 BIRKHILL CONDOMINIUM ASSOCIATION  
 ATTN: MICHAEL BRODSKY  
 308 EAST 4500 SOUTH, SUITE 200  
 MURRAY, UT 84107

FIFTH AMENDMENT TO THE DECLARATION OF CONDOMINIUM FOR BIRKHILL  
 (a Utah Expandable Condominium Project)

THIS FIFTH AMENDMENT TO THE DECLARATION OF CONDOMINIUM for BIRKHILL ("Fifth Amendment") is made this 16 day of February, 2010, by Birkhill at Fireclay, LLC, a Utah limited liability company (the "Declarant").

RECITALS:

WHEREAS, Declarant, made, executed and caused to be recorded, as Declarant, the following instruments:

(a) Declaration of Condominium for Birkhill (a Utah Expandable Condominium Project) (the "Declaration") recorded among the Salt Lake County Recorder's Office, Entry 10523182, Book 9643, Pages 7965 - 8058 on September 18, 2008 (the "Declaration"), pursuant to which the Declarant formed an association known as "Birkhill Condominium Association, Inc." ("Association"),

(b) First Amendment to the Declaration of Condominium for Birkhill (a Utah Expandable Condominium Project) (the "First Amendment") recorded among the Salt Lake County Recorder's Office, Entry 10603095, Book 9676, Pages 4603-4615 on January 22, 2009,

(c) Second Amendment to Declaration of Condominium for Birkhill (a Utah Expandable Condominium Project) (the "Second Amendment") recorded among the Salt Lake County Recorder's Office, Entry 10730956, Book 9736, Pages 1499-1504 on June 16, 2009,

(d) Third Amendment to Declaration of Condominium for Birkhill (a Utah Expandable Condominium Project) (the "Third Amendment") recorded among the Salt Lake County Recorder's Office, Entry 10803650, Book 9765, Pages 3891-3898 on September 24, 2009, and

(e) Fourth Amendment to Declaration of Condominium for Birkhill (a Utah Expandable Condominium Project) (the "Fourth Amendment") recorded among the Salt Lake County Recorder's Office, Entry 10831335, Book 9776, Pages 9691-9697 on November 4, 2009.

WHEREAS, pursuant to Article 17.2.1 of the Declaration, the Declaration and Plat may be amended by the affirmative vote of at least sixty-seven percent (67%) of the votes cast of the Owners.

WHEREAS, due to changes in plans affecting the Birkhill development, Declarant desires to amend the Declaration as set forth below.

WHEREAS, this Fifth Amendment has been approved by at least sixty-seven (67%) of the requisite number of votes.

NOW, THEREFORE, the Declarant hereby declares that the Declaration be amended as follows:

1. The Recitals shall form a substantive part of this Fifth Amendment.
2. Exhibit "A" of the Declaration is hereby replaced with Exhibit "A" attached hereto and made a part hereof.
3. Exhibit "C" of the Declaration is hereby replaced with Exhibit "C" attached hereto and made a part hereof, which plan may be amended or supplemented by the Declarant from time to time without requirement of an amendment hereto.
4. Recitals B. of the Declaration is hereby deleted in its entirety and replaced as follows:

Declarant intends to construct one (1) mixed-use building ("Building") on the Land (the "Project"), which includes Residential Units, Commercial Units, Common Areas and Facilities and Residential Limited Common Areas and Commercial Limited Common Areas, if applicable.

5. The definition of "Project" in Article I is amended by deleting "two hundred twenty three (233) Residential Units and commercial space containing Commercial Units located in several Buildings to be constructed on the Land" and inserting in its place "approximately fifty (50) mixed-use Condominium Units".

6. Article 5.1 is hereby modified by adding the following language at the beginning of the 2<sup>nd</sup> sentence: "Except as otherwise provided in this Declaration or in the Master Declaration,".

7. Article 6.1 is hereby modified by deleting the following portion of the fifth (5<sup>th</sup>) sentence: "...Building D and Building E and may be available to other Owners or occupants in the Project, as more particularly set forth in Section 10.8. herein."

8. Article IX is amended by adding a new Article 9.9 as follows:

The Common Areas and Facilities are subject to the Parking Easement as described herein.

9. Article 10.8 is hereby modified by deleting the following phrase from the 2<sup>nd</sup> sentence: "other than those areas designated as reserved parking areas in Buildings D and E...".

Further, Article 10.8 is amended by adding the following provisions at the end of this Article as a new Article 10.8 (a):

(a) Easement A (described below) is a part of the Common Areas and Facilities which the Association is required to maintain under Section 11.16.1 of this Declaration. Since the use of Easement A will be granted to owners of certain Lots, there will be an assessment referred to herein as "Easement A Assessment", which will be collected from certain owners (referred to below as "Easement A Owners"), some of which are subject to and included within Birkhill Townhome Owners' Association, Inc. ("TH Association") and others who own all or a portion of Building G. The payment due from the owners in the TH Association will be collected by the TH Association and remitted to the Association as recoupment of a portion of the costs related to Easement A. For the Easement A Owners who own all or any portion of Building G, payment will be made directly to the Association. The Easement A Owners shall have a non-exclusive and perpetual easement for purposes of pedestrian and vehicular ingress and egress, utilities and parking over, upon and through the area designated as "Easement "A", on the plat entitled, "BIRKHILL PHASE 1 - 2<sup>ND</sup> AMENDED", recorded in the Salt Lake County Recorder's Office. The TH Association shall act as a collection agent for the Association for the purpose of collecting the Easement A Assessment, which is due from each Easement A Owner, except for those Easement A Owners described below.

Except as provided herein, the Easement A Assessment shall be due and payable to the TH Association directly from each Easement A Owner who is responsible for such payment, or in the case of Building G the owners of all or any portion of Building G, on a monthly basis (or other intervals as may be directed by the Association upon at least 6 months' prior written notice to the TH Association or the owners of all or any portion of Building G, as applicable, but no more frequently than monthly), and further, provided, that only reasonable and necessary costs may be included in the Easement A Assessment. The Association may levy reasonable late charges and interest against any Easement A Owner who fails to pay the Easement A Assessment when due, provided that such late charges may not exceed Fifteen Dollars (\$15.00) nor be imposed more than once for each delinquent payment and further, provided, interest may not be greater than eighteen percent (18%) per annum. Within thirty (30) days of payment of the Easement A Assessment to the TH Association by an Easement A Owner, the TH Association shall deliver such Easement A Assessments which have been collected to the Association; provided, that in the event any one (1) or more Easement A Owners fail(s) to pay their share of the Easement A Assessment, then the TH Association shall provide with the monies collected and delivered the information relative to the name and address of the Easement A Owner who fail to pay their share. The Association, or the Master Association on behalf of the Association, may bring an action against any Easement A Owner who fails

to pay the Easement A Assessment pursuant to Utah law. The Easement A Assessment due from each Easement A Owner shall be calculated accordingly to the following formula from time to time: the numerator is one (1) and the denominator is the total number of Units and Lots which have certificate of occupancy permits issued by governmental authorities from time to time, and (a) in the case of Residential Units, those which are occupied; or (b) for Commercial Units, the number of Commercial Units equal to the number of votes allocated to the Commercial Units under the provisions of the governing documents of the Association, excluding those Units used as a sales center or model home by or for Declarant; or (c) in the case of Lots occupied for residential purposes, or for those Lots used as a Live-Work Unit occupied and/or used for residential and/or commercial purposes, excluding however, any Lots used as a sales center or model home by or for Declarant; or (d) for Building G, the number shall be equal to one (1) for each 1,000 square feet of usable space, rounded up or down to the nearest whole number.

For example, if there are:

forty-one (41) Residential Units which are occupied and have certificate of occupancy permits; and

eight (8) Commercial Units that are occupied with certificate of occupancy permits and are allocated a total of eight (8) votes under the governing documents of the Association; and

one (1) Commercial Unit is used as a sales center by or for Declarant; and

four (4) Lots which have certificate of occupancy permits and are occupied for residential purposes; and

10,000 square feet of usable space in Building G; then,

each of the Easement A Owners shall pay  $1/62^{\text{nd}}$  (or 1.61 percent) of the total amount of the Easement A Assessment.

The Association shall include the expected amount of the Easement A Assessment in each year's budget.

Notwithstanding the foregoing, certain Easement A Owners and Condominium Units or Lots, as applicable, will not be subject to payment of the Easement A Assessments; namely, Declarant and any Condominium Unit or Lot owned or leased by Declarant, from time to time, shall be exempt from payment of the Easement A Assessment if the

Condominium Unit or Lot, as applicable, is used as a sales office or model home by or for Declarant or is not otherwise occupied.

For purposes hereof, the following terms shall have the meanings ascribed to each below:

“Easement A” shall mean and refer to the area depicted as “Easement “A”, on the plat entitled, “BIRKHILL PHASE 1 – 2<sup>ND</sup> AMENDED”, recorded in the Salt Lake County Recorder’s Office.

“Easement A Assessment” shall mean and refer to the costs of maintenance, repair and replacement of the area and improvements located within Easement A, including, without limitation, sprinklers, street lighting, security cameras, parking lots and sidewalks, insurance, lawn care, irrigation water usage, trash collection (including the provision of dumpsters), snow removal and all reserves performed or undertaken by the Association.

“Easement A Owners” shall mean and refer to those owners of land designated as Lots 101 through and including 122 on the plat entitled, “BIRKHILL PHASE 1 – 2<sup>ND</sup> AMENDED”, recorded in the Salt Lake County Recorder’s Office.

In addition, the terms “Lots” and “Live-Work Units” as used in this Article 10.8 (a) shall have the meanings ascribed to each such term in the Master Declaration.

10. Any reference to “Fireclay at Birkhill, LLC” in the Declaration, First Amendment, Second Amendment, Third Amendment, Fourth Amendment, By-Laws or Articles, is replaced with “Birkhill at Fireclay, LLC”.

11. In all other respects, the Declaration, First Amendment, Second Amendment, Third Amendment and Fourth Amendment remain unchanged.

WITNESS the hand and seal of Birkhill at Fireclay, LLC, on the day herein above first written:

WITNESS/ATTEST:

BIRKHILL AT FIRECLAY, LLC  
By: Hamlet Homes Corporation, Member

  
\_\_\_\_\_

By:  (SEAL)  
John Aldous, President

STATE OF UTAH, CITY/COUNTY OF SALT LAKE, TO WIT:

I HEREBY CERTIFY that on this 3rd day of Feb., 2010, before me, the subscriber, a Notary Public of the state of Utah, personally appeared John Aldous, known to me or suitably proven, who acknowledged himself to be President of Hamlet Homes Corporation, Member of Birkhill at Fireclay, LLC, the entity named in the foregoing instrument, and who, being authorized to do so, in my presence, signed and sealed the same and acknowledged the same to be the act and deed of such entity.

AS WITNESS my hand and seal.

  
Notary Public

My Commission Expires: 6/3/2013









**CONSENT AND AGREEMENT OF TRUSTEE AND BENEFICIARY**

U.S. TITLE OF UTAH, Trustee, and WELLS FARGO BANK, N.A., Beneficiary, under that certain Deed of Trust dated May 23, 2007 and recorded June 8, 2007 in the office of the Recorder of Salt Lake County, Utah in Book 9475, Page 8410; and the Deed of Trust dated May 23, 2007 and recorded June 6, 2007 in the office of the Recorder of Salt Lake County, Utah in Book 9475, Page 9475; Participation and Development Agreement between the Redevelopment Agency of Murray City and Hamlet Development Corporation, recorded December 19, 2007 in Book 9549, Page 8425; Security Agreement by Hamlet Development Corporation recorded in the office of the Recorder of Salt Lake County, Utah in Book 9565, Page 7572; and the Deed of Trust dated January 29, 2008 and recorded February 1, 2008 in the office of the Recorder of Salt Lake County, Utah in Book 9565 Page 7677 as supplemented from time to time (the "Deed of Trust" and "Agreements") hereby join the foregoing Declaration for the express purpose of subordinating all of their respective right, title and interest under such Deed of Trust and Agreements in and to the real property described in the Declaration to the operation and effect thereto.

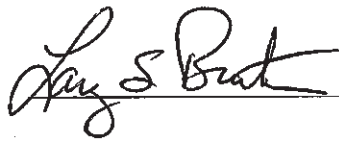
Nothing in the foregoing provision of this Consent and Agreement of Trustee and Beneficiary shall be deemed in any way to create between the person named in such Declaration as the "the Declarant" and any of the undersigned any relationship of partnership or joint venture, or to impose upon any of the undersigned any liability, duty or obligation whatsoever.

IN WITNESS HEREOF, the said Trustee and Beneficiary have executed and sealed this Consent and Agreement of Trustee and Beneficiary or caused it to be executed and sealed on its behalf by its duly authorized representatives, this 16 day of Feb. 2010.

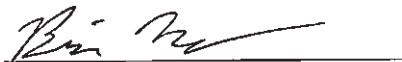
WITNESS/ATTEST;

\_\_\_\_\_

U.S. TITLE OF UTAH

  
\_\_\_\_\_

ATTEST:

  
\_\_\_\_\_

BENEFICIARY:

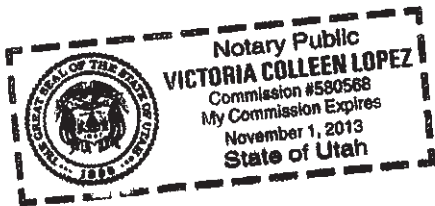
WELLS FARGO BANK, N.A.

By:   
\_\_\_\_\_

STATE OF Utah : COUNTY OF Salt Lake : TO WIT:

I HEREBY CERTIFY, that on this 16th day of February, 2010, before me, the subscriber, a Notary Public of the state aforesaid, personally appeared Larry S Burton who acknowledged himself to be the President of U.S. TITLE OF UTAH, Trustee, and that he/she, being authorized to do so, executed this Consent and Agreement of Trustee and Beneficiary for the purposes contained therein by signing the on behalf of the Corporation, in my presence.

IN WITNESS WHEREOF, I have set my hand and Notarial Seal, the day and year first above written.



[Signature]  
Notary Public

My commission expires on 11/1/13

STATE OF Texas : COUNTY OF Dallas : TO WIT:

I HEREBY CERTIFY, that on this 11 day of February, 2010, before me, the subscriber, a Notary Public of the state aforesaid, personally appeared David Lynch, who acknowledged himself to be the Vice President of WELLS FARGO BANK, N.A., Beneficiary, and that he/she, being authorized to do so, executed this Consent and Agreement of Trustee and Beneficiary for the purposes contained therein by signing the on behalf of the Corporation, in my presence.

IN WITNESS WHEREOF, I have set my hand and Notarial Seal, the day and year first above written.



[Signature]  
Notary Public

My commission expires on 2/2/2011

## DESCRIPTION OF THE PROPERTY

All that land shown as Lots B and G on the plat entitled "Birkhill Phase 1 – 2<sup>nd</sup> Amended", recorded in the Salt Lake County Recorder's Office in Book 2010P on Page 28 and attached hereto.

