



**Cohousing  
Legal Toolkit 3.0**

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# **Cohousing Legal Toolkit 3.0**

## **Compliments of:**

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The first edition of this book was written in 2012 by Janelle Orsi ([JanelleOrsi.com](http://JanelleOrsi.com)) and Cynthia Hawley ([CynthiaHawley@att.net](mailto:CynthiaHawley@att.net)) with contribution from Tree Bressen ([treegroup.info](http://treegroup.info)), and they are delighted to see this shared with the world even though they no longer have capacity to update this book. They are grateful to Jill Jacobs, who has taken over stewardship of the content.

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## ACK! LEGAL INFORMATION SHARING DISCLAIMER!

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**These sample documents and legal tools are for you to read, enjoy, study, share, and maybe even use...BUT ONLY AT YOUR OWN RISK!!!**

### **Why It's Safer to Read This On the Beach . . . and Talk to a Lawyer**

We have included some sample documents in this toolkit because we believe in sharing. We believe that everyone should share documents and information to facilitate the growth of cohousing and intentional communities.

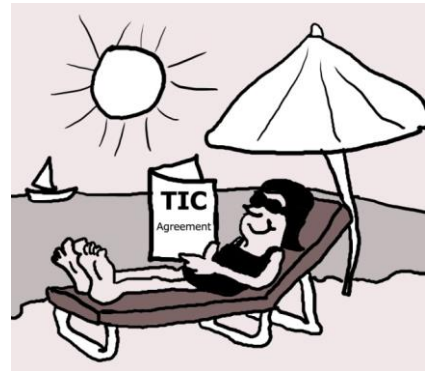
The sample documents in this handbook are educational tools—to give you an idea of what such documents look like. However, using these sample documents could be risky if you assume they will meet your needs. Co-Ownership Agreements, Bylaws, and LLC Operating Agreements vary in length from 10 to 50 plus pages, and must be customized to the financial arrangement and unique attributes of the community. That's why it's safer to read these resources for fun and learning, rather than adopt the agreements as your own.

Plus, real estate law is complicated stuff. Shared real property arrangements bring up all kinds of other legal questions related to:

- Income tax
- Property tax
- Zoning laws
- Your mortgage loan
- Local housing regulations
- Homeowners association rules
- Fair housing laws
- State real estate regulations
- Rent control laws
- Liability and insurance
- Estate planning questions
- And the list even goes on...

That's why you should always consult with a lawyer if you plan to co-own property. A lawyer will help you understand your rights, risks, and pitfalls in a shared real property arrangement, and can advise you on the other legal issues that arise.

**That said, kick up your feet and enjoy these documents with an ice-cold glass of lemonade!**



## CO-OWNERSHIP QUESTIONNAIRE

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**Use of this Questionnaire:** This Questionnaire is a tool to help co-owners talk through the details of their shared property ownership. The answers to these questions could help lay the groundwork for a more detailed Tenancy in Common or LLC Operating Agreement. Note that this Questionnaire assumes that the property in question contains multiple units, but many of the questions would also pertain to the co-ownership of a single unit property. Please do not rely on this as a thorough list of questions you should ask in connection with co-ownership, since there may be many other details to resolve or legal matters to sort through. We recommend that co-owners seek the advice of an attorney regarding the details of their co-ownership agreement.

### **Buying the Property**

1. **Contribution to Purchase Price and Costs:** Will each owner's contribution to the purchase price be based on financial ability, the value of the share of space they will receive, or some balancing of the two considerations? Are the units and/or private spaces substantially the same or do they differ in value? If the units and private spaces differ in value, how will you determine the share of the total cost to be paid by the occupants of each unit? For example, would it make more sense to allocate the cost by square footage or to have each unit and its exclusive use common areas appraised? If the units are substantially similar, will you be able to come to an agreement after taking into consideration any unique attributes such as parking, decks, views, etc.?
2. **Contribution Toward Down Payment, Monthly Payments, and Overall Debt:** What will be the percent of total paid by each co-owner for:
  - a. Down payment
  - b. Monthly payments
  - c. Overall share of debt
3. **Contribution of Labor or Property:** Will anyone be contributing goods or services in lieu of money payments for the purchase price or other costs? If so, what will those contributions be and how will you value them? What is the timeframe for completing this work? How will you manage the income tax consequences of "sweat equity?"
4. **Group Ownership of Units:** Will more than one person share the cost of one unit; that is, can a group of people buy into the property collectively as one co-owner to share one living space or unit?

## **Who Lives at the Property?**

5. **Number of Residents:** Do you want to limit the number of people who may live in each unit or living area?
6. **Housemates:** If a co-owner wants to have a housemate or roommates, should they get approval from **the other** co-owners?
7. **Renting Units:** If a co-owner moves out and wants to rent out his or her unit or living space, should they have to get the other co-owner's approval of the prospective tenant? Typically, it's reasonable for the co-owner of the other unit to have the right to review a prospective renter's financial status and references and reject a renter on reasonable grounds.
8. **Rules for Tenants:** Do you want potential tenants to sign a written agreement that includes all of the rules and use restrictions in the co-owners agreement?
9. **Eviction of Tenants:** Do you want to restrict how a co-owner may evict a tenant in order to protect other co-owners from legal retaliation?
10. **Pets:** Do you want a pet policy in your TIC agreement? You might want to consider how many pets per unit or living area might be allowed, what kinds of pets might be allowed and specifically excluded, where pets are to be kept, what kind of pet behavior is unacceptable, and whether a co-owner has to get approval of other co-owners to have a new pet.

## **Designation of Units, Exclusive Areas, and Common Areas**

11. **Assignment of Units and Living Areas:** Which unit or living area will each co-owner get to occupy?
12. **Common Areas:** What common areas of the property will be shared by all owners?
13. **Exclusive Use Common Areas:** What common areas of the property (outside of the units or living areas) will be reserved for the exclusive use of each owner, such as parking spaces, garages, yard and garden spaces, storage spaces, decks? These areas are often referred to as "exclusive use common areas."

## **What May or May Not Be Done to or on the Property?**

14. **Alterations to Units:** What kinds of alterations may a co-owner make to her or his unit or living area and which, if any, alterations would require the other co-owner's approval?
15. **Home Business Use:** May the property be used for a home business? If so, what kind of business? You may want to distinguish between businesses that involve visiting clients or customers versus a home office or studio with no visitors.

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16. **Use of Chemicals:** Do you want to limit the kinds of paints, pesticides, herbicides, cleaning chemicals, etc. that may be used on the property?
17. **Hazardous Activities:** Do you want to limit or prohibit any hazardous activities – particularly things that could affect your ability to get proper insurance for the property.
18. **Risks to Third Parties:** Do you want to limit or prohibit any activities that create a risk to third parties and subject co-owners to liability such as, for example, teaching gymnastics on the property or building a tree house, etc.
19. **Storage:** Do you want to limit what may or may not be stored on the property such as, for example, accumulated trash or clutter, discarded furniture or other personal items, seldom used or unused vehicles, etc? Do you want to limit storage of anything to certain areas of the property?

### **Property Related Costs and Accounting**

20. **Budgeting:** Will you hold an annual meeting to adopt an annual budget?
21. **Bank Account:** Will you open a joint bank account to manage collection of money and payment of bills?
22. **Utilities:** Are any utilities separately metered? If so, which ones? How will owners be reimbursed for the use of their separate utilities, such as water or lighting, in common areas. If any utility is not separately metered, on what basis will you share the cost? An equal share per unit or living space? The number of people living in each unit or living space as a percentage of total residents?
23. **Other Costs:** What other regular costs do you expect and on what basis will you allocate each co-owners share of them?
24. **Process for Collecting and Making Payments:** How will you collect money to pay for all shared monthly costs? Will each co-owner pay a fixed monthly amount into a joint or association bank account? In this case, an annual reckoning of the account would reimburse or charge co-owners as needed. Or will you get together every month to divide up expenses?
25. **Bookkeeper/Treasurer:** Will one person be asked to manage accounting? If so, how long will that person be expected to provide the service? If not, will you hire an accountant or bookkeeper to manage accounting?
26. **Large Expenses:** Are there foreseeable large expenses in the next 5-10 years such as for example roof replacement, painting, plumbing or sewer repairs or replacements, foundation work, renovation, etc.?

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27. **Reserve Account:** Will you build a reserve account for foreseeable repairs and unanticipated expenses? If so, how much? How will you build the fund? Will each owner contribute a set monthly amount to the account until the goal is reached?
28. **Repairs:** If a repair is needed, how much may a co-owner spend before they need to get the other co-owners' approval?
29. **Insurance:** What minimum level of property and liability insurance will you maintain?
30. **Indemnification:** Do you want to agree to compensate and defend each other in situations in which one co-owner may cause liability that would extend to other co-owners?
31. **Record-Keeping:** What records will you keep about the property and where will they be kept? What method will you use to account for co-owner contributions, expenses and payments made?

### **Taking Care of and Developing the Property**

32. **Maintenance Standards for Structures:** Do you want to have standards for the upkeep and maintenance of all structures on the property? If so, what are those standards? These standards are important to make sure the property is saleable, easier to insure, and more likely to get favorable financing.
33. **Maintenance Standards for Yards:** Do you want to have standards for the upkeep and maintenance of the yard and other common areas? If so, what are those standards?
34. **Architectural Style:** Are there particular design or architectural features you would like to preserve, styles you want to follow, or materials you want to use or not use on the property?
35. **Maintenance Responsibilities:** What parts of the property will each owner be responsible for maintaining?
36. **Shared Maintenance:** For what areas will you share maintenance responsibilities? Typically, where a tenancy in common is all in one building, the owners will be jointly responsible for maintaining the entire structure of the building. Where the units are in separate buildings, each owner may take full responsibility for maintenance of his or her whole building or may be responsible only for the interior of the building. In this case co-owners share responsibility for maintenance of the exterior of buildings as part of the common area.
37. **Alterations:** Should you need to get each other's consent to alter the interior of units or living spaces if it does not affect the structure of the building?



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38. **Maintenance Costs:** Do you want to have a monthly contribution from each co-owner to pay for upkeep and maintenance of common areas that will be maintained by all owners? If so, how do you want to allocate the costs?
39. **Property Tax Increases:** If property taxes are increased due to improvements made by a co-owner to his or her unit or living space, will that person be responsible for paying the added amount?
40. **Partial Destruction:** If the property is partially destroyed, under what circumstances do you want to rebuild – is there a maximum out of pocket amount above which you would not rebuild? If you take an insurance pay out, how will you divide the proceeds?
41. **Maintenance Manager:** Will one person be responsible for managing the maintenance and repair of the property? If so, will they be asked to serve as manager for a certain amount of time? If no co-owner will manage the maintenance and repair, will you hire someone to do that job?
42. **Improvements:** If a co-owner makes a significant improvement on the property that raises the value of the common area (such as installing a hot-tub), how will co-owners compensate the owner that made the improvement? Will the improvement be appraised at the time the property is sold? Will the owner have a right to reimbursement from the sale proceeds? How will depreciation be taken into account?

## **Refinancing the Property**

43. **Refinancing:** Under what circumstances may the co-owners refinance the property?
44. **Refinance Costs:** Who will pay the refinancing costs?
45. **Borrowing Against the Property:** Under what circumstance, if any, may a co-owner take an equity line of credit or a second mortgage?

## **If One Co-Owner has Financial Troubles**

46. **Financial Troubles:** What should happen if one co-owner runs into financial troubles and cannot make required payments?
47. **Default Fund:** Do you want to set up a default fund to pay the costs due by a co-owner who runs into financial trouble? This would serve to protect the assets, equity, and credit ratings of the other co-owners.
48. **Advancing Payments:** In lieu of a default fund, do you want to agree ahead of time to the terms under which co-owners would advance payment on behalf of another co-owner?
49. **Remedies for Default:** How far behind on payments must a co-owner get before the other owner can demand that the property be sold, or demand to buy out or find a third party purchaser for the defaulting owner's share?

## **Selling the Whole Property All at Once**

50. **Timeline for Selling the Property:** Do you want to agree now to set a goal of selling the whole property in the future? If so, do you want to target a time to sell? Will the decision to sell be based on, for example, a number of years, the occurrence of a certain event, or conditions of the housing market?
51. **Division of Sale Proceeds:** How will you divide the proceeds if all co-owners decide to sell at once? For example:
- a. Will you split it on the basis of how much you each paid toward the purchase minus each owner's share of the outstanding debt on the property and other money owed?
  - b. Will you base the split on the relative value of each owner's interest in the property? To do this, you would appraise each owner's interest (meaning their unit combined with their exclusive use common areas, their share of the common areas, and other rights with regard to the property), then add the appraisals of all owners' interests together, then divide sale proceeds based on each owner's percentage of the total. This method allows a co-owner to benefit from the increased value of improvements to his or her unit and provides an incentive to make improvements.

## **Selling Individual Interests in the Property**

52. **Terms for Sale of One Owner's Share:** Do you want to provide the terms under which a co-owner may sell his or her interest in the property? For example:
- a. Do you want to make a sale to a third party (not a co-owner) contingent upon approval of the sale by your existing mortgage lender? If the sale is not approved by the lender, you may run the risk of the mortgage lender declaring the entire outstanding balance of the existing mortgage immediately due and payable – with potentially serious consequences to other co-owners.
  - b. Do you want to agree that each co-owner will notify other owners when he or she intends to sell and that other owners will have the first option of buying that seller's interest?
  - c. Do you want to agree ahead of time how you will determine the selling price for sale of a share to other co-owners?
  - d. Do you want to make the sale contingent on the prospective buyer signing your tenancy in common agreement so the agreement will bind all future co-owners?
53. **Approval of Prospective Buyers:** Should the non-selling co-owners be able to approve or reject a prospective buyer? If so, should the approval or rejection be on the basis of the

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financial status of the prospective buyer? Should approval or rejection be on the basis of personal reasons? While it is not clear whether personal reasons could be a legally enforceable basis on which to reject a prospective buyer, it's a good idea to talk about and consider in advance on what basis you might not want to share ownership and residency of a house with someone.

## **Making Decisions About the Property**

54. **Meetings:** How often will you have regular meetings? What procedures do you want to adopt for meeting agendas, notice and scheduling, etc.?
55. **Decision-Making Process:** Will you use majority voting, supermajority voting, or a consensus process to make decisions about the property? What process will you use to consider and decide on proposals?
56. **Share of Votes:** If each unit or living space will get one vote, are there any topics on which one co-owner will have a greater decision-making power or power to veto?
57. **Delegating Decisions:** What kinds of decisions may co-owners make on their own and what kinds of decisions must be made by all co-owners?
58. **Conflict Resolution:** Will you rely on mediation to solve disputes or another process? How will you choose a mediator? Who pays? How many mediations sessions must you attend before you turn to arbitration or litigation?

## 20 BASIC QUESTIONS TO DISCUSS WHEN YOU SHARE

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Adapted from:

*The Sharing Solution: How to Save Money, Simplify Your Life & Build Community,*  
by Janelle Orsi and Emily Doskow (Nolo 2009)

When you sit down to discuss the details of your sharing arrangement, here's a checklist to guide your conversation:

- 1. Why are we sharing?
  - What are our personal, practical, financial, or environmental goals?
  - What do we each need or want to get out of the sharing arrangement?
- 2. What are we sharing?
  - And for that matter, what are we not sharing?
- 3. Whom are we sharing with?
  - Do our cosharers need to meet any particular qualifications?
- 4. How many people are we sharing with?
  - What are the pros and cons of having a large or small sharing group?
- 5. How will the timing of our arrangement work?
  - When will it stop and start?
  - Will it happen in phases?
- 6. Who owns the shared item(s)?
  - Will one person own it and let others use it?
  - Will we each own specific items or parts of the property?
  - Will we each own a percentage share of the whole property? If so, in what proportions?
- 7. Should we form a separate legal entity, such as a nonprofit organization?
- 8. Should our group have a name, and what should we call ourselves?
- 9. What do we get to do?
  - What benefits or services do we get from this sharing arrangement?
  - How much can we use the shared item(s) or services?
- 10. How will we make decisions?
  - Will we all take part in decision-making or delegate decisions to a small group?
  - Do we all have equal decision making power?
  - Must all decisions be unanimous or made by majority vote?

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- 11. What responsibilities will each of us have?
  - Will we assign roles and tasks?
  - Will we rotate responsibilities?
  - Will anyone receive extra benefits in return for extra responsibilities?
- 12. What are the rules for using our shared property or meeting our shared responsibilities?
- 13. How will we handle administrative matters like scheduling, communication, and record keeping?
- 14. How will we divide expenses?
  - Will there be initial buy-in or start-up contributions? Will we need any loans?
  - How will we divide overhead and variable costs?
  - How will we collect money? Through regular dues or by reckoning expenses in some other way? Will we start a bank account?
  - What kinds of unexpected costs could arise and how will we prepare for them?
  - Who will keep track of our money?
  - What happens if a member cannot pay?
- 15. How will we manage risk and liability?
  - What risks are involved in our sharing arrangement and how can we reduce them?
  - How is the risk distributed (i.e., who could suffer loss or be liable for damages)?
  - Do we want to redistribute risk by making agreements with each other or purchasing insurance?
- 16. Are there legal requirements we need to follow?
  - Are there any required licenses or permits?
  - Will this bring up any tax or employment law questions?
  - Are there any legal roadblocks arising from zoning laws or private land covenants?
  - What steps must we take to become a legal entity?
- 17. How will we resolve conflicts or disputes?
- 18. How will we bring new people into the group?
  - What procedures will new members follow?
  - How will new members be oriented?
  - What is our policy on guests?
- 19. How can a member leave the group?
  - What steps must be taken when a member leaves voluntarily?
  - Under what circumstances can a member be asked to leave the group?
- 20. How do we end the sharing arrangement?

## ARRANGEMENTS FOR HOLDING TITLE TO LAND

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There are three primary layers of considerations in the design of legal organizational arrangements for the ownership and management of land:

- **What legal organization or entity we choose:** The entity or organization we choose and form at the state level comes with a set of built-in parameters for how the entity can operate, manage funds, make decisions, and engage in activities. An entity we choose may also limit our liability, and determine whether we can obtain certain financing.
- **How the legal structure, entity, or entity tax status we choose affects our taxes:** Different legal organizations and tax statuses for entities adds another layer of parameters that guide how an organization can operate, and also affects the financial status of the entity and individuals involved. For example: Does the form of entity set requirements or restrictions for how the organization must divide profits or losses among individual members, partners, or shareholders? Do members, partners, or shareholders have to pay taxes on the organization's profits, and also receive tax benefits from losses? Do both the entity and members pay taxes and receive benefits from losses?
- **How we structure the entity:** Once we have chosen an organization or formed an entity, the next consideration is how to structure it, including how to manage governance, capitalization, and allocation of profits/losses, etc. This is done through the choices we make in drafting contracts, bylaws, operating agreements, and policies.<sup>1</sup>

Sometimes multiple organizations and entities will be involved in the creation of a housing arrangement. For example, there may be one entity for the ownership of land, one entity for the management of a development project, and one entity for the management of shared activities. Sometimes, holding title to land under a separate entity protects it from liability incurred by an entity that operates programs on and develops the property. In addition, each entity may have different purposes or activities that mandate different legal structures and tax exemptions.

### **Legal Organizational Structures for Holding Title to Land:**

#### **Tenancy in Common (TIC)**

When two or more non-legally related people own real property together without officially forming another type of organization, they will generally be considered tenants in common under the law.

The presumption is that all tenants in common share interest in the property equally, unless otherwise contracted for. For example, if you own a duplex with another person as tenants in common, you each own a portion of the *whole* building, even though each of you may live in

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<sup>1</sup> See "Legal Structure Models for Economically Sustainable Housing" by Janelle Orsi, for different types of structural configurations through contracts, available at <http://communityenterpriselaw.org/housing-legal-structure/#fnref-8637-7> and in "Practicing Law in the Sharing Economy", by Janelle Orsi (ABA Books 2012)

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and maintain one of the units. You may contract for exclusive right of occupancy to each of your individual units, and to the percentage value of your TIC interest.

TICs are a helpful legal structure for buildings that cannot be legally subdivided, and are customarily used when two or more unrelated people own a house together or a multi-unit residential building, such as a duplex, triplex, or four-plex. It is less common for more than four owners or households to hold title as a TIC, at least in California, where a TIC with five or more units may have to comply with certain state subdivision laws.

If you take title to property as a TIC, you and your co-owner(s) will want to draft a written agreement covering each owner's rights and responsibilities, or exclusive use or occupancy of certain space. For example, for a multi-unit property, a TIC agreement would give each owner rights to and responsibility for one unit, which creates a feeling of separate ownership. Deeds that describe fractional ownership interests are recorded, but TIC agreements are not. However, memorandums referencing a TIC agreement may be recorded.

Owners of TICs usually finance their property with a single mortgage secured by the whole property. This arrangement creates some hurdles, however. For example, all owners must qualify together for one loan, resulting in one owner being liable for another owner's portion of the mortgage should they fall behind in payment. It is for this reason that TIC agreements typically go into great detail on how co-owners divvy up financial obligations.

Although the single-mortgage approach is still used for sharing a single-family home, a few lenders now offer fractional mortgages for TIC properties that are easier to divide into separate units. For a fractional mortgage, each owner signs a separate promissory note and deed of trust. Each owner must qualify for the loan separately and can select different loan terms. Each fractional mortgage is secured only by that owner's interest in the property.

## **Joint Tenancy**

Joint tenancy is a form of ownership that is like a TIC but includes a right of survivorship. A right of survivorship means when one owner dies, that person's share of the property passes automatically to the other owner(s). In contrast, a TIC share goes to the owner's heirs at death.

Joint tenancy is most often used by legally related couples and families. However, joint tenancy could also work well for non-legally related owners in a small shared housing arrangement, where the owners wish to be certain their share will automatically pass to the other owner(s) upon death.

Forming a joint tenancy usually requires that all owners have equal interests in the property, and acquired title at the same time and on the same title document. Most joint tenancies are financed with a single shared mortgage.

## **Condominiums**

Condominiums are legally divided so that portions of the property can be separately owned.

Condominium ownership typically involves owning both an individual unit and a share of ownership in common areas, often called "common elements." Multi-unit properties that were not built as condominiums can often be converted to condos; and this usually requires the assistance of an attorney and professional surveyor, and the process depends greatly on local laws and regulations.

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A condominium form of ownership is often used in housing where residents own separate units. A condominium complex can be as small as a duplex or as large as a multi-story apartment building. Cohousing groups frequently use the condominium form because it facilitates both individual autonomy *and* sharing. With condominiums, each unit can be separately financed.

Condominium ownership typically requires membership in a community association (commonly called a homeowners' association) that governs and manages the common elements and enforces restrictions on the use of units. These associations collect monthly dues, often called "assessments," from each owner to pay for the costs of upkeep, taxes, insurances, and other expenses.

### **Ownership by an Entity**

In some cohousing communities, residents own shares or a membership in a business entity like a corporation or LLC, which, in turn, owns the entire property, including the individual units.

Under many states' legal definitions, this arrangement for holding title may be considered a "housing cooperative" or "stock cooperative," making the entity subject to certain laws. For example, in California, if a five member LLC is considered a stock cooperative by regulating agencies, it will need to comply with subdivision laws and the Davis Sterling Act.

Typically, a resident buys into a community by purchasing shares and signing a "proprietary lease" that entitles the resident to occupy a particular residential unit. Unlike typical leases, a proprietary lease generally has no fixed term. It lasts as long as the resident is an owner in the entity and doesn't violate important lease terms. The entity typically holds a single blanket mortgage on the property, and resident shareholders sometimes take out loans to finance their purchase of shares in the entity. In addition, residents pay regular fees to cover property taxes, management expenses, mortgage payments on the building, and so on.

Even though residents don't own the real estate directly, they still might be able to enjoy some of the tax benefits of home ownership; that is, so long as the cooperative meets the IRS' definition of a cooperative housing corporation (below). For example, although the corporation makes the mortgage and property tax payments, residents may still deduct their portion of these expenses from their income taxes. If residents take out a loan to purchase shares, however, the loan is usually treated as a personal loan, so the interest isn't deductible.

### **Definition of "Cooperative Housing Corporation" for Tax Purposes**

Internal Revenue Code Section 216(b)

The term "cooperative housing corporation" means a corporation -

#### **A note about the word "cooperative"**

The use of the word "cooperative" here does not necessarily imply or require that a cooperative corporation be the entity of choice, nor that the entity operate "on a cooperative basis" under Subchapter T of the Internal Revenue Code, nor that the cooperative be managed democratically, nor that the cooperative follow the Rochdale Principles for cooperatives. The moral to the story is: the word "cooperative" has way too many meanings, and it's hard to no wonder that it's hard to get a straight answer about what a cooperative is.



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- (A) having one and only one class of stock outstanding,
- (B) each of the stockholders of which is entitled, solely by reason of his ownership of stock in the corporation, to occupy for dwelling purposes a house, or an apartment in a building, owned or leased by such corporation,
- (C) no stockholder of which is entitled (either conditionally or unconditionally) to receive any distribution not out of earnings and profits of the corporation except on a complete or partial liquidation of the corporation, and
- (D) meeting 1 or more of the following requirements for the taxable year in which the taxes and interest described in subsection (a) are paid or incurred:
  - (i) 80 percent or more of the corporation's gross income for such taxable year is derived from tenant-stockholders.
  - (ii) At all times during such taxable year, 80 percent or more of the total square footage of the corporation's property is used or available for use by the tenant-stockholders for residential purposes or purposes ancillary to such residential use.
  - (iii) 90 percent or more of the expenditures of the corporation paid or incurred during such taxable year are paid or incurred for the acquisition, construction, management, maintenance, or care of the corporation's property for the benefit of the tenant-stockholders.

# FORMING AND STRUCTURING BUSINESS ENTITIES FOR SHARING REAL PROPERTY

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## 1. Choice of Entity:

### Considerations in Choosing an Entity:

There are usually many considerations to weigh in the choice of entity; these are discussed generally in transactional law practice guides. Here are some considerations relevant to the ownership and management of land:

**a) Does the choice of entity limit liability of individual members/shareholders?** If managed properly, limited liability companies and corporations of all kinds generally shield individual members/shareholders from liability for the entity's debts, acts, and omissions. If multiple people come together to purchase and develop land together, particularly if they plan to take out large loans, an entity with limited liability will likely be optimal to ensure that no one individual is left holding the bag if things go wrong. All entities listed above, except partnerships, offer limited liability. In many states, the primary reason that some groups may choose to form a partnership to own land is to save money on the costs otherwise required in forming and operating a limited liability entity. In California, for example, partnerships are not required to pay the \$800 annual minimum franchise tax required of LLCs and corporations.

**b) Does the choice of entity limit individuals' abilities to derive profit from the entity?** The ability to profit from the equity or income of land offers a strong incentive for people to buy land, but this incentive also drives people to exploit land and buy/sell/own in ways that drive up prices for others. Many groups will want to limit individuals' ability to profit from land, and will thus choose to form a nonprofit public benefit corporation or a nonprofit religious corporation. While the exact name of the corporation type and the legal restrictions vary from state to state, such nonprofits are generally prohibited from distributing their profits and assets to individuals, and may only distribute profits and assets to other nonprofits.

There are at least two other entity types that tend to impose *some* restrictions on the distribution of profits and assets. A nonprofit mutual benefit corporation, under some state laws, is prohibited from distributing profits to members, but may purchase or redeem memberships from the members.<sup>2</sup> Thus, if a member buys a membership in a land-owning nonprofit mutual benefit corporation for \$10,000, the corporation can pay that amount back to the member when he or she leaves. Most likely, however, no dividend, interest, or appreciation could be paid along with the redemption. Although they are prohibited from distributing profits, under some state laws, mutual benefit nonprofits may, upon dissolution only, distribute assets to

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<sup>2</sup> See, for example, Cal. Corp. Code Section 7411.

members or to a person or entity of its choosing.<sup>3</sup> This means that individual members may have some incentive to cash out by selling the entire property and dissolving the entity.

Often, cooperative corporations are limited by state laws in the ways that they can distribute profits to individuals. For example, in California, a cooperative cannot distribute more than a 15% return per year on individuals' capital contributions.<sup>4</sup> Cooperatives are generally required to distribute earnings on the basis of patronage, rather than on the basis of capital contributed.<sup>5</sup> This means that earnings are distributed to individuals, but that one individual cannot make a large profit on his/her capital investment.

- c) Does the choice of entity mandate democratic or accountable governance?** If an entity mandates a certain type of governance structure, this can contribute to the protection of land, by helping to ensure that private interests cannot control an entity for their personal benefit. Cooperative corporations, nonprofit mutual benefit corporations, and nonprofit public benefit corporations with members are typically mandated, by law, to have elections and major decisions be made on a one-member/one-vote basis. This helps to ensure that an organization operates with its members' interests or the original purpose of the organization in mind. In addition, even when they do not obtain tax exemption under 501(c)(3), nonprofit public benefit corporations are often subject to certain rules that help to maintain the integrity of the board. For example, state statutes may limit the number of financially interested directors that may serve on a board, and require that self-dealing transactions be approved by a disinterested panel of directors or by a government entity, such as the state Attorney General.<sup>6</sup>
- d) Does choice of entity mandate a certain tax treatment?** As described below, an entity can choose between two or more tax statuses or exemptions, but the IRS will also impose certain other rules on an entity depending on whether it is a corporation, LLC, or partnership. Tax law is vast, and it's impossible to summarize it all here. However, I'll describe one major consideration briefly, which is that in the real estate context, most of the time it will be optimal to own land as an LLC (or partnership, if partners are willing to assume personal liability for debts). Most commonly, groups choose to form an LLC over a corporation, because an LLC member's adjusted basis in the LLC is raised by the member's allocable share of the entity's debt. Because each member's adjusted basis is much higher than the amount of cash the member has actually contributed to the entity, each member is able to deduct greater losses in an LLC than they would through a corporation (where the entity's debt is not included in determination of a shareholder's basis). The loss deducted by an LLC member may, therefore, be greater than the amount of cash the individual member has actually contributed to the LLC. Many LLCs formed for the purposes of holding real estate will

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<sup>3</sup> See, for example, Cal. Corp. Code Section 8717.

<sup>4</sup> Cal. Corp. Code Section 12451

<sup>5</sup> See Cal. Corp. Code Section 12201.

<sup>6</sup> See, for example, Cal. Corp. Code Section 5233.

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be able to pass significant losses through to individual members, as a result of payment of mortgage interest, property taxes, insurance and other expenses, and by allocating a share of the property depreciation to members.<sup>7</sup> By passing through deductible losses to members in this way, LLCs are able to simulate some of the tax advantages of individual home ownership (such as tax deductions for mortgage interest and property tax payments).

### **Common Entity Types**

Every state offers a large handful of entity types to choose from, and each entity comes with a set of legal requirements and constraints. The rules governing entities vary from state to state, so it's important to read the statute governing the entity types. The most common entity types available at the state level and used for the ownership of land are:

- Partnerships (General and Limited)
- Limited Liability Companies
- Low-Profit Limited Liability Companies<sup>8</sup>
- General Stock Corporations,<sup>9</sup> which include new corporation types, such as Benefit Corporations and Flexible Purpose Corporations<sup>10</sup>
- Cooperative Corporations
- Nonprofit Public Benefit Corporations
- Nonprofit Mutual Benefit Corporations
- Nonprofit Religious Corporations

The following are the three most common entity types used in intentional communities:

#### **a) Limited Liability Companies (LLCs):**

Limited Liability Companies (LLCs) are increasingly popular entities through which intentional communities hold title to land. An LLC is a type of entity that can be formed in any U.S. state. LLCs provide a great deal of flexibility in the ways that members can structure the LLC's operations, governance, and financial provisions. A major benefit of an LLC, as suggested by its name, is that it provides liability protection to its individual members, in the event that something goes wrong or the LLC cannot meet its financial obligations.

Holding land as an LLC also has certain tax advantages (also described above) over holding land through an entity such as a corporation (unless the corporation meets the IRS definition of cooperative housing corporation, above), which is that certain costs, such as depreciation of the building and mortgage interest can be passed through to the members as a business expense and loss. However, one tax disadvantage is that LLC members that sell their share can't claim a \$250,000 capital gains tax exclusion.

One other disadvantage of purchasing property as an LLC is that the financing available to LLCs is more akin to commercial loans, rather than personal home mortgages. As

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<sup>7</sup> For more information, see IRS Publications 541 and 925.

<sup>8</sup> These are only available in a handful of states.

<sup>9</sup> The phrase "general stock corporations" is used here to refer to run-of-the mill for-profit corporations to differentiate between those corporations and cooperatives and nonprofits.

<sup>10</sup> These are only available in a small handful of states.

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such, the down payment required of the LLC is often double what individuals would pay under a regular home mortgage, and interest rates tend to be higher.

Many cohousing groups also use the LLC form during the process of developing a property that will ultimately be converted into condominiums. By forming an LLC the group becomes a legal entity and can enter into contracts, which allows it to purchase land and partner with developers and contractors. The LLC form of ownership also provides liability protection to individual group members should anything go wrong during the development process.

#### **b) Public Benefit Nonprofits**

Nonprofit public benefit corporations are the entities most often used to hold residential properties when the goal is to create some form of affordable housing, supportive housing, religious community, or housing for a group with distinct housing needs, such as students. Being a nonprofit public benefit corporation comes with a key restraint: the profits and the assets of the corporation cannot be distributed to private individuals. This is a critical control that removes individual incentives to buy, sell, develop, or extract resources from the land for profit-making purposes. Widespread ownership of land by public benefit nonprofit corporations could, therefore, significantly change the dynamics of the land market and reduce incentives to exploit or speculate on land.

When most people use the phrase “land trust,” they are usually not referring to the type of trust that has a trustee and beneficiary; the phrase most often refers to a nonprofit public benefit corporation that owns land and/or easements, usually for the purpose of preserving ecosystems, agricultural land, or affordable housing in the long term.

Community land trusts typically operate under this model: The nonprofit trust holds title to a piece of land and grants two things to each resident household: 1) a very long term lease (known as a “ground lease”) to occupy the land, and 2) ownership of certain improvements on that land (usually a housing unit). This model gives residents the feel of ownership, while the land trust’s ownership of the underlying land gives the trust the power to set limitations on the use and transfer of the property. In particular, the terms of the ground lease generally limit the residents’ ability to sell their unit at market rate, thereby preserving the affordability of the unit and creating what is usually called “limited equity housing.” Limited equity housing models use a variety of formulas to determine what kind of return a resident may get when he/she sells the unit. The formula is typically the purchase price multiplied by the change in the consumer price index or the change in area median income, plus the value of any improvements added by the resident.

Not all nonprofits that own land necessarily think of or refer to themselves as “trusts.” For example, many of the housing “cooperatives” occupied by University of California, Berkeley students are actually owned by the umbrella nonprofit, the Berkeley Student Cooperative.

#### **c) Mutual Benefit Nonprofits**

For housing that does not necessarily serve a special charitable class of individuals or purpose, a mutual benefit nonprofit form is sometimes used to hold title to property. Mutual benefit nonprofits provide a good, service, or benefit to a group of members. Homeowners associations in condominium cohousing communities generally form as mutual benefit

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corporations. The ownership of land at Earthaven Ecovillage in North Carolina is by a mutual benefit type of nonprofit. Mutual benefit nonprofit corporations are subject to an important constraint, which is that they may not distribute profits to individuals during the life of the organization; this prevents the corporation's land from being developed or mined to serve profit-making goals of individuals. At the same time, mutual benefit corporations are generally allowed to distribute assets to individuals upon dissolution, which means that profit-making goals are not completely prevented from driving the decisions of such an organization.

## **2. Choice of Tax Status:**

The question of an entity's tax status may be answered separately from the choice of entity formation at the state level. Most entities, once formed, will be able to choose from two or more tax statuses or exemptions.

- a) Entity-Level Taxation versus Pass-Through Taxation:** Some entities, like C Corporations and LLCs that elect to be taxed like C Corporations, are subject to "double taxation." Double taxation means the entity pays tax on its net earnings, and individual members or shareholders pay tax on those earnings when they are distributed to individuals. By contrast, pass-through entities (S Corporations, most LLCs, and Partnerships) are not taxed until profits are distributed or allocated to members and shareholders. Pass-through status is especially important in housing ownership, because, often more importantly, *losses* can be passed through to individuals to offset other sources of individual income.
- b) Cooperative Taxation:** Entities that distribute income to members on a cooperative basis (on the basis of how much each "patronized" the cooperative) can be taxed under Subchapter T of the Internal Revenue Code, which provides for a type of pass-through taxation. Under Subchapter T, cooperative earnings that are distributed as patronage dividends are taxable to an individual, but not to the entity.
- c) Forms of Tax Exemption:** Most nonprofit corporations will seek some form of tax exemption from the IRS. The section of the Internal Revenue Code under which an entity obtains tax exemption may dictate many things about how the entity operates, for what purposes, how it is governed, what sources of income it may have, and how it may spend or distribute its funds. Here is a brief summary of the categories of tax exemption land-owning organizations may contemplate:
  - i. 501(c)(2) Title Holding Corporations:** An entity "organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to [another tax-exempt nonprofit]" may obtain exemption under section 501(c)(2) of the Internal Revenue Code.<sup>11</sup> There are a variety reasons that a

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<sup>11</sup> See 1986 IRS EO CPE Text, "C. IRC 501(c)(2) - Title Holding Corporations" available at <http://www.irs.gov/pub/irs-tege/eotopic86.pdf>

nonprofit might want to create a separate entity to hold title to and manage income-producing properties, some of which are named by the IRS in one publication on 501(c)(2):

“These factors would include limitation of liability from potential damage suits; enhancement of ability to borrow; limitations imposed in gifts and bequests to exempt organizations that effectively require such gifts to be kept in separate entities; clarity of title; accounting simplification; and limitations imposed by various state laws on organizations that would be recognized as exempt under the federal revenue laws.”<sup>12</sup>

In addition to the benefits listed by the IRS, 501(c)(2) title holding corporations create an avenue for 501(c)(3) nonprofits to benefit from rental income from properties. Rental income is not considered taxable unrelated business income to a 501(c)(2), but such income may be subject to unrelated business income tax under a 501(c)(3).<sup>13</sup> If a 501(c)(3) organization plans to hold title to land that serves its tax exempt purposes, but which will also have a good amount of rental income, it may be helpful to hold title to the land in a 501(c)(2) to avoid tax on the rental income.

- ii. **501(c)(3) Charitable, Religious, Educational, and Scientific Organizations:** Unless it is in furtherance of a recognized charitable, educational, religious, or scientific purpose, developing and providing housing alone, is generally not considered a purpose that is tax exempt under 501(c)(3). Providing housing to people that are poor, distressed, or underprivileged is considered a charitable purpose.<sup>14</sup> Through various rulings and guidance documents, the IRS has provided guidance on the circumstances under which provision of housing to low income individuals,<sup>15</sup> people with disabilities,<sup>16</sup> and the elderly<sup>17</sup> will be tax exempt. Providing housing in furtherance of another tax exempt purpose can also, itself, be a tax exempt activity. For example, providing housing to students (whether or not students are part of an underprivileged group) may be tax exempt, because provision of housing advances the school’s educational purpose. Housing provided in connection with a religious center or other educational center will also likely be found to be a tax exempt purpose, if the provision of such housing is necessary to achieving the religious or educational purposes. Organizations formed to preserve ecologically significant land<sup>18</sup> or, in some cases, historically significant buildings<sup>19</sup> may also obtain tax exemption under 501(c)(3).

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<sup>12</sup> Id.

<sup>13</sup> See A. Allen Butcher and Diana Leafe Christian, “Legal Options for Intentional community”, available at <http://www.ic.org/wiki/legal-options-intentional-communities/>

<sup>14</sup> See IRS Publication 557 (October 2011), page 30.

<sup>15</sup> See IRS Exempt Organization Continuing Professional Education Text, 1992, “Low-Income Housing as a Charitable Activity,” by Robert Louthian and Marvin Friedlander, available at <http://www.irs.gov/pub/irs-tege/eotopicd92.pdf>. See also Rev. Rul. 70–585, 1970–2 C.B. 115, Rev. Rul. 67–138, 1967–1 C.B. 129, IRS Low Income Housing Guidelines Revenue Procedure, Rev. Proc. 96-32, 1996-1 C.B. 717, 1996-20 I.R.B. 14, available at [http://www.irs.gov/pub/irs-tege/rp\\_1996-32.pdf](http://www.irs.gov/pub/irs-tege/rp_1996-32.pdf)

<sup>16</sup> See Rev. Rul. 79–19, 1979–1 C.B. 195.

<sup>17</sup> IRS Exempt Organization Continuing Professional Education Text, 1979, “Rental Housing for the Elderly Under IRC 501(c)(3)” available at <http://www.irs.gov/pub/irs-tege/eotopich79.pdf>. See also Rev. Ruls. 72–124, 1972–1 C.B. 145; 79–18, 1979–1 C.B. 194; and 79–18, 1979–2 C.B. 194.

<sup>18</sup> Rev. Rul. 76-204, 1976-2 C.B. 15

<sup>19</sup> See the following IRS Revenue Rulings: Rev. Rul. 75-470, 1975-2 C.B. 207, Rev. Rul. 67-6, 1967-1 C.B. 135, and Rev. Rul. 76-147, 1976-1 C.B. 151

Many groups that are developing housing for themselves will be curious about the possibility of obtaining 501(c)(3) status and using grant money or tax-deductible donations in the purchase or development of their housing. Unfortunately, many of these groups would fail to meet the requirements necessary for 501(c)(3) tax exemption, primarily because their organization is designed to meet the housing needs of a fixed and defined group of people, and not necessarily formed for the purpose of creating broader public benefit. However, such groups may benefit from creating a separate 501(c)(3) corporation for the operation of specific activities that are tax exempt, such as educational or charitable programs provided on the property. Groups may also sell or give title, a conservation easement, or other rights to a 501(c)(3) organization to empower that organization to enforce the preservation of ecosystems on the land or the affordability of some of the housing on the land.

- iii. **501(c)(4) Social Welfare Organizations:** 501(c)(4) tax exemption is generally available to organizations engaging in activities that benefit the public or a broad sector of the community.<sup>20</sup> Many activities can fall under 501(c)(4) tax exemption, so long as they don't look a good deal like commercial activities and so long as they are not designed to benefit only a fixed group of people. A group that wants to develop housing for itself will likely fail to meet the requirements of 501(c)(4) for some of the same reasons that it might fail under 501(c)(3), since the group's efforts are often aimed primarily to benefit the group, as opposed to a broad community. Some homeowner's associations, however, obtain 501(c)(4) status if they operate primarily to provide facilities to the public<sup>21</sup> or if they operate to provide benefit to a large community (as opposed to a small geographic area).<sup>22</sup> If the organization works to improve individually-owned properties, it will likely fail to qualify for exemption under 501(c)(4).<sup>23</sup> Donations to 501(c)(4)s are not tax deductible to donors and most foundations do not make grants to 501(c)(4)s; this means that 501(c)(4) status generally does not help an organization to fundraise.
- iv. **501(c)(7) Social and Recreational Organizations:** In contrast to (c)(3) and (c)(4) organizations, which are required to provide benefits to the public, 501(c)(7) tax exemption is designed specifically for groups that provide a private benefit *to themselves*. In that respect, 501(c)(7)s may be fitting for groups seeking to provide certain housing amenities to themselves, like a country club, swimming pool, or possibly a cohousing common house. 501(c)(7) is a category of exemption designed for social, recreational, and "other nonprofitable purposes."<sup>24</sup> A question for further inquiry is: what kinds of activities can be included under 501(c)(7)'s "other nonprofitable purposes" category? It is not a perfect "catch-all," because the IRS has already said that maintaining roads in a neighborhood is not a proper activity for a 501(c)(7) because is not related to social or

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<sup>20</sup> See Exempt Organizations-Technical Instruction Program for FY 2003, "IRC 501(c)(4) Organizations," by John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, available at <http://www.irs.gov/pub/irs-tege/eotopic03.pdf>

<sup>21</sup> See Rev. Rul. 80-63, 1980-1 C.B. 116.

<sup>22</sup> See Rev. Rul. 74-99, 1974-1 C.B. 131.

<sup>23</sup> See Rev. Rul. 74-17, 1974-1 C.B. 130.

<sup>24</sup> See Exempt Organizations-Technical Instruction Program 1996, "C. SOCIAL CLUBS - IRC 501(c)(7)," by Jim Langley and Conrad Rosenberg, available at <http://www.irs.gov/pub/irs-tege/eotopic96.pdf>



pleasurable purposes.<sup>25</sup> Apparently the IRS has appointed itself the arbiter of “pleasure,” in deciding what does and does not further social and pleasurable purposes. Maintaining roads, to the IRS, must sound like all work and no play. 501(c)(7) may be a fine tax category for a group that wants to share a private vacation home or campground (which sounds like fun), but it will not likely work for a group that simply wants to provide itself with primary residences (which sounds too normal and boring).<sup>26</sup>

Note that 501(c)(7)s may not receive more than 35% of their income from non-member sources, and no more than 15% of the income may come from the use of the club’s facilities by the general public. This rule *requires* that the organization provide only for a limited group of people. The income derived from members must also be of a sort “traditionally” associated with “normal and usual” activities of a social club (member fees, entrance fees, and so on).<sup>27</sup> The IRS seems to have also appointed itself arbiter of “tradition,” in deciding what groups can provide for themselves and on what terms. A cohousing community could likely own a common house as a 501(c)(7) and could charge members dues and fees for involvement in community meals and social activities. But could that entity also operate a grocery buying club for the members, an equipment rental service, a shared internet service, a guest house, or other amenity that the members must pay for? This is an area for further inquiry, and it may require that we seek guidance from the U.S. Department of Pleasure and Tradition (the IRS).

- v. **501(d) Apostolic Associations:** A group of people that wish to develop and own housing communally may want to consider seeking tax exemption under 501(d)<sup>28</sup> if that group is bound together by a set of common beliefs and values. To obtain exemption under this section, a group must meet requirements of the statute, which are summarized by the 9<sup>th</sup> Circuit as follows: “that there be a common treasury, that the members of the organization include pro-rata shares when reporting taxable income, and implicitly, that the organization have a religious or apostolic character.”<sup>29</sup> The phrase “common treasury” generally means that members share income and property.

Twin Oaks is an intentional community in Virginia that has tax exemption under 501(d). Twin Oaks was also the subject of a Tax Court decision that held that members of a 501(d) community need not surrender their personal property and take a vow of poverty upon joining.<sup>30</sup> In determining what is a proper religious or apostolic “character,” 501(d) organizations appear to be subject to far less scrutiny than are churches that seek tax exemption under 501(c)(3). 501(d) organization need not hold religious services or engage in activities characteristic of traditional religions, such as songs, adoption symbols, or rituals. The community may simply create “an environment for the daily practice of its beliefs,” as the Tax Court observed in the *Twin Oaks* case.<sup>31</sup>

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<sup>25</sup> See Rev. Rul. 75-494, 1975-2 C.B. 214.

<sup>26</sup> *Id.*

<sup>27</sup> See Exempt Organizations-Technical Instruction Program 1996, “C. SOCIAL CLUBS - IRC 501(c)(7),” by Jim Langley and Conrad Rosenberg, available at <http://www.irs.gov/pub/irs-tege/eotopic96.pdf>

<sup>28</sup> See Internal Revenue Manual Section 4.76.29 (June 4, 2010).

<sup>29</sup> *Kleinsasser v. United States*, 707 F. 2d 1024 (9th Cir. 1983).

<sup>30</sup> *Twin Oaks Community, Inc. v. Commissioner*, 87 T.C. 1233 (1986).

<sup>31</sup> *Id.*

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- vi. **Section 528 “Homeowners Associations”:** A “homeowners association” (HOA) may sound like something you’d find managing common areas and property use in a run-of-the mill subdivision, but the tax category that the IRS has created for HOAs could also be used to purchase, develop, and own entire properties for the creation of intentional communities. Earthhaven Ecovillage in North Carolina, for example, owns a 320-acre property as a homeowners association and files taxes under Section 528.<sup>32</sup> Earthhaven leases plots of land to members, who construct residences on those plots. Homeowners associations are defined by the IRS to include condominium management associations, residential real estate management associations, and timeshare associations.<sup>33</sup> Such organizations are usually formed under state law as mutual benefit nonprofits. To qualify for tax status under Section 528, 90% of the entity’s expenditures must be made to acquire, construct, manage, and maintain property.<sup>34</sup> In addition, 60% of the organization’s income must be derived from member fees, dues, and assessments.<sup>35</sup> Income from other sources is generally taxable. An organization need not apply for tax exemption under 528, but need only meet the requirements of the statute and file its tax return using form 1120 or 1120-H.

### **3. Considerations When Structuring the Entity:**

Choice of entity and tax status are important considerations in designing an organization to own and manage land; however, the real “teeth” of an organization can sometimes be found in the choices the members/owners make in designing its structure, governance, and financial terms. These terms can greatly influence an organization’s accountability to its members and to the purposes it was designed to serve.

Some entities, like LLCs, afford a vast amount of flexibility to members to structure and manage the entity however they wish. But even in corporations, which by statute require specific structural and procedural formalities, there is some flexibility to build in the structural “teeth” to sustain an organization’s purposes and ensure accountability.

Here are some of the important considerations to be made in structuring an entity to own land:

- a) **Composition of membership:** Who may join and/or buy in to the entity?
- b) **Voting rights:** Do members receive one vote each, or are voting rights allocated in proportion to a member’s investment, share of land ownership, or on some other basis?
- c) **Governing body:** Will there be a governing board of directors or will members manage the entity directly?
- d) **Election and appointment procedures:** If the entity has a governing body, how will members of the governing body be elected or appointed? How will officers be elected or appointed?

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<sup>32</sup> Diana Leafe Christian, *Creating a Life Together: Practical Tools to Grow Ecovillages and Intentional Communities* (New Society 2003), page 179.

<sup>33</sup> IRC Section 528(c)(1).

<sup>34</sup> IRC Section 528(c)(1)(C).

<sup>35</sup> IRC Section 528(c)(1)(B).

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- e) **Composition of governing body:** Will the governing body be comprised of people that live on the property, people that do not live there, or some balance? (For example, many community land trusts require that 1/3 of the board be comprised of residents of the trust's housing, that 1/3 be comprised of experts, professionals, and public officials helpful to the trust, and that 1/3 be comprised of concerned and committed community members.)
- f) **Spheres of decision-making, management, and operations:** What decisions must be put to all members of the entity and what are decisions that will be made by governing bodies? Are some decisions allocated to certain committees within the organization? Will certain officers of the organization be empowered to make some decisions? How will the activities of the organization be managed?
- g) **Procedures for meetings and decision-making:** What procedures will be used to hold meetings? What procedures are used to consider and decide on proposals?
- h) **Financial provisions:** How will members buy in and sell out? How will profits and losses of the entity be allocated and distributed to members, if applicable? What fees may members be required to pay regularly?
- i) **Conflict of interest policies:** How will the organization preserve the integrity of its governing body and ensure that it is not steered to serve the interest of certain individuals or certain profit interests? Under what circumstances might a member or director be deemed financially interested in a transaction or issue, and how will the organization handle this?
- j) **Procedures for amending governing documents:** If governing documents can be amended simply (such as by a majority vote of the board), this means that many of the safeguards built into legal structure could be easily undermined. Many organizations may want to build in greater safeguards, such as by requiring approval by a super-majority of the board or members, unanimous approval, or approval by a third party (such as a designated nonprofit) to change certain key provisions of the governing documents.
- k) **Dissolution of the entity:** Under what circumstances might the entity dissolve and sell its assets? How will the proceeds be distributed? To a nonprofit, to current members, or to both current and past members?

## SAMPLE CO-OWNERSHIP AGREEMENT

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### **DISCLAIMER for Sample Co-Ownership Agreement:**

The following is a basic Tenancy in Common (TIC) Agreement for co-ownership of a two-unit property. **Use of this agreement in whole or in part is at your own risk, and does not create an attorney client relationship with its authors, editors, contributors, or publishers.** Also, the odds are this sample agreement will not reflect how you wish to structure your Co-Ownership Agreement for sharing real property. This is because Co-Ownership Agreements vary as widely as each members' considerations of finances, the type of land and buildings to be shared, community, and aesthetics. Therefore, it is prudent that every co-owner carefully consider what they are agreeing to when signing a contract and consult professionals like attorneys, CPAs, and governance/community experts.

### **About Co-Ownership Agreements and this Sample:**

The following is a basic Tenancy In Common (TIC) Agreement for co-ownership of a two-unit property. This is an example of an agreement that could flow from the use of the questionnaire provided above.

Co-ownership agreements have a spectrum of different personalities, depending on the degree of sharing involved. Some co-ownership agreements seek to simulate separate ownership by giving each owner his/her own exclusive unit and independent set of responsibilities, and by requiring that each owner obtain separate financing.<sup>36</sup> For example, on a two unit property where each unit is contained within its own building, such as a house with a back cottage, each owner is likely solely responsible for maintaining his/her own building, and this division may create a real feeling of separate ownership, and may more easily obtain fractional financing. In contrast, a co-ownership agreement for a single family home for example, likely entails shared use of most spaces, shared financing, shared responsibilities for most maintenance tasks, and so on.

This agreement sits somewhere in the middle of the spectrum of sharing. The agreement is for co-ownership of a duplex where the units are housed under the same roof.

When two units share a single structure, co-owners must usually be jointly responsible for maintaining the exterior, plumbing, foundation, roof, and weight-bearing walls of the building. This particular agreement is also written for co-owners that share a single mortgage, as opposed to each obtaining separate fractional financing.

At the same time, rights and responsibilities under this agreement are divided to simulate separate ownership in other respects. Each owner is allocated a single living unit, the interior of which each owner is responsible for maintaining.

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<sup>36</sup> Fractional financing for TICs, however, can be somewhat difficult to come by, and the majority of TIC owners must share responsibility for a single home loan.

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Each owner may sell his/her unit to third parties on the open market, though only after providing the other owner the opportunity to buy the unit. If the entire property is sold, the owners agree to divide the proceeds based on the appraised relative value of each unit rather than based on a pre-determined percentage. This method of dividing sale proceeds allows owners to benefit financially from careful upkeep and any improvements they make on their own unit, and it, thus, simulates separate ownership in that respect.

In a TIC/co-ownership agreement, it is important to confront the possibility of and provide terms for the possible occurrences of life events related to employment, health, and domestic changes that affect the relationship of owners, or who will occupy the property and when it will be sold. Note that although it is long this TIC Agreement in many ways is bare bones. A significant amount of detail could potentially be added to nearly every provision, to give more thorough procedures for how to handle various matters.

## **Co-Ownership Agreement for [ADDRESS]**

**Background of this Agreement:** PERSON1 and PERSON2 share ownership of and responsibility for the duplex at ADDRESS.

PERSON1 and PERSON2 have decided to co-own the property because they enjoy and respect each other, and they trust one another to be reliable and accountable. PERSON1 and PERSON2 value clear and open communication, and expect to navigate any changes or challenges with a commitment to respectful communication.

To ensure that expectations are clearly communicated and carried out, PERSON1 and PERSON2 want to clarify their rights and responsibilities with regard to the shared property and their shared debt, and also want to ensure that any future co-owners and tenants adhere to any terms and conditions agreed upon now.

Therefore, PERSON1 and PERSON2 now reduce their agreement to writing, and agree as follows:

### **1. Tenants in Common Agreement in Relation to the Property**

This is a Tenants in Common (TIC) Agreement (“Agreement”) and it governs the rights and obligations of any person or entity that has an ownership interest, under the terms of this Agreement, in the real property located at ADDRESS (the “Property”). The Property consists of one duplex building containing two legal units and the lot underneath and surrounding the building. By owning the Property as Tenants in Common, each Owner (defined in Paragraph 2) owns an undivided fractional interest in the entire Property. This means that none of the Owners has an individually deeded right to exclusive possession of any portion of the Property. However, through this Agreement, Owners intend to divide their rights and

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responsibilities with regard to the Property. The Owners do not intend to create a common interest development, partnership, or joint venture.

## **2. Owners and Parties to this Agreement**

- a. PERSON1 and PERSON2 are each a “Party” to this Agreement and an “Owner” of the Property; collectively they will be referred to as the “Parties” and/or “Owners.”
- b. Anyone who later assumes the rights and obligations under this Agreement shall become a Party to this Agreement. By entering into this Agreement, **PERSON1 assumes all rights and obligations of Owner A** and **PERSON2 assumes all rights and obligations of Owner B**. An “Owner” may refer to an individual, an entity, or a group of people, depending on who owns the Property. For example, if the Cotenancy Interest of Owner A is later owned by two people, those two people will be referred to, together, as “Owner A.”

## **3. Effective Date, Term, and Termination**

This Agreement is effective on the date it is signed and shall continue for 90 years from the effective date unless all then current parties to this Agreement terminate the Agreement sooner by mutual written agreement, consolidation of the property under sole ownership, sale of the entire property, conversion of the property to a condominium, or partition in some other legally allowed manner.

## **4. How Owners Allocate Rights and Responsibilities**

As of the date this Agreement becomes effective, Owner A and Owner B have chosen not to assign a percentage to each Owner’s share of the Property. In the absence of any other share percentage agreed to as by 100% of all current Owners, each Owner shall be presumed to own a 50% share in the Property. However, this 50/50 allocation does not necessarily govern the way that decisions are made, how the Property is used, how much each owner should pay toward the mortgage, or how proceeds will be divided on sale, partition, destruction, or condemnation. The allocations of those and other rights and responsibilities allocated as set forth in this Agreement and current written, signed and otherwise valid amendments hereto, if any.

## **5. Cotenancy Interests**

The total of an Owner’s ownership share and rights and responsibilities with regard to the Property, as defined by this Agreement, is referred to as her “Cotenancy Interest.” Each Owner’s Cotenancy Interest includes, but is not limited to that Owner’s Unit and Exclusive Use Common Areas, and that Owner’s undivided share of the Common Areas.

## **6. Units, Common Areas, and Exclusive Use Common Areas**

### **a. Units:**

- i. The Property consists of a duplex with two Units. Each Unit consists of its interior surfaces of the joists, studs, and beams within the perimeter walls, floors, ceilings, windows, window frames, doors, door frames, and trim of such Unit and the airspace bounded by and contained within those interior surfaces. Each Unit includes, without limitation, any appliances, hot water heaters, space heaters, air conditioning units, furnace, cabinetry, and lighting fixtures inside each unit; and any portions of the plumbing, heating, and electrical systems serving only that Unit. A Unit does not include those areas and those things that comprise the Common Area.
- ii. Owner A will have the right to exclusive use and possession of the Downstairs Unit, totaling 720 square feet, consisting of all rooms on the first floor, including \_\_\_\_\_ [more detailed description of what rooms it includes], not including the main entranceway to the structure and stairs accessing the upstairs unit, and the basement. Owner B will have the right to exclusive use and possession of the Upstairs Unit, totaling 750 square feet, consisting of all rooms on the top floor, including \_\_\_\_\_ [more detailed description of what rooms it includes].

- b. **Common Areas:** The spaces of which both Owners have possession and use are referred to as "Common Areas." Owners shall be jointly responsible for maintaining all Common Areas. Each Owner may use these Common Areas in accordance with the purposes for which they are intended without hindering the exercise of or encroaching upon the rights of any other Owners to use the spaces for those purposes. Common Areas include all yards, driveways, the basement, decks, patios, walkways, interior stairway, roof, laundry room, foundation, all other exterior portions of the Property, and the entire building structure, minus the Units, described above.

- c. **Exclusive Use Common Areas:** Certain portions of the Common Area, referred to as "Exclusive Use Common Area"; are set aside and allocated for the exclusive use of the Owner of the Unit to which they are either physically attached or assigned to a Unit, as described below. The Exclusive Use Common Area consists of:

- i. **Fixtures.** Shutters, awnings, window boxes, exterior stairways, porches, landings, doorsteps, exterior doors, doorframes and hardware incident thereto, screens and windows, skylights and other fixtures, all of which are designed to serve a single Unit, but located outside the boundaries of such Unit.
- ii. **Pipes and wiring.** The plumbing, pipes, conduits, wires, cables and all other electrical equipment or apparatus that are designed to serve a single Unit but located outside the boundaries of such Unit.

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- iii. **Yards.** As owner of the downstairs unit, Owner A shall have exclusive use of the two foot strip of garden that borders the front of the Downstairs Unit and runs the length of Unit A.
- iv. **Decks.** Owner A shall have exclusive use of the deck off the back door of Unit A and Owner B shall have exclusive use of the deck off the back door of Unit B.
- v. **Parking spaces.** Each Owner shall have the exclusive right to use and enjoy that parking space designated for the benefit of each Owner's Unit, described on the attached map.

## **7. Use of Property**

- a. **Residential use of Property:** Each Owner agrees that the primary use of the Property shall be residential. Owners may operate a home business so long as it complies with zoning rules pertaining to home businesses, and so long as it does not create a sound nuisance or clutter in the Common Areas.
- b. **Pets:** Unless Owners agree otherwise, each Owner may keep no more than two dogs and two cats on the Property. Before obtaining any pets, an Owner should consult with the other Owner to ensure that the other Owner does not have any serious concerns. The non-obtaining Owner *may* block the obtaining Owner from obtaining or keeping a pet if the pet has a tendency to bite or attack, if the pet is loud and creates a sound or any other nuisance, or if it is illegal to keep such an animal. An Owner with a dog agrees to immediately clean up after any messes left by the dog in the Common Area and will not leave any dogs in the Common Area unattended unless all Owners agree to it.
- c. **Creating a clean and reasonably quiet environment:** Owners agree to keep all Common Areas clean and clutter-free, and shall respect one another's reasonable need for quiet.
- d. **Prohibited activities:** No person living on the Property shall use hazardous chemicals in cleaning or caring for the Common Area.
- e. **Chemicals.** No person living on the Property shall use hazardous chemicals in cleaning or caring for the Common Area. All Owners must approve any new paint, stain, sealant, cleaning agent, pesticide, herbicide, or other product that might contain volatile organic compounds or other harmful chemical before it may be used on the Premises.

## **8. Rental and Occupancy**

- a. **Housemates:** An Owner may allow others to live in that Owner's unit and does not need to receive the permission of the other Owner, so long as the number of people living in each unit does not exceed four. As a courtesy, an Owner bringing in housemates shall



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notify the other Owner before the proposed housemates move in. If the other Owner feels resistant to or has worries about a proposed housemate, both Owners agree to sit down and discuss any worries with the goal of making the arrangement workable and comfortable for everyone.

- b. **Leasing to Third Party Tenants:** Each Owner is entitled to lease her Unit to a Third Party Tenant and to retain all income derived from such a lease, provided that the following requirements are met:
- i. **Approval by nonleasing Owner:** Any prospective Third Party Tenant is subject to approval by the nonleasing Owner. The nonleasing Owner may review a standard form rental application, credit report, and other information that the nonleasing Owner may reasonably request from the prospective Tenant or leasing Owner. The nonleasing Owner shall quickly respond to requests for approval of a Third Party Tenant, and shall not unreasonably withhold approval of a prospective tenant. A failure by the nonleasing Owner to respond within three days to a leasing Owner's written request for approval of a Third Party Tenant shall be treated as approval by the nonleasing Owner.
  - ii. **Lease agreement:** Any lease agreement with a Third Party Tenant shall be in writing, shall include this agreement and any written Rules as attachments, and must include an agreement that the Third Party Tenants shall adhere to the terms of this TIC Agreement and to any written Rules regarding day-to-day management, use and care of the Property as described below.
  - iii. **Agreement to avoid evicting a tenant:** If leasing a unit to a Third Party Tenant, the leasing Owner agrees to not attempt an eviction, without first consulting the other Owner and receiving the other Owner's permission, which may not be unreasonably withheld. This is because evicting a tenant could negatively affect the future applications for city approvals such as for condo conversion. The Owner attempting eviction must comply with all applicable law when pursuing an eviction. Any Owner who violates this provision of the Agreement shall indemnify and hold harmless all other Owners from any resulting damages including attorney's fees.
  - iv. **All financial obligations under this agreement are current.** If a leasing Owner has an outstanding financial obligation under this agreement, the leasing Owner hereby assigns to the other Owner the right to collect any rent payable to the leasing Owner, and the other Owner shall upon receipt thereof immediately use these funds to pay outstanding financial obligation under this agreement until the leasing Owner has no outstanding financial obligation under this agreement. This provision 8 (b)(iv) of this Agreement shall be null and void and of no effect if both Owners have an outstanding financial obligation under this agreement.

## **9. Decision-making and House Rules**

- a. **Meetings:** Owners agree to meet at least once per year to agree on an annual operating budget. There shall be no other requirement for regular and formal meetings. However, a meeting of the Owners may be called by any Owner provided that owner gives notice and a proposed agenda to the other Owner at least a week in advance. Owners agree to keep a written record of issues discussed and decisions made regarding the Property.
- b. **Voting:** Regardless of the size and value of an Owner's Cotenancy Interest, and regardless of the number of people living at the Property, Owner A and Owner B each have one vote in decisions about the Property. Thus, except where this Agreement allows an Owner to take unilateral action, all decisions about the Property must be unanimous. In the event that Owners cannot agree about a Property-related issue, Owners shall discuss and adapt the proposal in order to find a solution that is agreeable to both Owners. If the issue cannot be resolved through discussion, Owners agree to attend mediation in accordance with paragraph 26 of this agreement.
- c. **Adopting Rules:** The Owners may, from time to time, adopt and amend written "Rules" regarding day-to-day management, use, and care of the Property. Such Rules may concern any subject or matter and shall be binding on all Owners, their household members, guests, and tenants.

## **10. Financial Arrangement for Purchase**

PERSON1 and PERSON2 purchased the Property in January of 2013 for \$460,000, of which each agrees to pay half.

At the time of the purchase, PERSON2 paid an additional \$10,000 toward the down payment, and PERSON1 and PERSON2 have agreed this is a loan from PERSON2 to PERSON1 , and PERSON1 agrees to repay this \$10,000 to PERSON2 within one year of the execution of this Agreement. A promissory note has been executed by PERSON1 and PERSON2 and is attached to this agreement as Exhibit B.

## **11. Responsibility for Debt on the Property**

Owners share responsibility for the Property-related debt as follows:

- a. **Shared Mortgage:** The primary mortgage on the property is the Local Credit Union mortgage (the "Shared Mortgage"), in the amount of \$400,000. Owner A and Owner B shall share responsibility for the Shared Mortgage in the following proportions:
  - i. **Owner A: 50%**
  - ii. **Owner B: 50%**

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The portion of Shared Mortgage for which each Owner is responsible will be referred to in this Agreement as that owner's "Share of the Outstanding Debt." An Owner's Share of the Outstanding Debt may be adjusted, as described below.

- b. **Monthly payments on the Shared Mortgage:** Each Owner shall make a monthly payment toward the Shared Mortgage on the basis of their Share of the Outstanding Debt. At the time that this Agreement is entered into, the total required monthly payment on the Shared Mortgage is \$2,300. In accordance with each Owner's Share of the Outstanding Debt, Owner A and Owner B shall make monthly payments as follows:
  - i. **Owner A: \$1150**
  - ii. **Owner B: \$1150**
- c. **Adjustments Due to Prepayment:** An Owner may prepay all or a portion of her Share of Outstanding Debt, so long as the lender does not penalize prepayment. That Owner may arrange a reamortization, provided said Owner pays the reamortization fee, so that the total monthly payment is reduced to reflect the prepayment. In such event, the Owners shall recalculate their Shares of Outstanding Debt and the Owner making the prepayment will receive the full benefit of the monthly payment reduction.

## **12. Creation of a Joint Bank Account and Payment of Expenses**

- a. Owners agree to open a joint bank account, and each Owner agrees to make a fixed monthly deposit into the account.
- b. Owners shall meet at least once a year to 1) determine an operating budget for Property-related expenses, taking into account foreseeable maintenance costs, and 2) consider the management of the joint bank account for accounting and record keeping purposes (See subparagraph 14b household records folder). Owners shall then determine how much each Owner should deposit into the joint bank account and any new procedure for management of accounting of the joint bank account.
- c. Except when Owners front costs, all bills shall be paid from the joint bank account.

## **13. Creation of a Reserve Fund**

- a. **Creation and purpose of a Reserve:** Owners agree to keep at least \$10,000 in the joint bank account to serve as a Reserve fund. The purpose of creating a Reserve is primarily to protect the credit and assets of Owners in the event that one Owner cannot make an obligatory payment related to the Property. In the event that one Owner does not make an obligatory payment, either Owner may use the Reserve to make necessary mortgage, tax, or insurance payments. The Reserve may also be used to make unforeseen and necessary repairs, so long as all Owners agree to such repairs. Agreements for substantial expenditures for repairs may be documented in the Households Records Folder, Paragraph 14b.

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- b. **Contributions to and reimbursement of the Reserve:** Each Owner agrees to contribute \$250 per month to the Reserve until the Reserve has reached \$10,000. Owners will keep and manage an accounting of how much each Owner has contributed to or drawn from the Reserve. The accounting may be documented in the Household Records Folder, Paragraph 14b. When an Owner ceases to own the Property, they shall be reimbursed any contributions they made to the Reserve, minus their share of any payments that were made from the Reserve. Owners shall attempt to reimburse the Reserve fund as soon as possible after the Reserve is used to pay for an expense. If the Reserve fund is used to pay for an expense that would be divided on something other than an equal basis, Owners shall reimburse the Reserve fund accordingly.

#### **14. Keeping Accounts and Records**

- a. **Maintaining an accounting spreadsheet:** Owners agree to maintain an accounting spreadsheet documenting the following:
  - i. How much each Owner has contributed to the joint bank account,
  - ii. All costs paid for directly by an Owner and whether that Owner was reimbursed by the joint bank account,
  - iii. All payments made from the joint bank account, and
  - iv. How each payment should be allocated among the Owners (for example, most costs shall be allocated on a 50/50 basis, but others may be unequal).
- b. **Household record folder:** The household record folder will contain signed documents pursuant to, referencing, the joint bank account. Each Owner also agrees to deposit independent evidence of all of that Owner's expenditures for the Property, such as canceled checks or receipts, in the household records folder to be jointly maintained by the Owners. An earnest attempt will be made to keep one hard copy and one electronic copy of the household record folder updated monthly; to the extent possible, all records shall be kept current on a monthly basis.
- c. **Annual reckoning of accounts:** Within one month of the end of each accounting year (ending December 31), Owners shall reckon the accounts by determining each Owner's total contributions to Property-related expenses and the total amount of Property-related expenses that should be allocated to each Owner. If an Owner's total contributions are less than that Owner's total allocation of expenses, that Owner shall reimburse the bank account for the difference. If an Owner's total contributions are more than that Owner's total allocation of expenses, that Owner shall be reimbursed by the bank account or by the other Owner.

## **15. Sharing Costs**

- a. **Costs shared on an equal basis:** Except as otherwise provided in this Agreement, regardless of the number of people living at the Property, Owner A and Owner B shall each be responsible for one half of the following costs:
  - i. Maintenance and repairs of Common Areas
  - ii. Insurance
  - iii. Property taxes
  - iv. Trash
- b. **Costs shared on the basis of the number of people living in a Unit:** Because gas, electric, water costs, and other similar services to the property are not separately metered, Owners will each pay 50% of the costs so long as each Unit has an equal number of occupants. If one Unit has one more occupant than the other Unit, the Owner of the Unit with the larger number of occupants shall pay an additional 7% of each bill, and the Unit with fewer occupants will pay 7% less. Thus, if the Downstairs Unit has two occupants and the Upstairs Unit has one occupant, Owner A shall pay 57% of all utilities bills and Owner B shall pay 43%. For each additional occupant, the bills shall be adjusted by an additional 7%.

## **16. Insurance**

- a. **Insurance coverage:** The Owners have agreed that they will jointly maintain an insurance policy that includes public liability and replacement coverage for damage to the Property. If an Owner wishes to do so, they may obtain a separate insurance policy covering personal property.
- b. **Avoiding risky activities:** Owners agree not to engage in activities that could create a risk or hazard to property or persons or that would make the Property difficult or expensive to insure, unless all Owners agree in advance that the activity may take place on the Property.

## **17. Maintenance, Repair, Alterations, and Improvements**

- a. **Standards for maintenance, repair, alterations, and improvements:** Because the Owners desire to maintain a tidy and comfortable home environment, Owners agree that they will maintain the Property in good condition and will not allow any significant defects to remain unrepaired for an unreasonable period of time. An unreasonable delay would be

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one that results in unsightly or otherwise unacceptable living conditions and/or damage to the property.

- b. **Maintenance, repair, and improvement in Units:** Each Owner shall be solely responsible for maintaining and repairing the interior of their Unit, which includes ensuring that floors, walls, ceilings, light fixtures, and smoke detectors are kept in good condition so as to not substantially impair the value or desirability of the other Unit or the Property as a whole. Owners may make alterations to their Unit without the other Owner's approval; however, if the alteration might affect the structural or acoustic integrity of the building or requires governmental permits and approvals, the Owner must seek and obtain the other Owner's written permission which will not be unreasonably withheld.
- c. **Maintenance, repair, and improvements to Exclusive Use Common Areas:** Each Owner must maintain in good condition all parts of her Exclusive Use Common Areas, including utility lines, pipes, and conduits that serve her Unit exclusively, so as to not impair the value or desirability of the other Unit or the Property as a whole. Prior to making any changes or improvements to an owner's Exclusive Use Common Area that might affect the structural or acoustic integrity of the building or require governmental permits and approvals, each Owner must obtain written permission from the other Owner to ensure that any changes or improvements fit in harmony with the design of the building and exterior. The other Owner shall not unreasonably withhold consent to any changes or improvements to an Exclusive Use Common Area.
- d. **Maintenance and repair of Common Areas:** Owners are jointly responsible for maintenance and repair of Common Areas and agree to share the costs of such repairs on a 50/50 basis. The only exceptions to this are 1) in the event that a negligent act or omission by one Owner or that Owner's guest or tenant causes damage to the Property and that damage is not covered by insurance, then that Owner shall be responsible for making or paying for the repairs, and 2) a repair to the Common Area is necessitated as a consequence of the malfunction of any element that is owned by the Owner for which it is their responsibility to maintain under this Agreement.
- e. **Paying for necessary maintenance and repairs to Common Areas:** Unless an emergency repair is required, Owners agree to consult with each other prior to authorizing any repairs to the Common Area costing more than \$200. If at any time the Owners determine that there are foreseeable and expensive repairs that will become necessary within three years of such a determination (such as a roof or foundation replacement, exterior painting, or plumbing or wiring replacement), Owners agree to come up with a plan for paying for such repairs and will begin to make larger monthly payments into the joint bank account in order to plan for that expense.
  - i. **Emergencies:** In an emergency, the Owner who discovers the emergency shall promptly attempt to contact the other Owner and if possible both Owners will agree on a plan to address the emergency. If the other Owner cannot be contacted before action is needed the Owner who discovered the emergency will take

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reasonable steps using their own prudent judgment to address the emergency without spending more money than necessary.

An emergency exists when a repair is needed to keep the premises in the following condition:

- free of leaks in the roof, walls, windows, and doors;
- unbroken windows and doors;
- plumbing and natural gas pipes and fixtures have no leaks or other problems that could cause a safety hazard or lead to additional damage;
- hot and cold running water is available to appropriate fixtures in both Units;
- a working toilet, sink, bathtub or shower, and a working connection to the sewer system are present in both Units wherever needed;
- appropriate heating systems are capable of providing enough heat to keep the interior of the Units at a reasonable room temperature;
- electrical wiring that is free of safety hazards;
- structural elements of the building are free of safety hazards; and
- the premises are free of any other condition that poses an unreasonable risk to health or safety.

f. **Improvements to and alterations of Common Areas:** Owners by mutual consent may make improvements and alterations to the Common Areas. Prior to making an improvement or alteration, Owners shall use best efforts to come to an agreement about how to share the costs and labor. In the event that one Owner wishes to make an improvement and the other Owner agrees to that improvement but does not want to contribute to the cost, then recognizing that the other Owner could benefit financially from the improvement, Owners could agree in writing to handle the situation in a variety of ways including but not limited to:

- i. The Owner requesting the improvement could be reimbursed by the other Owner in monthly payments over time;
- ii. The Owner requesting the improvement could be reimbursed by the other Owner at the time the Property is sold, or at the time the other Owner sells their Cotenancy Interest;
- iii. The Owners could agree that, at the time the Property is sold in its entirety or at the time the non-improving Owner sells their Cotenancy Interest, the improvements shall be appraised to determine the amount by which the improvement has raised the fair market value of the Property or of the Cotenancy Interest. The Owner that paid for the improvement shall then be paid that amount

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from the sale proceeds. Owners shall, at the time of sale, choose an appraiser together. Should Owners be unable to jointly agree to an appraiser, then each shall hire their own appraiser and the two appraisals shall be averaged. To assist in future appraisals, Owners should carefully document the condition of the Property prior to the improvement.

In the event that the Owners do not agree in writing, to any of the above methods of handling an improvement to the Common Area, then the default rule will be that the Owner making improvement will be compensated according to the procedure described in Paragraph iii.

In a situation where one Owner makes an improvement to a Common Area without contribution by the other Owner, Owners should also discuss and come to an agreement about who should pay any property tax or insurance policy premium increases that could result from the improvement. In absence of an agreement otherwise, the default rule shall be that the Owner making the improvement shall be responsible for paying any increases to property taxes or insurance premiums.

- g. **Effect of Unit improvements on property taxes and insurance:** Any Owner that alters their Unit agrees to be solely responsible for the payment of all property tax increases, insurance policy premium increases, permitting fees, and all other costs for any insurance policy or policies obtained and maintained by the Owners arising from such alteration or improvement of the Owner's Unit.
- h. **Contributions of Labor:** The Owners intend that there will be no monetary or additional ownership compensation for labor expended by an Owner for ordinary repair and maintenance of the Property, unless Owners agree to it in writing.

## **18. Failure to Make Payments**

- a. **Taking steps to avoid missed payments:** Owners recognize that there is significant risk involved with sharing ownership of a property, particularly when there are debts secured by the entire property, and when failure to pay bills and taxes could result in liens against the entire property. As a result, in order to avoid default on any loans secured by the Property and any Property-related bills and taxes, if one Owner has financial difficulties and becomes aware that they may not be able to make a full and timely payment, that owner shall notify the other Owner as soon as they become aware of their financial difficulties. This will allow the other Owner to plan for the possibility of making a substituted payment.
- b. **Failure of an Owner to make payments:** If an Owner is unable to make any necessary payments because of illness, disability, prolonged unemployment, or other hardship, and if there are no funds in the Reserve to cover such payments, the other Owner may make those payments in the non-paying Owner's place, for as long as necessary or possible, or as long as the paying Owner is willing. The Owners agree that the Owner making the



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payments may choose the manner and timeframe for reimbursement from among the following options:

- i. Treat the additional payments as a loan to the non-paying Owner, bearing interest at a rate of no more than 10%, and treat it as a lien in favor of the paying Owner upon the Cotenancy Interest of the non-paying Owner. The paying Owner may decide the time frame for repayment of this loan, and parties shall put the terms of the loan and lien into writing.
  - ii. The Owner's Shares of the Outstanding Debt may be adjusted based on the amount of payments made by the paying Owner, thereby reducing the paying Owner's share of subsequent monthly mortgage payments.
- c. **Forcing a sale or buyout as a remedy for non-payment:** If a paying Owner is unable or unwilling to cover a non-paying Owner's share of necessary payments, and the non-paying Owner is unable to resume regular payments within three months of first missing payments, or if the non-paying owner has missed three months of payment in any 12 month period, the paying Owner may demand to buy the non-paying Owner's Cotenancy Interest at a price determined in accordance with Paragraph 21.b.ii of this Agreement. In the event of three months of missed payments by the other Owner, the paying Owner may also demand that the Property be sold in its entirety. After the paying Owner gives written notice of said Owner's choice to exercise this provision, said Owner may commence the sale process.

## **19. Encumbrances**

Parties agree not to incur any obligations that would place a lien or any kind of encumbrance on the Property unless all Owners agree to the encumbrance. In the event that a lien or encumbrance is placed on the Property as a result of one Party's obligations, that Party shall bear the cost of removing the encumbrance or shall compensate the other Owners for the resulting decrease in property value.

## **20. Transferring an Interest in the Property and First Right of Refusal**

- a. **Offering to Sell to Another Owner:** An Owner may, at any time, offer to sell their Cotenancy Interest to the other Owner.
- b. **Transfer to a Third Party:** The Owners have agreed to co-own together because of their knowledge of and confidence in each other. Thus, an Owner may transfer their interest in the Property to a Third Party only in accordance with the guidelines provided in this section.
- c. **Lender Approval Requirement:** All Parties understand and acknowledge that if a Cotenancy Interest in the Property is transferred to an individual who is not a signatory to the mortgage and such transfer is not approved by the mortgage lender, the lender

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could declare the entire outstanding balance of the mortgage immediately due and payable (an "acceleration") in the event of non-payment and initiate foreclosure of the Property. Accordingly, notwithstanding anything to the contrary in this Agreement, no Party shall transfer any interest in the Property to an individual who is not already a signatory to the mortgage unless (i) the lender approves the transfer in writing, or (ii) all Parties agree in writing to allow the transfer without lender approval and assume the resulting risk of acceleration and foreclosure. In the event all Parties do not agree to allow the transfer without lender approval, each Party shall cooperate in good faith in securing such approval. Such cooperation shall include, but not be limited to, submitting all documentation required by the mortgage lender. All charges imposed by the mortgage lender shall be paid by the transferor and/or transferee.

- d. **Unrestricted transfers of Cotenancy Interests:** Subject to the lender approval requirement noted above, an Owner may transfer a Cotenancy Interest without other restriction if the transferee is (i) a person who is already a Party or (ii) a revocable living trust of which a Party is a beneficiary.
- e. **Restricted transfer of Cotenancy Interests:** Subject to the lender approval requirement noted above, an Owner may transfer a Cotenancy Interest as provided in this Section.
  - i. **Notice of Intended Sale.** If a sale is intended, the transferring Owner shall provide to the other Owner a "Notice of Intended Partial Sale" stating (i) the expected sales price, terms, and conditions (including financing) and (ii) the amount of sales commission, if any, which shall be paid in the event of sale by a real estate agent.
  - ii. **Initial Right to Purchase.** If a sale is intended, the non-transferring Owner shall have the right to purchase the transferring Owner's interest on the terms and conditions stated in the Notice of Intended Partial Sale except that the price and the cash down payment required shall be reduced by the amount of the intended sales commission. The non-transferring Owner shall exercise this right by (i) within 10 calendar days of receiving the Notice of Intended Partial Sale, providing Notice to the transferring Owner of her tentative intent to purchase (a "Notice of Tentative Intent") and (ii) within 30 calendar days of the Effective Date of the Notice of Tentative Intent, providing a second Notice to the transferring Owner reaffirming her intent to purchase (a "Notice of Final Intent"). The Notice of Final Intent shall be binding. If a non-transferring Owner fails to provide either Notice, they waive the Initial Right to Purchase.
  - iii. **Additional Right to Purchase.** Before accepting any purchase offer, the transferring Owner shall provide a copy of the offer to the other Owner. If the offer is two percent (2) or more lower than the original expected sales price, the non-transferring Owner shall have the right to purchase the transferring Owner's interest on the terms and conditions stated in the purchase offer (without deduction of the intended sales commission). A non-transferring Owner shall exercise this right by providing within 48 hours of receipt of the third party offer,

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Notice to the transferring Owner of said Owner's intent to purchase. This Notice shall be binding. If a non-transferring Owner fails to provide the Notice within 48 hours of receiving a copy of the offer, said Owner waives the Additional Right to Purchase with regard to that offer. No further purchase rights shall be created as a result of a good faith renegotiation of sale price or terms following inspections or other disclosures related to that particular third party offer.

- iv. **Right to Reject Transferee.** Before completing any sale, gift, or other voluntary transfer, the transferring Owner shall provide to the other Owner a statement of the financial qualifications of the prospective transferee including a loan application, credit report, and, in the case of a self-employed person, the two most recent years' Federal Tax Returns. The non-transferring Owner shall have ten calendar days from delivery of this information to provide written notice of disapproval to the transferring Owner. During this period, each Party shall be entitled to contact the prospective transferee to arrange a personal or telephone interview. To be considered valid, the written notice of disapproval must (i) be delivered within the required time frame, and (ii) state a reasonable basis not prohibited by law for the disapproval. A transfer shall be deemed approved unless the transferring Owner receives a valid notice of disapproval stating the basis for disapproval from the non-transferring Owner.
  
- f. **Non-transferring Owner's Right to Demand Sale of the Entire Property.** In the event that one Owner would like to sell or transfer their Cotenancy Interest, and the non-transferring Owner would rather not end up co-owning the property with a Third Party Transferee, the non-transferring Owner, within 30 days from receiving the "Notice of Intended Partial Sale" pursuant to 20.e.i., may then demand that the entire Property be sold and the proceeds divided in the manner described below.
  
- g. **Allocating increased property taxes after a transfer.** The Owners understand and acknowledge that a transfer of any interest in the Property may trigger a reassessment of the Property. The Owners agree that the transferee should be solely liable for the amount by which property taxes increase as a result of the transfer.

## **21. Other Events Constituting Offers to Sell to the Other Owner**

- a. **Events triggering offer to sell:** Upon the occurrence of any of the events listed below, such event shall be deemed to constitute an offer by the affected Owner, or that Owner's executor, trustee, personal representative, or successor-in-interest, as the case may be, to sell their Cotenancy Interest to the other Owner at a specified purchase price, as described below:
  - i. **Death:** The death of the Owner;
  
  - ii. **Bankruptcy:** The voluntary or involuntary filing of a petition in bankruptcy or for the protection under similar insolvency laws or any general assignment of assets

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for the benefits of creditors, if the bankruptcy is structured in such a way as to not allow the Owner to retain their cotenancy interest; or

- iii. **Foreclosure of One Owner's Interest:** The recording of a Notice of Sale of one Owner's Interest because of default of a loan secured only by that Owner's Interest ("fractional financing"); or
- iv. **Court-ordered transfer as a result of divorce:** The entry of a final decree of divorce or dissolution of marriage that transfers an Owner's Cotenancy Interest to any person not a party to this Agreement.

**b. Notice and appraisal**

- i. **Giving notice of an event triggering offer to sell:** Upon an event that constitutes an offer to sell to the other Owner as defined above, an Owner or their personal representative or successor-in-interest shall give written notice to the remaining Owner of such Owner's demise, bankruptcy, foreclosure sale, or court-ordered sale, as the case may be, and the remaining Owner shall have the right to purchase the Cotenancy Interest at a specified purchase price, as defined below, by giving written notice to the personal representative, successor-in-interest, Owner, or trustee in bankruptcy, as the case may be, within 30 days after said Owner's receipt of the notice, except that in the case of a foreclosure sale, the non-transferring Owner would need to exercise the right to purchase and take action to prevent the foreclosure sale by the applicable deadlines.
- ii. **Determining price of sale:** The specified purchase price for occurrences in this section shall be the then current fair market value of the Cotenancy Interest, less the amount of the Selling Owner's or deceased Owner's Share of the Outstanding Debt and increased or decreased, as required, by the amount of any advances, credits, or excess contributions made and not yet reimbursed. If the parties cannot agree on the fair market value, then parties shall either jointly appoint an appraiser for the purpose of determining the fair market value or, failing a joint action, each separately designate an appraiser. In the latter case, the average of the two appraisals shall serve as the specified purchase price.

## **22. Sharing of losses related to the Property:**

- a. The Owners understand and acknowledge that as a result of fluctuating market circumstances, it is possible that the total indebtedness for the Property may exceed its market value at some point in time. In the event that the Owners are personally liable for any such obligation or if there is any loss incurred by the Owners with regard to the Property, the Owners agree that that obligation shall be borne by all Owners on the basis of the Owners' then current Shares of the Outstanding Debt, unless otherwise agreed upon in writing.

## **23. Refinancing the Property**

- a. **Agreement to refinance:** All Owners must consent to any refinance of a debt secured by a lien against the entire Property. For the Shared Mortgage, refinancing expenses shall be allocated to Owners in proportion to their then-existing Shares of Outstanding Debt.
- b. **Assumable loans and fractional financing:** In connection with the refinancing of any loan secured by the entire Property, the Owners agree to make reasonable efforts to secure a loan that allows for substitution and may be assumable by subsequent purchasers of then-existing Owners' Cotenancy Interests. If fractional financing, in the form of TIC loans, is available, Owners agree to explore and weigh the pros and cons of obtaining such financing. Although it is generally more expensive, fractional financing will reduce risk exposure for each Owner, and will make it more simple for each Owner to sell their Unit separately.

## **24. Events Triggering Distributions**

- a. **Distribution of proceeds upon sale, partition, condemnation, or destruction:** Proceeds from sale of the entire Property, condemnation, destruction, or partition will be distributed among the Owners based upon the Relative Value Percentage of each Cotenancy Interest (the calculation process for which is described below). Each Owner's share of the distribution will be reduced by the amount of their Share of Outstanding Debt, and increased or decreased, as required, by the amount of any advances, credits, or excess contributions made under this agreement and not yet reimbursed.
  - i. **Sale of entire Property:** Sale of the entire Property would require the approval of all Owners. Owners shall distribute sale proceeds in accordance with Subparagraph (a.) of this Section.
  - ii. **Partition:** An Owner wishing to partition the Property shall first offer to sell their interest in the Property to the other Owner, according to the provisions of this Agreement, and agrees to participate in the mediation and arbitration procedures set forth in this Agreement. Owners shall distribute partition proceeds in accordance with Subparagraph (a.) of this Section.

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- iii. **Condemnation and Eminent Domain:** The proceeds of any condemnation or eminent domain proceeding shall be distributed in accordance with Subparagraph (a.) of this Section.
  - iv. **Destruction:** In the event that the house is destroyed and Owners choose not to rebuild, Owners shall share insurance proceeds in accordance with Subparagraph (a.) of this Section. Generally, Owners shall endeavor to repair any damage to the Property so long as the repairs do not incur any more than \$10,000 in out-of-pocket expenses to any one Owner.
- b. **Calculating the Relative Value Percentage of each Cotenancy Interest:** For the purpose of distributions listed above, Parties agree to use the Relative Value Percentage of each Cotenancy Interest; this is because the market value of each Cotenancy Interest may fluctuate based on improvements, maintenance, and other factors. The Relative Value Percentages will be determined by having each Cotenancy Interest appraised separately, then dividing each appraisal by total of the two appraised values. For example, if Owner A's Cotenancy Interest is appraised at \$400,000 and Owner B's Cotenancy Interest is appraised at \$350,000, then the Relative Value Percentages will be 53.33% and 46.66%, respectively. To ensure precision in this process, Owners may, at the request of either Owner, jointly hire two separate appraisers, each of whom will make a determination of the Relative Value Percentages. Owners will then average the two appraisals.

## **25. This Agreement Shall Bind Future Owners**

Unless this Agreement is terminated, the terms of the Agreement shall be binding on each of the Owners and their heirs, assigns, transferees, and successors in interest and shall constitute a covenant and/or equitable servitude running with the Property. When a Cotenancy Interest in the Property is transferred, all rights and obligations under this Agreement must be accepted by the transferees. Any transfer of a Cotenancy Interest in this Property shall be void if the transferee does not accept all rights and obligations associated with the transferred share of the Property. Transferees must accept this Agreement by signing an addendum agreeing to be bound by the terms of this Agreement, or by entering into a new agreement with the non-transferring Owner, subject to approval by the non-transferring Owner.

## **26. Resolution of Disputes**

- a. **Mediation:** Any unresolvable disputes between the Owners regarding the use, management, ownership, or disposition of the Property shall be submitted to mediation. A mediator shall be chosen by both Owners, or if they cannot so agree, each Owner shall select one person and the two selected people shall, together, select a third person to act as mediator. The chosen mediator shall conduct at least one mediation session per week for three weeks, with all Owners present, unless the dispute can be resolved sooner. Each session must last up to two hours, unless the dispute is resolved sooner. Each Owner agrees to participate in the mediation in good faith and make reasonable efforts to

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resolve the dispute quickly. If no agreement is reached after three mediation sessions, the Owners agree to submit the dispute to arbitration as set forth in this Agreement.

- b. **Arbitration:** If the Owners are unable to resolve their disputes by mediation, the issues in controversy shall be submitted to an arbitrator selected by the Owners. If Owner cannot agree on an arbitrator, they shall each select one person, and the two people together shall choose an arbitrator. The arbitrator shall be competent to conduct arbitration proceedings in conformity to applicable provisions of California law. No Owners shall be awarded attorneys' fees incurred during arbitration of any dispute.

## **27. Indemnity**

If a Party becomes subject to any claim, liability, obligation, or loss arising from or related to the willful or negligent act or omission of another Party, such other Party shall fully indemnify and defend the liable Party from all associated costs and expenses including attorneys' fees.

## **28. Memorandum of Agreement**

The Owners shall execute a Memorandum of this Agreement and cause the same to be recorded in the Official Records of the County where the Property is located, as soon as reasonably possible after the execution of this agreement.

## **29. Miscellaneous Provisions**

- a. **Headings and subheadings in this Agreement:** This Agreement contains many headings and subheadings (in bold), which are there to make the Agreement easier to read and navigate. The headings and subheadings are not intended to limit the scope or meaning of the provisions contained in this Agreement.
- b. **Agreement governed by the laws of California:** The validity and interpretation of this Agreement shall be governed by the laws of the State of California.
- c. **Severability:** Should any provision of this Agreement be determined to be invalid, the remaining provisions shall remain in full force and effect.
- d. **Consultation with attorneys:** This Agreement has been drafted with the assistance of attorney \_\_\_\_\_, who is representing PERSON1. Each Owner has been given the opportunity to consult with their own separate attorney, before executing this Agreement.
- e. **Amending this Agreement:** This Agreement may be altered or amended only by written agreement signed by all Owners.
- f. **Multiple originals of this Agreement:** This Agreement may be executed in multiple originals, each of which shall be considered an original.

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In witness hereof, the Owners have signed this Agreement on the date and year set forth next to each signature.

Dated: \_\_\_\_\_  
PERSON1

Dated: \_\_\_\_\_  
PERSON2

**Attachments:**

**Exhibit A:** Drawing of the property with buildings and features as described.

**Exhibit B:** Promissory Note



## COMMON INGREDIENTS OF CC&RS

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“Conditions, Covenants, and Restrictions” (CC&Rs) is the name of a detailed document that is typically recorded in the county property records, and which describes a condominium community’s plans for the management of property rights and responsibilities. Cohousing communities that are structured as condominiums are usually subject to a set of recorded CC&Rs. CC&Rs are usually recorded along with a Condominium Plan that clearly maps out the boundaries of units and common areas.

We have not included a sample set of CC&Rs in this handbook, primarily because the CC&Rs of cohousing communities are not especially unique in comparison to the CC&Rs of typical condominium communities.

CC&Rs typically cover the following matters:

1. **Description of Property:** Location and description of property; boundaries of land and location of buildings.
2. **Units:** Description of the units and their boundaries.
3. **Common Areas:** Description of commonly owned portions of the property (“Common Areas”).
4. **Exclusive Use Areas:** A description of the areas that are owned by the group, but reserved for the use of individual unit-owners (“Exclusive Use Areas”).
5. **Owners Association:** Provisions mandating the creation of a Condo-Owners Association (COA), also sometimes known as a Homeowners Association (HOA).
6. **Mandatory Membership:** Requirement that unit owners be members in the Association.
7. **Voting Rights:** Allocation of voting rights of unit owners.
8. **Allocation of Expenses:** General description of how the association will handle finances and allocate expenses between unit owners.
9. **Assessments and Enforcement:** Description of how the association will enforce rules and payments, such as the right to place a lien on units of owners who fail to pay.
10. **Insurance:** General description of plans for insurance.
11. **Architecture:** A framework for regulating use and architecture of the property.
12. **Maintenance:** Designation of responsibility for maintenance of common areas versus units.
13. **Use Restrictions:** Restrictions on how the property may be used.
14. **Damage and Destruction:** Provisions related to the destruction of the property.
15. **Rights of First Refusal:** Rights of first refusal, to be exercised in the event that an owner wants to sell a unit.
16. **Expansion:** Provisions related to the potential to expand the community.
17. **Dispute Resolution:** Provisions requiring mediation and/or arbitration in the resolution of disputes.

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# Sample Bylaws For a Cohousing Owners Association

## DISCLAIMER for Sample Bylaws for a Cohousing Owners Association

The following are sample bylaws for a nine unit condominiums development's nonprofit mutual benefit corporation (homeowners' association.) **Use of this agreement in whole or in part is at your own risk, and does not create an attorney client relationship with its authors, editors, contributors, or publishers.** Also, the odds are this sample agreement will not reflect how you wish to structure your bylaws for sharing real property. This is because bylaws vary as widely as each members' considerations of finances, the type of land and buildings to be shared, community, and aesthetics. Therefore, it is prudent that every association member carefully consider what they are agreeing to when signing a contract and consult professionals like attorneys, CPAs, and governance/community experts.

### About these Sample Bylaws

These sample Bylaws are for a condominium association where units are owned by the members, and the land (including under the condo units) and all common facilities are owned or managed by the Cohousing Owners Association, which is a nonprofit mutual benefit corporation.

The process for decision making in these Bylaws is consensus. The management is to be divided into teams responsible for specific spheres of management and authorized to make specific types of decisions. The Bylaws provide for the facilitated development of the Association's consensus process and the development of the management teams. This toolkit includes a sample consensus policy.

In addition, these bylaws are preliminary; that is, they are drafted to address the needs of an organization in the first stage of operation. Note that these bylaws call for the development of Teams, Policies and Procedures that must, by California law, be developed and included in the bylaws. Once adopted, bylaws must be amended to include the Policies and Procedures that are necessary under California law.

Your own bylaws, decision making process, and system of management may turn out to be very different from this sample, based on your own specific values and goals. We emphasize that your organization will have a much better chance of long term success if you begin by establishing clear values, policies, and goals that will determine choices of organizational structure, ownership, financing, and management.

## **BYLAWS OF THE MOUNTAIN TOP COHOUSING OWNERS ASSOCIATION**

### **A California Nonprofit Mutual Benefit Corporation**

- 1. Name and Location.** The name of the corporation is the Mountain Top Cohousing Owners Association, referred to in these Bylaws as “Association.” The Association is incorporated under the California Nonprofit Mutual Benefit Corporation law. The principal office of the Association is, and shall be located in San Luis Obispo County, State of California.
- 2. Purpose of the Bylaws.** The purpose of these Bylaws is to provide for the operation and management of the Association. The Association is a condominium development made up of nine member-owned residential units and Association-owned common facilities.
- 3. The Purpose and Values of the Association**
  - a. It is the purpose of the Association to create a supportive, peaceful, healthy, sustainable, affordable, and friendly community among its members. The Association shall develop policies, rules, agreements, and procedures as appropriate to carry out the purposes and goals of the Association; and shall manage and operate the Association according to its purposes and goals.
  - b. More specifically, the goals of the Association are to:
    1. Create an interconnected community that enriches the daily lives of its Members, and the surrounding community which includes the environment;
    2. to govern the community based on a process that builds community and results in decisions that can be effectively implemented;
    3. create a community culture and governing processes that include opportunities for positive growth and change for Members and the community;
    4. create a culture of sharing and to share the Common House, the Common House facilities, common areas, and commonly owned possessions according to the agreements and rules for their use;
    5. support and respect the needs and desires for privacy of Members;
    6. provide a secure and safe environment for residents and especially for children;
    7. create and maintain environmental and economic sustainability to the extent possible;
    8. provide and maintain affordable housing for members;
    9. support nonviolence and engage in nonviolent communication;
    10. support and encourage activities that create health and happiness;
    11. encourage positive involvement in the surrounding community; and
    12. include open spaces and facilities dedicated to gardening, gathering, personal and cultural enrichment, play, and recreation.
- 4. Application of the Bylaws**
  - a. The Association is subject to the Davis-Stirling Common Interest Development Act, Civil Code sections 1350-1378; and described within these Bylaws, the Mountain Top Cohousing Covenants, Conditions & Restrictions (“Declaration”), policies, rules,

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agreements and procedures, which are incorporated into these Bylaws in their entirety by reference as they are adopted and amended from time to time.

- b. The Bylaws, Declaration, policies, rules, agreements, and procedures adopted by the Association shall collectively be referred to as the Association's "Governing Documents." The Association's Governing Documents apply to the entire condominium development as described in the Declaration including all separately owned units and commonly owned land, structures, and facilities.
- c. These Bylaws and other incorporated Governing Documents apply to all present and future owners of each unit, mortgagees and other encumbrances, lessees, tenants, licensees, and all occupants of units for any length of time and their guests and employees, and any other person who may be present on the premises or use the Association's facilities.

**5. Membership and Voting Rights**

- a. Every owner of a unit shall by virtue of ownership be a Member of the Association. For purposes of these Bylaws and all other Governing Documents, the term Member only applies to a person who owns or shares ownership of a unit or units in Mountain Top Cohousing.
- b. For purposes of consensus, where there is more than one record owner of a unit, each owner is entitled to participate in the consensus decision making processes as described in these Bylaws and other Governing Documents.
- c. If voting is used in a decision making process at full Membership meetings, each unit is entitled to one vote.

**6. Association Duties and Responsibilities.** The Association shall:

- a. Maintain all common areas and facilities in good order;
- b. maintain insurance as required by the Declaration;
- c. fix, levy, collect, and enforce assessments as set forth in the Declaration and as needed to pay for all budgeted expenses;
- d. enforce these Bylaws, the Declaration, and all other Governing Documents including governing policies, rules, agreements, and procedures;
- e. keep adequate and correct books and records of account, minutes of Members meetings and team meetings, and a current list of all names and contact information of all Members;
- f. contract for goods and services as provided in the Declaration; and
- g. defend the Association as needed in court.

**7. Organizational Structure of Operations and Management; Decision Making Spheres, Decision Making Chart, and Team Procedures**

- a. The operations and management of the Association will be conducted based on decision making spheres as described by the practice of sociocracy and/or by the Occidental Arts and Ecology Center/Sowing Circle Community Model, as applicable.
- b. The Association will hire and Members will work with a professional consultant who specializes in governance to develop and manage appropriate decision making spheres, Team Procedures, and a clear Decision Making Chart, that is compliant with

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California law. Decision making spheres will operate as teams to oversee specific areas of operation and management, and will be made up of Members responsible for 1) carrying out the day to day decisions they make and 2) proposing important decisions to be made by all Members, as described in the Team Procedures and Decision Making Chart. The Decision Making Chart and Team Procedures as they may from time to time be amended by the Membership are incorporated in these Bylaws by reference.

## **8. Governance**

### **8.1 Consensus Decision Making Process**

- a. To carry out the goal of governance in section 3.b.2., it is the intent of the Association Members to govern the Association based on a consensus decision making process which shall be developed and adopted by the Membership and which may be amended from time to time to further the values and goals of the Association.
- b. The consensus process that is adopted shall include an effective method of governing the use of “blocks” to decisions and this method shall provide, among other things, an explanation of what constitutes inappropriate blocks and the method that will be used to deter and/or prevent inappropriate blocks.

**8.2 Communications and Consensus Training.** Immediately after establishing the Association and no later than two months after establishing the Association: All Members shall participate in training in communications and the consensus process. The training will be provided by a professional consultant to be hired by the Association.

**8.3 Governance Specialist Professional Consultation.** The Association will hire and Members will work with a professional consultant who specializes in governance, to facilitate and help develop the Mountain Top Consensus Policies and Procedures, and the Mountain Top Communications Policies and Procedures.

**8.4 Development and Adoption of Consensus Process.** The consultant facilitation of the development of the Mountain Top Consensus Policies and Procedures shall culminate in the adoption of the Mountain Top Consensus Policies and Procedures, which are incorporated as amended from time to time in these Bylaws by reference.

**8.5 Development and adoption of Communications Policy.** The consultant facilitation of the development of the Mountain Top Communications Policies and Procedures shall culminate in the adoption of the Mountain Top Communications Policies and Procedures, which are incorporated as amended from time to time in these Bylaws by reference.

## **9. Board of Directors**

- 9.1 Members of the Board of Directors are the Membership.** All Members (defined in 5a) of the Association shall be on the Association Board of Directors. The number of Directors will be determined by the number of Members in the Association. Since all Members of the Association are Directors on the Association Board of Directors, Members and Directors are one and the same and will be referred to in these Bylaws as Members, and the Board of Directors shall be referred to as Membership. Since all Members of the Association are Directors on the Association Board of Directors, all meetings of the Board will be meetings of the Membership and are referred to in these Bylaws as Membership meetings.
- 9.2 Responsibility of the Membership.** The activities and affairs of the Association shall be conducted by the Membership, and all corporate powers shall be exercised by the Membership. The Membership has the ultimate responsibility for directing the affairs of the Association.
- 9.3 Powers and Duties.** The Membership has the authority and duty to adopt governing policies, rules, agreements, and procedures; oversee and review the administration of the Association's affairs; enforce these Bylaws, the Declaration and all adopted governing policies, rules, agreements, and procedures; levy and collect assessments; and impose fines.
- 9.4 Delegation of Authority and Duty.** The Membership will delegate the responsibility for specific elements of the Association to Member teams which will have specifically defined duties and spheres of decision making authority as limited by Corporations Code section 7212 and as described in the Team Procedures and Decision Making Chart (See Section 7), included in these Bylaws by reference as they may be amended from time to time.
- 9.5 Budget Team**
- a. The Membership shall appoint an initial Budget Team which shall develop the Budget Procedures and a budget for the following fiscal year. The Budget Team will present the Budget Procedures and budget to the Membership for review, potential amendment, and adoption.
  - b. Once adopted, the Budget Procedures as amended from time to time, shall be included in these Bylaws by reference.
  - c. At the annual Membership meeting (See Section 11.1), the Members shall appoint a budget team which shall develop a budget for the following fiscal year in accordance with the Budget Procedures. The proposed budget will be distributed to all Members and presented at the annual Membership meeting at least 60 days before the beginning of the next fiscal year.

## **10. Chairperson, Secretary, and Treasurer**

**10.1 Officers.** The positions of Secretary, Treasurer, and Chairperson shall be filled by consensus of the Membership at the annual Membership meeting (See section 11.1), and shall be held for one year.

**10.2 Chairperson.** The Chairperson shall be responsible for:

- a. Managing a rotation system for meeting facilitators;
- b. signing certain documents and checks for the Association, as provided in Section 22; and
- c. any other responsibilities of the Chairperson shall be determined by the Membership by consensus.

**10.3 Duties of Secretary.** The Secretary shall:

- a. Keep the minutes of Membership meetings including a record of decisions made at Members meetings;
- b. post notices of meetings on the Common House bulletin board;
- c. serve notices of Special Member meetings per Section 11;
- d. serve notices of intent to enforce and conflict resolution meetings, per Section 16;
- e. serve notices of intention to enforce fines, per Section 19.4;
- f. keep past and current records, including but not limited to a list of current Members based on recorded ownership of units and their contact information;
- g. Make documents available per Section 21; and
- h. be responsible for signing certain documents and checks for the Association per Section 22.

**10.4 Duties of Treasurer.** The Treasurer shall:

- a. Receive and deposit in appropriate bank accounts all monies of the Association;
- b. disburse funds as directed by the Members;
- c. co-sign all checks and promissory notes of the Association;
- d. keep proper books of account or cause them to be kept;
- e. assist in or cause the preparation and distribution of the financial statements of the Association;
- f. be responsible for signing certain documents and checks for the Association, per Section 22; and
- g. at the beginning of each fiscal year, notify each Member of the amount of the regular monthly assessment due for that year per Section 13.2.

**10.5 Resignation and Removal.** The Chairperson, Secretary, and Treasurer may resign at any time by written notice and may be removed at any time with or without cause by the Membership by written notice. If resignation or removal occurs midyear, existing officers will immediately agree to share or fully assume the duties of the vacant office, and as soon as possible hold a Special Membership Meeting to elect a new officer.

## **11. Membership Meetings**

### **11.1 Annual Membership Meeting**

- a. An annual Membership meeting will be held at least 60 days before the beginning of the following fiscal year to 1) discuss the budget, and 2) determine Officers and Teams.
- b. All Members will attend and participate in the meeting. As necessary, attendance may be facilitated by phone, internet, or the equivalent.
- c. At the meeting, the budget team will present and discuss a proposed budget for the following fiscal year, and a budget for the following fiscal year will be adopted by the Membership.
- d. This Membership meeting may be continued as needed.

**11.2 Regular Membership Meetings.** The Members will have regular Membership meetings once a month on the third Wednesday of every month, or another regular time to be determined at the annual Membership meeting.

### **11.3 Notice and Place of Regular Membership Meetings**

- a. Notice of the day of the month on which regular monthly Membership meetings will be held will be given at the beginning of each fiscal year.
- b. Notice of the day, time, and location of each month's Regular Membership meeting will be posted at all times on the Common House bulletin board.

**11.4 Special Membership Meetings.** The Secretary shall call a special meeting of the Membership if directed to do so by a petition signed by not less than thirty percent (30%) of the Members. The petition must state the purpose of the meeting. No business shall be transacted and no decisions shall be made at a special meeting except as directly related to the purpose stated in the notice.

### **11.5 Notice of Special Membership Meetings**

- a. At least ten days before a special meeting, notice of the purpose, date, time, and place of a special meeting shall be delivered by the Secretary to each member by mail or by phone, email, or other method that is agreed to in writing by the Membership.
- b. If notice is by mail, delivery is when the notice is mailed. If notice is by phone, the Secretary will document this notice.
- c. Notice of any special Membership meeting shall be immediately posted on the Common House bulletin board and maintained there until the meeting is over.
- d. Notice of a special Membership meeting may be waived by 1) in writing before or after the meeting, 2) consent to holding the meeting, or 3) approval of the meeting minutes. Notice of a special Membership meeting is deemed to be waived by attendance at the meeting.



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- 11.6 Emergency Membership Meetings.** An emergency Membership meeting may be called by any Member where there are circumstances that require immediate attention and/or action to protect the welfare of a Member, Members, or the Association, and which of necessity make it unreasonable or impossible to take the time to provide the notices required for Special Membership Meetings.
- 11.7 Quorum.** A quorum is 50% of the Membership. If any Membership meeting does not have a quorum present or if the Members present agree that additional Members should be present for the meeting, the Members who are present may adjourn the meeting to a time not less than forty-eight hours from the time the original meeting was called. Immediate notification shall be given to all Members.
- 12. Financial and Reporting Requirements.** The Association shall carry out the financial and reporting requirements in accordance with Civil Code §§1365 through 1365.6. Either a Member, team, or a non-member professional, will be chosen at the annual Membership meeting (See section 11.1), to carry out the requirements of this section.
- 13. Assessments**
- 13.1 Basis for Regular Assessment.** Regular annual assessments will be based on the budget approved by the Membership for that year and shall be billed to the owner or owners of each unit for the next fiscal year.
- 13.2 Notice of Assessment and Time for Payment.** At the beginning of each fiscal year, the Treasurer shall notify each Member of the amount of the regular monthly assessment due for that year. Each Member is responsible for payment of his/her/their assessment on the first of every month without additional notice. A Member may pay extra payments or the full remaining amount due of the annual assessment at any time.
- 13.3 Special Assessments.** If the Members decide at a Membership Meeting that the amount to be collected from regular assessments will not be adequate to pay the expenses for that fiscal year due to unanticipated costs or for any other reason, the Members may, at a noticed Membership meeting, set an amount consistent with the needed amount for special assessment. The special assessment shall be paid either monthly or in a lump sum, the same as the regular assessment, unless the Membership decides that it is necessary to pay in a lump sum or in any other way.
- 13.4 Interest on Unpaid Assessments.** Interest of 10% may be payable on any portion of an assessment if unpaid within 30 days of the assessment due date.
- 13.5 Enforcement of Assessment Due.** Enforcement of an assessment due may be by civil suit to obtain a personal judgment and/or by lien on the debtor's unit.
- 14. Conflict Resolution**

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- a. The Membership shall appoint members of a Conflict Resolution Team.
- b. The Members of this team may change from time to time as needed.
- c. This Team shall provide conflict resolution among Members and between Members and the Association and/or Membership, and shall provide Initial Conflict Resolution Meetings with Members related to enforcement of Bylaws, the Declaration and other policies, rules, agreements, and procedures as discussed below.
- d. A consultant shall be hired by the Association as needed to train the Conflict Resolution Team Members in conflict resolution.

## **15. Enforcement of Governing Documents**

**15.1 Enforcement of Governing Documents.** The Association, through its Membership, shall enforce these Bylaws and its Declaration, policies, rules, agreements, and procedures. It is understood that the Association has the duty to enforce its Governing Documents and, if the Association fails to enforce, a Member may take judicial action to compel the Association to enforce the Governing Documents.

### **15.2 Remedies**

- a. Enforcement of Governing Documents shall include a lawsuit for injunction, fines, and suspension of privileges including suspension from participation in teams, suspension from participation in any decision making process, and suspension from the use of common areas and facilities as allowed by law.
- b. Enforcement may not include suspension from attendance of meetings or suspension from free access to and use of a Members unit and/or parcel consistent with law and all Governing Documents.

### **15.3 Enforcement Team**

- a. The Membership shall appoint an Enforcement Team no later than two months after incorporation of the Association.
- b. The Enforcement Team shall develop Enforcement Policies and Procedures. The Policies and Procedures shall include liens, suspension of privileges, fines, money judgments, injunctions, imposition of late charges for delinquent assessments and fines, payment plans for delinquent assessments and fines; and notice of an owner's right to dispute a delinquency, to internal dispute resolution, and to alternative dispute resolution.
- c. The Enforcement Team shall develop a specific Fine Policy and Fine Schedule as described below in Section 19. After adoption of the Policy and Schedule, the Fine Policy Team shall be responsible for monitoring the effectiveness of the adopted Fine Policy and Fine Schedule and shall assess the need for and propose appropriate amendments as needed.

## **16. Conflict Resolution Process**

### **16.1 Notice of Intent to Enforce and Initial Conflict Resolution Meeting.**

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- a. Unless otherwise provided in Section 18 or unless the violating member refuses to participate in the conflict resolution process: Prior to initiating the use of any remedies described in Section 15.2, including imposition of fines, the Association must use the Conflict Resolution Process described in these Bylaws.
- b. Immediately as practical, or within 30 days after a violation occurs or is known to have occurred, the Membership, the Secretary shall provide 1) notice to the Member, Members, and where applicable, renters; of the Association's intent to enforce within the next 30 days what has considered to have been violated, and 2) notice of an Initial Conflict Resolution Meeting of the Conflict Resolution Team as described in section 16.6.

#### **16.2 Initial Conflict Resolution Meeting with Conflict Resolution Team**

- c. An Initial Conflict Resolution Meeting of a Member and the Conflict Resolution Team may be requested by the Member or noticed by the Association Secretary.
- d. The Meeting must be requested in writing.
- e. Once requested by a Member, the Association must immediately schedule the Meeting, which must occur at least within 20 days of the request and more promptly if the circumstances show an urgent need for faster resolution, such as imminent harm to a member or the Association.

#### **16.3 Purpose of the Initial Conflict Resolution Meeting**

- a. The purposes of the Initial Conflict Resolution Meeting shall be to 1) understand and clarify the circumstances and the positions of the Member and the Association, 2) resolve any conflict if possible, and 3) attempt to correct a violation, if possible, or stop it from continuing.
- b. The team must report the results of this meeting to the full Membership.

#### **16.4 Required Participation**

- a. If the Initial Conflict Resolution Meeting is requested by a Member, the Conflict Resolution Team is required to participate.
- b. If the Initial Conflict Resolution Meeting is requested by the Association, the Member is not required to participate.

**16.5 No Fee for Initial Conflict Resolution Meeting.** A Member of the Association shall not be charged a fee to participate in this process.

#### **16.6 Notice of Initial Conflict Resolution Meeting**

- a. No matter who calls the Meeting, any meeting of the Conflict Resolution Team or the full Membership to discuss enforcement or discipline of any Member shall be noticed.
- b. The Secretary must give the Member notice at least 10 days before the Meeting in writing; and must either deliver the notice personally or by U.S. mail or by other method established by the Membership in writing.

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- c. The notice must include the date, time, and place of the Meeting, must explain the violation that is claimed, and must let the Member know that he or she has the right to attend the Meeting and to talk with the Membership about the allegation.

**16.7 Additional Conflict Resolution Meetings.** If the Member participates in an Initial Conflict Resolution Meeting and the dispute is not resolved by agreement of both the Member and the Conflict Resolution Team, then, if appropriate in relation to the urgency for resolution, the Conflict Resolution Team and the Member may meet up to two more times within 30 days of the Notice of Initial Conflict Resolution Meeting.

**16.8 Unresolved Conflict**

- a. If this process does not result in ending the violation and/or provide a remedy for harms done within the 30 day period described in Section 16.1b, or if the Member does not participate in the Conflict Resolution Process, then the Association must use the remedies described in Section 15.2 to enforce the terms of these Bylaws and its Declaration, policies, rules, agreements, and procedures.
- b. At a Meeting noticed as described in Section 11.5, the Membership shall decide the remedy to be imposed.
- c. The Member shall not participate in any decision-making processes related to enforcement.

**16.9 Resolved Conflict.** If the Member participates in this process and a resolution is reached that is not in conflict with the law or the Association's Governing Documents, the resolution shall be put into writing and signed by the parties, and shall bind the parties and be enforceable in court.

**17. Waivers**

- a. Waiver of enforcement of terms of the Governing Documents may be granted by the Membership without bias and where it is determined that a waiver is in the best interest of the Association.
- b. The Membership understands that failure to enforce a term of its Governing Documents or the improper granting of waivers could result in the Association's loss of its right to enforce that term.

**18. Immediate Enforcement of Governing Documents**

- a. Enforcement, as allowed by law and these Bylaws and other Governing Documents, including imposition of fines, suit for injunction and/or suspensions as described in these Bylaws, shall be immediate where any violation has caused, is causing, or could cause serious harm or injury to people, property, or the environment, as determined by the Conflict Resolution Team.
- b. In such a case, it shall not be a requirement to use the Conflict Resolutions Process prior to initiating enforcement.

**19. Enforcement of Governing Documents: Fines**

**19.1 Fine Policy Team**

- a. The Membership shall appoint a Fine Policy Team which will be responsible for developing, and amending as needed, a proposed Fine Policy and a proposed Fine Schedule.
- b. After adoption of the Policy and Schedule, the Fine Policy Team shall be responsible for monitoring the effectiveness of the adopted Fine Policy and Fine Schedule and shall assess the need for and propose appropriate amendments as needed.

**19.2 Fine Policy.** The fines in the Fine Policy shall be reasonable and the amount of fines shall be set to deter violation of the Association's Governing Documents.

**19.3 Review and Adoption of Fine Policy and Fine Schedule.** Before the Fine Policy and Fine Schedule are adopted, the Association must send a draft of the proposed Policy and Schedule to the Membership for 30 days of review, after which a Membership meeting will be held to discuss, amend as necessary, and adopt a Fine Policy and Fine Schedule.

**19.4 Notice of Fine Policy, Fine Schedule, and Fine**

- a. The Fine Policy and Fine Schedule shall be provided to all Members at the beginning of each year and shall be posted at all times on the Common House bulletin board.
- b. Before fining, the Secretary shall provide notice of intent to enforce and notice of initial conflict resolution meeting, as described in Section 16.

**20. Fiscal Year.** The fiscal year for the Association shall be the calendar year, beginning on January 1 and ending on December 31.

**21. Availability of Documents**

- a. All Association documents shall, as stated above, be kept by the Association Secretary who shall make all documents available for review by all Members by appointment.
- b. For transparency and accessibility of documents, other availability of documents may be negotiated among the Membership, and a record will be made of such an agreement.
- c. Documents will be kept to the extent possible in copies hard and secure, and digital and secure, and in different localities.

**22. Execution of Documents**

- a. All agreements, contracts, deeds, leases, checks, and other instruments to be executed on behalf of the Association shall be signed by two of the following officers: The Chairperson, Secretary, and/or Treasurer.

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- b. In no event shall any such document be signed by only one person unless a decision has been adopted by the Membership to allow the signing of certain documents or of checks under a certain amount.

**23. Good Faith Actions.** When making decisions and acting for the Association, Members understand that it is their duty to act in good faith in the best interest of the Association.

**24. Contributions of Time, Labor, and Services**

**24.1 Services to the Association on Volunteer Basis.** All service on teams, service as Chairperson, Secretary, and Treasurer, and service as facilitator of any process or meeting, and any other service to the Association shall be on a volunteer basis without pay, unless otherwise decided by the Membership.

**24.2 Contributions of Time, Labor, and Services.** The Members of the Association agree to contribute their time, labor, and services to the benefit of the Association as described in the Mountain Top Cohousing Community Service Policy and Rules which is included in these Bylaws as amended from time to time.

**24.3 Community Service and Maintenance Team.** The Membership shall appoint a Community Service and Maintenance Team which will develop the Mountain Top Cohousing Community Service Policy and Rules for review, amendment, and adoption by the Membership.

**25. Pets**

**25.1 Pet Policy**

- a. Pets may be kept in accordance with the Mountain Top Cohousing Pet Policy which, when adopted, will be included by reference in these Bylaws as amended from time to time.
- b. The pet policy shall include limits on the type, size, and number of pets allowed at Mountain Top Cohousing, and shall set rules about the enclosure and behavior of animals.

**25.2 Pet Policy Team**

- a. The Membership shall appoint a Pet Policy Team which will develop the Mountain Top Cohousing Pet Policy and Rules for review, amendment, and adoption by the Membership.
- b. The Pet Policy Team shall be responsible for monitoring the effectiveness of the Pet Policy, developing appropriate amendments for review by the Membership, and for monitoring compliance and the need for enforcement of the Pet Policy and Rules.

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- c. Violations of the Pet Policy and Rules may be reported to the Membership by any Member.

**26. Amendments.** These Bylaws may be amended at a properly noticed Membership meeting by a consensus of the membership as described in the Association's Consensus Policy.

**27. Indemnification.** The Association shall indemnify all Members in their status of directors and/or officers and any person who is or was an employee or agent of the Association (Corporations Code section 7237) to the fullest extent permitted and subject to any limitations imposed by the California Corporations Code section 7237. In addition, the Members of the Association are and shall be entitled to the benefits described in the Mountain Top Cohousing Declaration of Covenants, Conditions & Restrictions and section 1365.7 of the California Civil Code both of which limit the liability of directors and officers.

## SAMPLE CONSENSUS PROCESS POLICY

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by **Tree Bressen**

(Reprinted from *Practicing Law in the Sharing Economy*, by Janelle Orsi, ABA Books 2012).

**Tree Bressen** serves a wide variety of groups, offering skilled facilitation, dynamic workshops, and elegant process design. Tree's offerings are for joyful value exchange within the market, barter, and gift economy. [www.treegroup.info](http://www.treegroup.info)

The following is a sample policy outlining a consensus decision-making process that may be useful to draw on. This level of detail would typically appear in a policy document rather than bylaws, so that it can be more easily modified as a group evolves. Often, an organization's bylaws will make reference to a separate consensus policy, and require that decisions be made in accordance with the policy. An electronic copy of this policy and an accompanying article by Tree Bressen is available at: <http://treegroup.info/topics/consensus-in-sharing-law.pdf>

### **Introduction**

Consensus is a cooperative process in which group members develop and agree to support a decision in the best interest of the whole. It embraces individual perspectives, honoring each person's piece of the truth, while emphasizing the sense of the meeting through a creative search for unity. By choosing to use consensus as our primary decision-making method, we recognize that we are pledging to do the hard, patient work of bringing our best selves forward and listening from the heart. We encourage participants to share ideas, feelings, needs, and concerns, in a spirit of honesty, kindness, and mutual respect, giving all viewpoints a fair hearing. We recognize we are sometimes called to accept with good grace a decision of the meeting with which we are not entirely in agreement. We affirm our willingness to listen with an open mind to the truths of others, and to work in good faith toward decisions that reflect the whole group intention and serve its greatest good.

### **Agenda Planning**

Items to be considered for the monthly meeting agenda are expected to be received by the agenda planner(s) no later than 10 days before the meeting, including any associated documentation. Agenda planners aim to publish the proposed agenda 5-7 days before the meeting, along with the background materials (reports, research, survey results, proposals, etc.). Members are asked to please read this and come prepared to discuss the issues.

There are often more potential items for the agenda than time in the meeting. We support our agenda planners in prioritizing, recognizing that the group usually finds it more satisfying to do a thorough job on a few items than to take a quick pass at many. Agenda planners may also assist members in finding alternate ways to address issues without taking full group time. The planner makes sure there are facilitators and minute-takers signed up for each meeting, as well as the next agenda planner.

Every plenary agenda includes time at the beginning for short personal check-ins and group confirmation and approval of the agenda; at least one break; and time at the end for



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evaluations and appreciations. Each item on the agenda is assigned a time allocation and labeled with a clear goal, such as: Information, Discussion, or Decision.

We use the following matrix in determining whether an item comes first as an issue discussion or an official proposal:

<i>Is the issue . .</i>	SIMPLE	COMPLEX
SMALL	Proposal may pass with relative ease.	Likely send to committee for main work.
LARGE	Might be ok to start with proposal, and might take a few more meetings, possibly with committee work in between.	Start with issue discussion not proposal, and expect it to take a series of meetings, almost always with committee or individual work in between.

### **Facilitator Roles**

We ask everyone present to share responsibility for creating a constructive conversation. Our facilitators take special responsibility to support us by managing our meeting process so the rest of us can focus on the content. The facilitator acts as a servant of the group. In order to do this, facilitators need to remain as neutral as possible—in word, deed, and appearance—and avoid stating or implying your opinion on the agenda items in the meeting. This includes not being the official presenter of any items at the meeting you are facilitating, and finding a replacement facilitator if something gets put onto the agenda that you have especially strong feelings about. If at any time your neutrality becomes an issue (for you personally or in someone else’s perception), your co-facilitator and the rest of the team can support you by stepping in and giving you a break.

The facilitator job includes working with the agenda planner(s) beforehand. Each meeting has a lead facilitator and an assistant facilitator, who sign up ahead of time and together decide how to handle the job. They may recruit additional assistance if needed to cover all the work, which includes:

- Contacting presenters to discuss format and how the item may unfold at the meeting
- Getting the room ready, including setting up chairs, flipchart, markers, and tape
- Posting agenda clearly so everyone can read it
- Welcoming the group and opening the meeting
- Making it clear which step of the process we are on when
- Keeping “stack” and deciding who speaks in what order, including ensuring that quieter voices are heard
- Doing reflective listening to individual participants, especially those holding concerns
- Weaving and summarizing input to the meeting
- Scribing comments and lists onto the flipchart
- Suggesting formats, “light & lively” exercises, or breaks to help improve the energy

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- Taking “temperature checks” if needed to get feedback from the group
- “Vibes-watching,” that is, keeping an eye out for emotional dynamics and responding appropriately
- Running the call for consensus on each item that reaches the decision point
- Ensuring that extraneous issues which arise mid-meeting and get put onto the “bike rack” make it onto the agenda list afterward to get considered for future meetings
- Time-keeping

We try to have at least six facilitators on the team at any given time, serving staggered terms, and to pair up more and less experienced facilitators so that newcomers get support to step up.

### ***Steps of the Consensus Process***

Each item requiring a decision goes through the following steps. Some items may not need a decision, in which case they might not go through the full sequence. We expect substantive items to take multiple meetings, in which case we start each time with step #1, and then pick up where it makes sense based on what happened last time. Because we prefer to give power to people who are present in a meeting more than those who are absent, proposals can be modified on the floor and adopted; indeed, changing a proposal in response to new wisdom emerging is at the heart of the consensus process.

#### ***1. Introduction***

Typically takes less than 5 minutes, and covers the following:

- Why are we talking about this, why does it matter?
- History of the issue (including results of any previous meetings on it).
- Goal for this item at this particular meeting (report, decision, committee gather input, etc.).

At the end of the initial presentation, others who have factual knowledge of the issue are sometimes invited to add in further bits about the history and so on, as long as it doesn’t go on at too much length.

#### ***2. Clarifying Questions***

These are simple questions just to make sure everyone in the room fully understands what has been presented or proposed.

#### ***3. Discussion***

This is the exploratory phase, where people are invited to ask further questions, show the full diversity of perspectives, raise challenges and concerns, and so on. Agreements and disagreements on general direction are noticed, and the reasons for them examined—not just what the positions are, but why, and any underlying values conflicts brought out.

#### ***4. Establish Basic Direction***

What is the sense of the meeting, in terms of basic direction on this issue? Here we seek general or philosophical agreement, an agreement in principle.

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### **5. Synthesize or Modify Proposal (as needed)**

Integrate what's been shared so far and make it as specific as needed, recognizing that some details will always be left to implementation and real life experimentation. Again, we notice agreements and disagreements (this time on the specifics of the proposal), and work with the underlying reasons, then generate ideas for addressing and resolving concerns, emerging with a proposal that has substantial group support. Periodically the facilitator may ask, "Are there any remaining unresolved concerns?"

### **6. Call for Consensus**

The facilitator clearly restates the proposal and then asks people to indicate where they are, using the options listed below. Remember our bylaws require 70% quorum for official decisions. Note that newcomers are required to attend an orientation from the facilitation team before they can be vested as fully empowered decision-making members.

### **7. Record**

The notetaker reads back the decision to the group. In addition, they record any implementation information needed (tasks, who's responsible, timelines, etc.).

### **8. Revisiting the Decisions**

Once a decision has been reached, it may be revisited if any of the following conditions apply:

- (a) Something relevant and significant has changed since the decision was reached;
- (b) More than two years have passed;
- (c) Five or more members request a revisit.

### **Decision Point Options**

At the point that the facilitator calls for consensus (step #6 above), participants have the following options:

- 1. Agreement:** "I support this proposal, and am willing to abide by and implement it."
- 2. Consent with Reservations:** "I support the basic thrust of this proposal, and have one or more minor unresolved concerns."
- 3. Stand Aside:** "I have major concerns with the proposal, and agree to stand aside and let the group proceed with it." The choice to stand aside may be based on (but is not limited to) any of the following:
  - Disagreement with the proposal, or the process used to reach the decision;
  - Personal values or principles;
  - Personal impact or need, e.g. "I can't afford this" or "I'd have to leave the group."

If someone stands aside, their name and reason is recorded in the minutes. That person is relieved of any lead implementation responsibilities, yet is still bound to follow the decision.

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**4. Blocking:** “I believe this proposal would be majorly detrimental to our group, because either it goes against our fundamental principles or it would lead to a disastrous outcome.” Note that none of the following are appropriate reasons to block:

- To get your way or because you prefer a different proposal, or no proposal;
- To fulfill your personal moral values or how you want to live;
- Tradition: because things have always been done this way;
- Because the proposed action doesn’t fit your personal needs (or finances);
- Because you’d have to leave the group if the proposal passed.

In order to protect against inappropriate use of blocking, the group has the option to evaluate blocks: If 90% of the group present believes that a block is being applied inappropriately, then the block is invalidated. This power must be used carefully in order to avoid simply overruling those we disagree with.

**5. Abstain:** “I choose not to participate in the making of this decision.” Typically used because a participant feels uninformed or not ready to participate.

If we’ve done a good job during the discussion period, there should not be any surprises at the call for consensus. If anyone has reservations, stands aside, or blocks, the group will pause to ensure that the reasons are clearly known, and consider whether the proposal might be modified to address the concerns. If more than three people have minor reservations, or more than one person stands aside, we will ask whether or not the decision at hand requires higher support in order to fulfill the goals of our consensus process (high quality decisions, effective implementation, and connection among the group), in which case we may hold the decision over to a future meeting. Most decisions don’t need to be made in a rush; at the same time, we recognize that there is a cost to inaction, so we seek to move things along in order to respect people’s time, energy, and morale.

If a decision is time-sensitive due to external factors and consensus is not reached, the group may elect to invoke a voting fallback. In order for that to happen, 95% of those present must agree it is called for. If a vote takes place, decisions may pass by 90% of those voting. Options at that decision point are: Yes, No, Abstain. (Abstentions don’t count toward the total.)

\* \* \*

### **Additional Consensus Resources**

**Tree Bressen’s website**, filled with free articles, handouts, and pointers to yet more resources. [www.treegroup.info](http://www.treegroup.info)

**Group Works deck, published by the Group Pattern Language Project.** Distills the core wisdom of good meetings into an excellent hands-on tool. [www.groupworksdeck.org](http://www.groupworksdeck.org)

**Seeds for Change (UK)** has a wonderful website on consensus decision-making: their writing is straightforward, thorough, values-based, and includes a historical and multicultural perspective. [www.seedsforchange.org.uk/free/res#grp](http://www.seedsforchange.org.uk/free/res#grp)

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**Starhawk's "Five-Fold Path of Productive Meetings,"** a free bonus chapter from her book *The Empowerment Manual: A Guide for Collaborative Groups*.  
[www.starhawk.org/Empowerment\\_Five-Fold-Path.pdf](http://www.starhawk.org/Empowerment_Five-Fold-Path.pdf)

**Training for Change** has a great collection of tools and exercises on topics such as diversity, strategy, and team-building. [www.trainingforchange.org](http://www.trainingforchange.org)

**Vernal Project.** Randy Schutt, long-time activist, has a dozen short papers on cooperative decision-making. See, for example, "Getting Unstuck: Common Problems in Meetings and Some Solutions." [www.vernalproject.org/papers/Process.html](http://www.vernalproject.org/papers/Process.html)

## **BLOCKING CONTROL IN A CONSENSUS PROCESS**

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### **WHY IS CONTROL OF BLOCKING IN A CONSENSUS PROCESS SO IMPORTANT?**

Some cohousing groups that use a consensus process require a unanimous approval of a proposal and allow one or more members to block a decision. This is a critical matter because a community's progress toward projects, decisions, or proposals that all but one member want to carry out can be blocked by that one member if no blocking-control procedures are adopted in the community's governing documents. For example, a community that wants to amend its governing documents to include a blocking process may be continually stopped from doing so by a single person who blocks the amendment.

There is an excellent series of articles about this topic in the June 2012 issue of Communities Magazine.

A forming community that wants to use a consensus process and wants to include a procedure for controlling blocks should include provisions in its original recorded Declaration of Covenants, Conditions, and Restrictions (CC&R) that 1) consensus process will be used and that 2) the consensus process will include clear processes for blocking and for group determination of whether a block is appropriate. The adopted bylaws should then include a consensus policy and detailed procedures for consensus and for blocking. In California, recording CC&Rs with these covenants means that prospective buyers have notice of the provisions and they are, if challenged, presumed to be reasonable.

### **WHAT IF YOUR GOVERNING DOCUMENTS DON'T HAVE A PROVISION FOR CONTROLLING BLOCKS?**

Some communities established their governing documents to include a consensus process without provisions for controlling blocking by one person. This can freeze a community in turmoil and conflict.

In California, there is a remedy. Under the Davis-Stirling Act, an individual owner or the association may file a lawsuit asking the court to step in and reduce the number of affirmative votes needed to amend the association's CC&Rs. In this case, it would be to reduce the number of affirmative votes from unanimity. For example, an owner or the association could ask the court to order that the CC&Rs can be amended to allow decisions to be approved by unanimity minus, for example, 1 or 2, or by 75% vote, or whatever is reasonable for the association. Once a court order allows the membership to amend the CC&Rs with less than a unanimous agreement, the membership can amend the CC&Rs to include rules for blocking including qualifications for effective blocks.

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Cohousing community members in other states may want to research the possibility of the same type of provision in their state law. If no specific provision exists, a legal remedy may be a court action for declaratory relief, that is, a request for a judicial declaration that the requirement for unanimity is not reasonable, and for a court order requiring how the provision for unanimity in the governing documents shall be changed.

# SAMPLE LLC OPERATING AGREEMENT FOR COHOUSING

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## **DISCLAIMER for Sample LLC Operating Agreement for Cohousing**

The following is a Sample LLC Operating Agreement for an LLC with some members as residents and some members as non-resident investors. **Use of this agreement in whole or in part is at your own risk, and does not create an attorney client relationship with its authors, editors, contributors, or publishers.** Also, the odds are this sample agreement will not reflect how you wish to structure your operating agreement for sharing real property. This is because operating agreements vary as widely as each members' considerations of finances, the type of land and buildings to be shared, community, and aesthetics. Therefore, it is prudent that every LLC member carefully consider what they are agreeing to when signing a contract and consult professionals like attorneys, CPAs, and governance/community experts.

### **Note about this LLC Operating Agreement:**

Note this particular agreement envisions a community that will purchase an existing building or buildings, and will have non-resident investors. In this hypothetical, the member-residents envision themselves as tenants in a landlord-tenant relationship with the LLC. Not every member/owner of the LLC has a right to live at the property, and this is in part due to non-resident investors owning shares of the LLC. This group has also structured itself in this way in order to clarify that it is *not* a common interest development subject to the many burdensome legal requirements under California state law and local city laws.\*

**\*The legal structuring of this agreement to avoid being a common interest development has not been tested in the courts, so any use of this agreement, in its entirety, or part, is at your own risk.**

## **Operating Agreement for [Imaginary] Cambria Cohousing, LLC**

The Members of Cambria Cohousing, LLC (the "Company") enter into this Operating Agreement to form and provide for the governance of the Company and the conduct of its business, and to specify their relative rights and obligations. The Members agree as follows:

### **Section 1 – Purpose of Cambria Cohousing**

The primary purpose of the Company is to purchase, develop, own, and maintain a rental property (the "Property") for the purpose of creating a cohousing community. The Company shall be responsible for entering into leases with and collecting rent from everyone living at the Property (the "Tenants") and managing community activities. The Company may, in addition, engage in any and all lawful business activities.

### **Section 2 – Membership and capital Contributions**

2.1 **Classes of Membership:** There shall be two classes of Membership in the Company:

- a. **RESIDENT MEMBERS:** Resident Members are those Members that intend to live at the Property. Resident Members are entitled to Member Distributions and under some circumstances, Special Distributions, as described in Section 6. A person, group, or entity wishing to become a Resident Member must be approved by 2/3 of current



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Resident Members, must sign this Agreement, and make the following capital contributions and agreements:

- i. **During the Planning Phase:** Any Resident Member joining the Company before the Company has entered into a purchase and sale agreement for the Property shall make a \$15,000 Initial Capital Contribution to the Company. Members may agree to raise this required Initial Capital Contribution in order to meet any necessary costs of the Company.
  - ii. **After the Company is Under Contract to Purchase a Property:** After the Company has entered into a purchase and sale agreement for the Property, each Resident Member shall make an Additional Capital Contribution so as to bring that Member's Total Capital Contribution to between \$20,000 and \$100,000, as determined by the Managers at the time of purchase, depending on the cost of the Property being purchased and the Unit to be occupied by that Member. A Resident Member may make an additional Capital Contribution if that Member desires, so long as a majority of Resident Members approve. A Resident Member that makes an additional Capital Contribution shall be entitled to a Special Distribution, as described in Section 6. If a Resident Member does not make his or her Total Capital Contribution within one week of the Company's signing of a purchase and sale agreement, that Member's membership shall convert to a Non-Resident Membership. All Resident Members joining the Company after the purchase of the Property shall also be required to make a Total Capital Contribution as appropriate.
  - iii. **Entering into an Option to Lease:** After the Company has entered into a purchase and sale agreement for the Property, each Resident Member shall enter into an Option to Lease with the Company, as described in Section 5 of this Agreement. A Sample Option to Lease is attached to this Agreement as Exhibit B.
- b. **NON-RESIDENT MEMBERS:** Non-Resident Members are those Members that make an investment in the Company *without* the intent to live in the cohousing. Non-Resident Members are entitled to Member Distributions and Special Payments, described in Section 6. Non-Resident Members may convert to Resident Members by going through the membership process described in section 2.1(a), which includes acceptance by the Members and entering into a Lease or Option to Lease. A person, group, or entity wishing to become a Non-Resident Member must be approved by the majority of all Members, sign this Agreement, and make the following capital contributions:
- i. **When the Company is Under Contract to Purchase a Property:** When the Company has entered into a purchase and sale agreement for the Property, the Non-Resident Members shall make their Capital Contributions as approved by a majority of Resident Members. The minimum Capital Contribution for Non-Resident Members shall be

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determined by the Resident Members based on the cost of the Property being purchased.

- 2.2 **Members' Percentage Interests:** A Member's Percentage Interest in this LLC shall be computed as a fraction, the numerator of which is the total of a member's capital account and the denominator of which is the total of all capital accounts of all members. This fraction shall be expressed in this agreement as a percentage, which shall be called each member's "Percentage Interest" in this Company. Each Member's Percentage Interest shall be listed in Exhibit A. Members understand that the addition of new Members to the Company will dilute pre-existing membership interests, as well the contribution of additional capital by any previously admitted Members. The Percentage Interest of each new Member shall dilute the Percentage Interests of the previously admitted Members in proportion to their respective Percentage Interests as in effect immediately prior to such dilution. At no point may a Resident Member's Percentage Interest fall below a certain fraction, the numerator of which is 1 and the denominator of which is the total number of Units at the Property.
- 2.3 **Changing the Required Capital Contributions:** Members may, by majority vote, raise or lower the required Total Capital Contributions of all current and new Members.
- 2.4 **Member List:** The Members' names, contact information, classes of membership, Total Capital Contribution, and Percentage Interest in the Company are as set forth in Exhibit A. Exhibit A shall be updated as each new Member joins the Company and shall immediately become a part of this Operating Agreement. All Members agree to promptly notify the Company of changes to their address and contact information.
- 2.5 **Memberships Held by Couples, Households, or Groups:** A single Membership may be held by an individual or a group of individuals. In the event that a Member consists of more than one person, that Member must designate one person (the "Contact") to serve as the contact person and decision-maker for that Member. This Contact person shall be listed on Exhibit A.

### **Section 3 – Management and Decision-Making**

- 3.1 **Spheres of Decision-Making:** The Company shall have three primary spheres of decision-making:
- a. **MEMBER DECISIONS:** Except as otherwise provided, any decision designated in this Agreement to be made by the Members shall be made by an affirmative vote of the Members whose combined Interests in the Company constitute the majority of the total Interests in the Company. However Major Decisions pertaining to the Company shall be made by an affirmative vote of the Members whose combined Interests in the Company constitute 2/3 or more of the total Interests in the Company. **Major Decisions** are defined as follows:
    - i. Amendment of any Operating Agreement provision that would materially affect the financial interests or decision-making power of a Resident or Non-Resident Member;

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- ii. The decision to expel a Member from the Company, unless the expulsion is of a Non-Resident Member more than 10 years from the effective date of this Agreement;
  - iii. The decision to raise or lower the required Capital Contributions of Members;
  - iv. The dissolution, merger, or sale of the Company;
  - v. The sale of any real property owned by the Company;
  - vi. A change in the disposition of all or a substantial part of the Company's assets not in the ordinary course of business;
  - vii. The incurring of any debt secured by the Property;
  - viii. Any act that would make it impossible to carry on the ordinary business of the Company;
  - ix. Any confession of a judgment against the Company;
  - x. The filing of a petition in bankruptcy or the entering into of an arrangement among creditors; and
  - xi. The entering into, on behalf of the Company, of any transaction constituting a "reorganization" within the meaning of the Beverly-Killea Limited Liability Company Act.
- b. **MANAGEMENT DECISIONS:** The business of the Company shall be managed by the Managers, consisting of all Resident Members. Decisions to be made by Managers shall be called Management Decisions, and include all decisions that do not constitute Major Decisions, which are not otherwise designated to be made by the Members, and which do not fall within the purview of the Community Program. In any Management Decision in which a Member is entitled to vote, the Member shall have one vote, regardless of the size of that Member's Percentage Interest in the Company and regardless of the number of people comprising that Member or living in that Member's household.
- c. **COMMUNITY DECISIONS:** Decisions falling under the purview of the Community Program shall be made by the Community Committee. The scope and management of the Community Program is further described in Section 4 of this Agreement.

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### **3.2 Management Decision-Making Process:**

- a. **MANAGEMENT DECISION-MAKING PROCESS:** As provided in this Agreement, any decision to be made by Managers, unless otherwise provided or delegated, shall be made during Management Meetings, in the following manner: All Management Decisions shall be made by an affirmative vote of a majority of the Resident Members, meaning a vote of Resident Members whose combined votes equal more than 50% of the votes of all Resident Members in this Company. Prior to voting on any proposal constituting a Management Decision, Resident Members shall first make a good faith effort to obtain consensus of the group by submitting the proposal for discussion and modifying the proposal based on Members' reasonable concerns. Prior to purchasing the Property, Managers shall adopt a more detailed policy describing this consensus procedure, and attach that policy to this Agreement as Exhibit H.

### **3.3 Meetings:**

#### **a. TYPES OF MEETINGS**

- i. **Annual Member Meeting:** The Company shall hold an Annual Member Meeting for the transaction of any business requiring the vote of both Resident Members and Non-Resident Members. The Annual Member Meeting shall be held in October. The Secretary shall provide all Members with one month Notice of the time, date, and place of this meeting.
  - ii. **Special Member Meetings:** Any two Members may call a Special Member Meeting by giving Notice to all Members of the time and place of the Meeting at least one week prior to the time of the holding of the Meeting. The Notice must specify the purpose of the Meeting.
  - iii. **Management Meetings:** Meetings of Managers for the purpose of Management Decisions shall be held as needed with no less than 48 hours' Notice.
- b. **PARTICIPATION IN MEETINGS:** Members may participate in meetings through the use of a conference telephone or similar communications equipment, provided that all Members participating in the Meeting can hear one another.
  - c. **ACTION WITHOUT MEETING:** Any action required or permitted to be taken by the Members or any group of Members under this Agreement may be taken without a Meeting so long as all Members entitled to vote on that decision receive Notice of the proposal and a reasonable opportunity to object or communicate concerns to the Membership, and so long as the requisite number of Members consents in writing to such action. Furthermore, the transactions of the Members at any Meeting however called or noticed or wherever held, shall be as valid as though transacted at a Meeting duly held after call and Notice if either before or after the Meeting each Member not present signs a written waiver of Notice or document giving consent to the holding of

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the Meeting, or gives written approval of the minutes. Waiver, consent, and approval of minutes may also be facilitated by email and e-signing.

3.4 **Records:** The Members shall keep the following records accessible to all Members at the principal business address of the Company and if agreed to by the membership copied in electronic files:

- a. **MINUTES, NOTICES, AND CONSENTS:** Full and accurate minutes of all Meetings, Notices, waivers of Notices of Meetings, and all written consents in lieu of Meetings.
- b. **BOOKS:** Books of account of the Company's financial transactions.
- c. **ORGANIZING DOCUMENTS AND MEMBER LIST:** Copies of the LLC's Articles of Organization and a signed copy of this Agreement, including Exhibit A updated with current Member names and contact information.
- d. **TAX RETURNS:** The Company's tax returns for the preceding three tax years.

3.5 **Officers:** The Managers shall be responsible for electing the following Officers from among its Resident Members. Officers shall be elected by a vote of Managers at the Annual Member Meeting and shall serve a term of one year. In the event of the incapacity, resignation, or recall of one of these Officers, the Managers shall elect a new person to fill the position. Officers may receive reasonable compensation for their work as Officers, and any compensation must be approved by the Managers. The Officers and their duties are as follows:

- a. **CHAIR:** The duties and authorities of the Chair are as follows:
  - i. The Chair will have no independent decision-making authority.
  - ii. The Chair shall set the agenda for Management Meetings and Member Meetings with input from other Members.
  - iii. The Chair shall serve as facilitator at meetings or designate another person to serve as facilitator.
  - iv. The Chair will, along with the Treasurer, sign all checks for the Company.

The Managers can opt to elect a facilitation team to assume responsibilities for items ii & iii.

- b. **TREASURER:** The duties and authorities of the Treasurer are as follows:
  - i. The Treasurer shall provide the Company with regular written financial reports.
  - ii. The Treasurer shall coordinate with the Company's accountant and ensure that the Company files all required tax returns.
  - iii. The Treasurer shall collect and deposit rent payments.

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- iv. The Treasurer shall, along with the Chair, sign all checks for the Company.
- c. **SECRETARY:** The duties and authorities of the Secretary are as follows:
  - i. The Secretary shall provide Notice to Members when Notice is required for a meeting.
  - ii. The Secretary shall maintain contact information updates to Exhibit A of this Agreement.
  - iii. The Secretary shall take written minutes or designate someone else to take minutes of Management and Member Meetings and send minutes by email to all Resident Members within 7 days of the meeting.

## **Section 4 – The Community**

**4.1 *The Community Program.*** In addition to managing the Property and leasing the residential units, the Company shall operate a special program called the Community Program (the “Community”). The Community shall be responsible for organizing community events and meals, owning and maintaining shared items (such as recreational equipment and tools), adopting rules pertaining to day-to-day life in the cohousing, and managing certain common areas on the Property. The Managers shall determine the terms on which common area management and use is delegated to the Community Program (such as whether rent will be paid and so on). The Community shall be subject to the provisions in this Section 4.

**4.2 *Community Participants:*** To be eligible to regularly take part in Community activities, a person or household must become a Community Participant, by signing a Community Participant Agreement, attached to this Agreement as Exhibit E. All adults (age 18 and over) living in Units owned by Resident Members shall become Community Participants. The Community may admit any other person as a Community Participant, with approval of the Community Committee. All Community Participants must pay regular dues and take part in certain activities and chores set by the Community Committee.

**4.3 *Community Committee:*** Decisions regarding the Community and its activities shall be made by the Community Committee, which shall be elected by the Community Participants. The initial members of the Community Committee shall be the Resident Members of the Company at the time that this Agreement is first executed. The Community Committee shall adopt separate policies for decision-making, meetings, and future Committee elections. The Community Committee may appoint other committees for the delegation of certain duties and activities.

**4.4 *Adopting Policies and Rules:*** The Community Committee may adopt policies and rules relevant to Community activities, chores, and day-to-day life at the Property.

**4.5 *Collecting Community Dues:*** The Community shall set and collect dues from all Community Participants. The Community may set a range of dues levels, based on various factors,

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including whether the Community Participant lives at the Property and how many people live in the Community Participant's Unit.

4.6 **Community Account:** The Community shall maintain a special account where Community Dues shall be deposited and from which Community expenses shall be paid.

4.7 **Failure to Pay Dues:** This Agreement provides and the Community Participant Agreement shall provide that if a Resident Member fails to pay dues to the Community, the Company may treat the unpaid dues as a lien against the Member's Membership Interest in the Company in the amount of all unpaid dues plus an interest rate of 3%. The Community Committee may set separate policies for how to respond when any other Community Participants fail to pay dues.

4.8 **Legal Structure of the Community:** The Community Program shall initially be a program operated under the umbrella of the Company. The Company may, for tax, liability, or governance reasons, wish to later have the Community operate under another entity, such as a nonprofit mutual benefit corporation tax exempt under Internal Revenue Code Section 528 (which is what homeowners associations generally use) or 501(c)(7) (which is what country clubs and social clubs use). The Community Program may be terminated and re-organized by an affirmative vote of a majority of Resident Members.

## **Section 5 – Leasing Policies**

5.1 **No Residency Rights:** Members shall not have the right to reside at the Property solely because of ownership of an Interest in the Company.

5.2 **Prospective Tenants:** "Prospective Tenants" refers to all people that are listed in the "Occupancy Priority List," and with whom the Company has entered into an Option to Lease agreement.

5.3 **Member Tenants:** "Member Tenants" refers to Resident Members of the Company that have entered into a current Lease to live at the Property.

5.4 **Pre-existing Tenants:** "Pre-existing Tenants" refers to all people living in at the Property at the time that the Company takes title to the Property. As Pre-existing Tenants move out of the Property, the Units they vacate will be made available to Prospective Tenants in the Occupancy Priority List, or shall be converted to a common area.

5.5 **The Occupancy Priority List:** The "Occupancy Priority List" refers to a list that the Company shall keep, indicating the order of priority in which Prospective Tenants will be offered a Lease for a Unit. Only Resident Members may be placed in the Occupancy Priority List.

5.6 **Option to Lease:** The Company shall enter into Option to Lease agreements with Resident Members, which secures those Prospective Tenants' place in the Occupancy Priority List. The following provisions shall be included in the Option to Lease:

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- a. **PLACE IN THE OCCUPANCY PRIORITY LIST:** The Option shall offer the Prospective Tenant an opportunity to lease a Unit when one becomes available, in order of that Prospective Tenant's priority in the Occupancy Priority List. A copy of the Occupancy Priority List shall be attached to the Option to Lease and an updated Occupancy Priority List shall be attached to this Agreement.
- b. **ACCEPTING A LEASE:** If a Prospective Tenant does not enter into a Lease with the Company within two weeks of a Unit being offered to that Prospective Tenant, that Unit shall be offered to the next person in the Occupancy Priority List. The Company shall make reasonable efforts to ensure that Notice of such offer is received by a Prospective Tenant when a Unit has become available for that Prospective Tenant. If a Prospective Tenant is next in the Occupancy Priority List and is traveling or out of reach, he or she shall give the Company information necessary to reach him or her, or shall designate a representative to accept the Lease on the Prospective Tenant's behalf.
- c. **FEE FOR OPTION:** To ensure the contractual enforceability of the Option to Lease, the Company shall charge a fee (even if nominal) to Prospective Tenants when entering into the Option to Lease. The fee shall be refundable only in the event that the Company does not succeed in taking title to the Property within five years of the effective date of this Agreement.
- d. **COPY OF THE LEASE:** A copy of the Lease that will be offered to the Prospective Tenant shall be attached to the Option to Lease. By attaching a copy of the Lease, the Prospective Tenant is able to secure the terms on which they will be offered a Lease.
- e. **MONTHLY RENT:** The Option to Lease shall state the amount of initial rent the Prospective Tenant shall pay upon becoming a Member Tenant; however, the rent may be contingent on the size and desirability of the Unit that becomes available to that Member. The Option shall state the criteria for determining the rent amount. The base rent for every Unit shall be set at the time that the Property is purchased, and a schedule of the rents for each Unit shall be attached to this Agreement as Exhibit F. Before a Resident Member moves into a Unit, the Unit shall be brought up to a common standard of repair, at the expense of the Company. A description of this standard of repair is attached to this Agreement as Exhibit G.

5.7 **Lease Provisions:** The Company shall include the following provisions in the Lease offered to Prospective Tenants:

- a. **COMMUNITY:** The Lease shall require that a Member Tenant become and remain a Community Participant in good standing and pay Community Dues.
- b. **REMEDY FOR NON-PAYMENT OF RENT:** If Member Tenant doesn't pay the full rent amount, the Company, in addition to any other legal remedies available, shall have a lien on the Member's Interest in the Company, in the amount of the unpaid rent, plus 7% interest accruing annually. A Member Tenant that has fallen more than one month



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behind on rent payments may, at the option of the Managers, have their Company membership converted to a Non-Resident Membership, and will therefore be ineligible to take part in Management Decisions. The Lease shall also require that Member Tenants pay a fee for late payment of rent. In accordance with state and local laws governing evictions, the Company may evict any Tenant in violation of the terms of the Lease.

- c. **BUYING OUT THE LEASE:** The Lease shall provide a way for the Company to “buy out” a Member Tenant’s Lease, in the event that the Member Tenant leaves voluntarily or the Company wishes for the Member Tenant to leave. The Buy Out provision shall specify how the Company shall compensate a Member Tenant for the termination or forfeiture of their Lease, taking into account rental prices in the area and improvements that the Tenant has made to the Unit. Furthermore, the Company shall offer to Purchase (on the terms set forth in Section 7) the Membership Interest of any Member Tenant that has been evicted or had their Lease involuntarily terminated. The Company has the option, but no obligation, to buy out the Lease of a Member Tenant that moves out voluntarily. Unless the departing Member’s Membership is terminated by the Members, the departing Member Tenant has the option to maintain his or her Membership, however it will convert to a Non-Resident Membership when the Member Tenant vacates the Property.
  - d. **ASSIGNING A LEASE TO SOMEONE ELSE:** A Member Tenant may not assign his or her Lease to a third party without first offering the Company an opportunity to Buy Out the Lease. When there are Members waiting in the Occupancy Priority List, the Company shall Buy Out the Lease unless doing so would make the Company unable to meet other financial obligations. If a Member Tenant assigns his or her Lease without transferring his or her Membership Interest in conjunction, that Member’s membership shall become a Non-Resident Membership. A Member Tenant may not assign his/her Lease to a third party unless the third party is approved by 2/3 of the Resident Members. A Resident Member that disapproves a proposed third party assignee must state reasonable grounds for that disapproval.
  - e. **SUBLEASING:** In the event that a Member Tenant wishes to move out and sublet his or her Unit to a third party subtenant, an affirmative vote of 2/3 of Resident Members is required to approve the subtenant. A Resident Member that disapproves a proposed subtenant must state reasonable grounds for that disapproval. If a Member is subleasing and has not lived at the Property for more than two years, that Member’s Membership shall convert to a Non-Resident Membership, unless determined otherwise by the Managers.
- 5.8 **Rents:** All Tenants shall pay monthly rent to the Company, as provided by that Tenant’s Lease. The rent for each unit shall be set by the Company based on the square footage of the unit and other reasonable factors related to the unit’s desirability, etc. The rents for each Unit shall be determined in advance and attached to this Agreement as Exhibit F. The Company may raise or lower rent as it chooses and as allowable by law, however all

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Member Tenants rents shall be raised or lowered simultaneously and in the same proportions.

## **Section 6 – Accounts and Distributions**

- 6.1 **Capital Account for Each Member and Allocation of Profits and Losses:** A capital account shall be set up and maintained on the books of the Company for each Member. It shall reflect each Member's Total Capital Contribution to the Company, increased by each member's share of profits in the Company, decreased by each member's share of losses and expenses of the Company, and adjusted as required in accordance with applicable provisions of the Internal Revenue Code and corresponding income tax regulations. All profits and losses of the Company shall be allocated among the Members' Capital Accounts on the basis of their Percentage Interest in the Company.
- 6.2 **Operating Budget:** The Managers will meet at least once per year to determine an operating budget for the Company, taking into account both regular expenses and foreseeable improvement and maintenance costs of the Property
- 6.3 **Maintenance of Reserves:** The Company shall maintain a Reserve account and shall plan to build a Minimum Reserve of \$300,000 within three years of purchasing the Property. The Reserve shall serve to pay for unforeseen expenses of the Company and instances when the Company desires to Buy Out the Lease of a Member Tenant. The Company shall budget appropriately in order to contribute to and build the Reserve to the minimum level.
- 6.4 **Special Payments to Non-Resident Members.** Before the end of second fiscal year after the Company has taken title to the Property, and before the end of every fiscal year thereafter, the Company shall make a Special Payment to each Non-Resident Member. The amount of each Non-Resident Member's Special Payment shall be the equivalent of 3% of the amount of the Member's Total Capital Contribution. The Special Payment shall not change the Non-Resident Members' proportionate share of the allocated profits and losses of the Company. Special Payments may, at the election of the Managers, be reduced, delayed, or cancelled in the event that the Management Team believes the Company will not have sufficient funds to meet its Operating Budget and to build and maintain its Minimum Reserve.
- 6.5 **Special Payments to Resident Members.** Special Payments to Resident Members shall be made in order to provide an incentive to Resident Members to contribute more than their required share of capital. Before the end of second fiscal year after the Company has taken title to the Property, and before the end of every fiscal year thereafter, the Company shall make a Special Payment to each Resident Member that has contributed more than that Member's required Capital Contribution. The amount of each Resident Member's Special Payment shall be the equivalent of 3% of the amount by which the Member's Total Capital Contribution exceeds that Member's required Capital Contribution. The Special Payment shall not change the Resident Members' proportionate share of the allocated profits and losses of the Company. Special Payments may, at the election of the Managers, be reduced, delayed, or cancelled in the event that the Management Team believes the Company will

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not have sufficient funds to meet its Operating Budget and to build and maintain its Minimum Reserve.

6.6 **Member Distributions.** From time to time, when the Managers have determined that the Company has sufficient funds to meet its Operating Budget and to maintain a Minimum Reserve, the Company may decide on an amount of Distributable Cash, which shall be divided up and paid to Members of the Company in proportion to each Member's Percentage Interest in the Company.

6.7 **Consent to Capital Contribution Withdrawals and Distributions:** Except as provided elsewhere in this Agreement and except for the Member Distributions and Special Payments described above, Members shall not be allowed to withdraw any part of their capital contributions or to receive distributions, whether in property or cash, unless such distributions are approved by the Managers.

6.8 **Tax and Accounting Matters:**

- a. **TAX CLASSIFICATION:** The Members of this Company intend that this LLC be initially classified as a partnership for federal and state income tax purposes.
- b. **FISCAL YEAR:** The tax year of this Company shall be January 1 to December 31.
- c. **ACCOUNTING METHOD:** The Company shall use the cash method of accounting.
- d. **ANNUAL INCOME TAX RETURNS AND REPORTS.** Within 60 days after the end of each taxable year of the Company, the Company shall send to each of the Members all information necessary for the Members to complete their federal and state income tax or information returns and a copy of the Company's federal, state, and local income tax or information returns for such year.
- e. **WITHHOLDING TAXES.** The Company may withhold from distributions all amounts required under applicable law or regulation. Amounts required to be withheld pursuant to Code Section 1446 or any other provision of federal, state, or local tax law shall be treated as amounts actually distributed to the affected Members for all purposes under this Agreement.

## **Section 7 – Transfers of Interests**

7.1 **Voluntary Transfer of a Membership Interest:** During his/her lifetime a Member may not sell, assign, transfer, pledge, gift, subject to a voting trust, or otherwise dispose of an Interest or any incident or privilege of Membership (referred to as a "Transfer"), unless he/she obtains the prior written consent of 2/3 of Resident Members, or in the absence of such consent has complied with the following:

- a. **RIGHT OF FIRST REFUSAL.** The Member wanting to Transfer an Interest (referred to as the "Offering Member") shall first offer the Interest to the Company, which shall

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have the option (but not the obligation) to purchase the Offering Member's Interest for a period of fifty (50) days after the date of such offer. Any portion of the Interest not purchased during this period may then be purchased by the other Members. The Members shall have the option (but not the obligation) to purchase the Offering Member's Interest pro rata based on the relative percentages (by ratio) of their respective Interests, for a period of forty (40) additional days after the date of such offer. Any portion of the Interest not purchased during this period may then be purchased by the Members exercising the purchase option, who shall have a period of thirty (30) additional days in which to proportionately increase their respective purchase of the Offering Member's Interest. The notice by the other Members of acceptance of the aforesaid offers shall set a closing date for such purchase between ten (10) and thirty (30) days after the date of such notice.

- b. **PERMITTED TRANSFER.** The Interest of the Offering Member with respect to which the Company and other Members fail to exercise purchase options, may then be sold by the Offering Member to a third party. However, a Resident Member that continues to live at the Property may not offer to sell his or her Membership Interest to a third party unless the third party will be assigned the Member's Lease.
  - i. **Conditions of Transfer.** Notwithstanding any provision of this Section 7 to the contrary, all Transfers shall be subject to the following: (i) The transferee must agree in writing to be bound by the provisions of this Agreement and any other agreements and policies incorporated into this Agreement by reference, as well as any amendments thereto; (ii) no Transfer shall be made if, in the opinion of counsel to the Company, the Company would lose its characterization, or be deemed terminated, as a partnership for tax purposes; (iii) every Transfer in contravention of any provision hereof shall be void and ineffectual, and shall not bind or be recognized by the Company or the Members; and (iv) all parties shall take such actions as are necessary, including execution of amendments to this Agreement or the Articles, to carry out the intent of this section.
- c. **PURCHASE PRICE.** Notwithstanding the offer received by the Offering Member, or any other provision hereof to the contrary, the purchase price for any Member Interest to be paid by the Company or any other Member under this Agreement shall be an amount equal to the amount of the Member's Capital Contribution adjusted in accordance with any change in the fair market value of the Property, which shall be determined and adjusted as follows:
  - i. **Adjustment for Fair Market Value:** The Company shall record the fair market value of the Property at the time that each Member either joined the Company or at the time the Company purchased the Property, whichever comes second. A determination of fair market value shall be made again for the time at which the Member gives notice of intent to Transfer. The amount payable to the

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Member shall then be adjusted based on the change in fair market value. For example, if the value of the Property has risen by 10%, the Member shall receive an additional 10% premium on the amount of the Member's Capital Contribution. If the value of the Property has declined by 10%, the Member's payment shall be the amount of the Capital Contribution minus 10%.

- ii. **Determining Fair Market Value of the Property:** The recorded fair market value shall be determined by an agreement between the Company and the Member in question. If the Member does not agree with the Company's assessment of fair market value, the Member may have the Property appraised to determine the fair market value. If the Company does not agree with the Member's appraisal, the Company may obtain an independent appraisal and the two appraisals shall be averaged.
- d. **PAYMENT TERMS:** If the Membership Interest is purchased by the Company or other Members, the Purchase Price shall be paid in full within six months of the Company's or Members' exercise of the option to purchase the departing Member's Interest.

## **7.2 Involuntary Transfer of a Membership Interest:**

- a. **WITHDRAWAL.** For purposes of this Agreement, an Involuntary Withdrawal of a Member (the "Withdrawing Member") shall be deemed to occur if the Member (i) files for bankruptcy protection, is adjudged insolvent or otherwise becomes subject to bankruptcy or insolvency proceedings that are not dismissed within thirty (30) days, (ii) dies, or (iii) has acted or omitted to act in a manner inconsistent with the purpose of the Company or whose holding an Interest is otherwise detrimental to the Company or the Members, as determined by 2/3 of the Members in good faith. Since the goal of the Company is to achieve 100% resident ownership, an Involuntary Withdrawal of a Non-Resident Member may also be brought about by a decision of the Managers 10 years or more after the purchase of the Property. In the event of any Involuntary Withdrawal, the Member's share shall be purchased as provided in Paragraph b of this Section.
- b. **PURCHASE OF WITHDRAWING MEMBER'S INTEREST:** In the event of an Involuntary Withdrawal, the Company shall purchase the Withdrawing Member's Interest at the price and on the terms set forth in Paragraph 7.1.c and 7.1.d. However, if the Withdrawing Member has died, the Withdrawing Members' heirs or beneficiaries may request to keep the Membership Interest. In the event that a deceased Withdrawing Members' heirs or beneficiaries request to keep the Membership Interest, such a request shall then be considered by Managers and may only be disapproved if a majority of Managers reject the request.

## **Section 8 – Dissolution the of Company**

- 8.1 **Duration of the Company:** The duration of this Company shall be indefinite.

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8.2 **Events That Trigger Dissolution of the Company:** The following events shall trigger a dissolution of the LLC, except as provided:

- a. The written agreement of 2/3 of the Members to dissolve the Company;
- b. Entry of a decree of dissolution of the Company under state law.

8.3 **Distribution of Assets Upon Dissolution:** Upon dissolution of the Company, all assets remaining after payment of debts shall be distributed to the then current Members of the Company on the basis of their Percentage Interests in the Company.

## **Section 9 – Conflict Resolution**

9.1 **Mediation as the First Recourse:** In any dispute over the provisions of this Agreement and in other disputes among the Members, if the Members cannot resolve the dispute to their mutual satisfaction, the matter shall be submitted to mediation. The terms and procedure for mediation shall be arranged by the parties to the dispute. The chosen mediator shall conduct at least one mediation session per week for four weeks, with all parties to the dispute present, unless the dispute can be resolved sooner than four weeks. If no agreement is reached after four mediation sessions, the parties shall submit the dispute to arbitration as set forth in the following paragraph.

9.2 **Arbitration as the Second Recourse:**

- a. **ARBITRATION:** If good-faith mediation of a dispute proves impossible or if an agreed-upon mediation outcome cannot be obtained by the Members who are parties to the dispute, the dispute may be submitted to arbitration in accordance with the rules of the American Arbitration Association.
- b. **REQUESTING ARBITRATION:** Any party may commence arbitration of the dispute by sending a written request for arbitration to all other parties to the dispute. The request shall state the nature of the dispute to be resolved by arbitration. Arbitration shall be commenced as soon as practical after such parties receive a copy of the written request.
- c. **PAYING FOR ARBITRATION:** All parties shall initially share the cost of arbitration, but the prevailing party or parties may be awarded attorney fees, costs and other expenses of arbitration.
- d. **ARBITRATION SHALL BE BINDING:** All arbitration decisions shall be final, binding and conclusive on all the parties to arbitration, and legal judgment may be entered based upon such decision in accordance with applicable law in any court having jurisdiction to do so.

## **Section 10 – General Provisions**

*For informational purposes only. This is not legal advice.*

- 10.1 **Replacing Prior Agreements:** This Agreement amends and replaces all prior Operating Agreements of Cambria Cohousing, LLC, formerly known as Cambria Cohousing, LLC.
- 10.2 **Modification of this Agreement:** This Agreement represents the entire agreement among the Members of this Company, and it shall not be amended, modified or replaced except by a written instrument executed by an affirmative vote of 2/3 of Resident Members, except when approval of Non-Resident Members is also required, as provide in Section 3.
- 10.3 **Notice:** Any time Notice is required to be given under this Agreement, unless otherwise provided, Notice shall be deemed to have been delivered to a Member on the day that an email is sent to the email address provided by the Member to the Company and listed on Exhibit A of this Agreement. If a Member wishes to receive Notice by mail, that Member must request this in writing delivered to the Secretary of the Company.
- 10.4 **Record Date:** The date on which Notice of a meeting of Members is delivered or the date on which a distribution is made, as the case may be, shall be the record date for the determination of the Members entitled to notice of or to vote at such meeting, including any adjournment thereof, or the Members entitled to receive such distribution.
- 10.5 **Nonliability of Members:** No member of this Company shall be personally liable for the expenses, debts, obligations or liabilities of the Company, or for claims made against it, except as otherwise provided by law.
- 10.6 **Headings and Subheadings in this Agreement:** This Agreement contains many headings and subheadings (in bold or italics), which are there to make the Agreement easier to read and navigate. The headings and subheadings are not intended to have any legal effect or limit the scope or meaning of the provisions contained in this Agreement.
- 10.7 **Severability:** If any provision of this agreement is determined by a court or arbitrator to be invalid, unenforceable or otherwise ineffective, that provision shall be severed from the rest of this agreement, and the remaining provisions shall remain in effect and enforceable.
- 10.8 **Agreement governed by the laws of California:** The validity and interpretation of this Agreement shall be governed by the laws of the State of California.
- 10.9 **Effective Date:** This Operating Agreement of Cambria Cohousing, LLC, effective \_\_\_\_\_, is adopted by the Members whose signatures appear at the end of this Agreement.

### **Execution of this Agreement**

In witness whereof, the Members of this Company sign and adopt this Agreement as the Operating Agreement of Cambria Cohousing, LLC.

Name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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Name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_ Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**List of Exhibits:**

1. **Exhibit A:** Names, Contact Info, Capital Contributions, and Percentage Interests of Members
2. **Exhibit B:** Sample Option to Lease
3. **Exhibit C:** Occupancy Priority List
4. **Exhibit D:** Sample Residential Lease
5. **Exhibit E:** Bylaws and Participant Agreement for Community Program
6. **Exhibit F:** Schedule of Rents
7. **Exhibit G:** Standard of Repair for Units



## GETTING LOANS OR INVESTMENTS FROM FRIENDS AND FAMILY

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### **What is a Security and Why Does it Matter?**

You create a security when you ask people to invest in or lend money to your cohousing community or other project. It's important to know what is or isn't a security, because whenever you sell or even offer to sell a security, it needs to either 1) be registered with the federal Securities Exchange Commission and with the state agency in every state where you want to raise money, or 2) qualify for an exemption from registration.<sup>37</sup>

### **The 25102(f) Securities Exemption in California<sup>38</sup>**

California Corporations Code Section 25102(f) offers a special securities law exemption to certain kinds of private securities offerings, if they meet the following criteria:

#### **First, you must be exempt from federal securities filing requirements:**

- Your company must be formed under California law (i.e., if you are a corporation you filed your articles of incorporation in California, etc.)
- You only offer to sell securities to California residents
- Your contract with your investors include a provision that they will not re-sell the security to anyone outside the state for nine months
- Your business is very California-focused – here is a test for this:
  - You get at least 80% of your revenues from California
  - At least 80% of your assets are in California
  - You plan to use at least 80% of the money you raise within California

#### **Then, you must meet the requirements for 25102(f):**

- You can sell your securities to up to 35 investors as long as they meet one or more of the following criteria:
  - The investors have a preexisting personal or business relationship with you “consisting of personal or business contacts of a nature and duration such as would enable a reasonably prudent purchaser to be aware of the character, business acumen, and general business and financial circumstances of the person with whom such relationship exists.” These investors can be friends or family;
  - The investors have enough financial experience to protect their interests; or
  - The investors have experienced professional financial advisors.
- You can sell an unlimited number of securities to officers and directors of the company and accredited investors. Accredited investors are 1) people with \$1 million in net worth (excluding their home) or \$200,000 in annual income, or 2) entities with more than \$5 million in assets.
- Your securities offering cannot be advertised to the public.
- The investors must sign something saying that they are not investing for the purpose of re-selling the securities to someone else.

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<sup>37</sup> For more on Securities and Exemptions, see “Financing Landing Page” at [communityenterpriselaw.org/financing-landing/](http://communityenterpriselaw.org/financing-landing/) and “Exemptions from Registration” at [communityenterpriselaw.org/financing-topics/exemptions-from-registration/](http://communityenterpriselaw.org/financing-topics/exemptions-from-registration/)

<sup>38</sup> Adapted from a handout created by Jenny Kassan of the Sustainable Economies Law Center ([www.theSELC.org](http://www.theSELC.org))

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- You have to file a simple Notice of Transaction form with the California Department of Corporations and pay a small fee: [dbo.ca.gov/forms/LOEN/25102\(f\)-260.102.14\(c\)%20LOEN.pdf](http://dbo.ca.gov/forms/LOEN/25102(f)-260.102.14(c)%20LOEN.pdf).

## A SAMPLE FRIENDS AND FAMILY PROMISSORY NOTE

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### Promissory Note for Cambria Cohousing Lender

**Background Information:** Cambria Cohousing, LLC is currently under contract to purchase a 40-acre property in Cambria, California for the purpose of building a cohousing community. \_\_\_\_\_ [Name of Lender] is now making a loan of \$ \_\_\_\_\_ to Cambria Cohousing, LLC to assist with the purchase of the property and development of the project. Now, Cambria Cohousing, LLC and \_\_\_\_\_ [Name of Lender] wish to clarify the terms of repayment of this loan, as follows:

- 1. Promise to Pay:** Thus, for value received, Cambria Cohousing, LLC (“Borrower”) hereby promises to pay to the order of \_\_\_\_\_ (“Lender”), at an address provided to Borrower by the Lender, a sum of \$ \_\_\_\_\_ (the “Principal”), together with interest on the unpaid Principal balance accruing at an annual rate of \_\_\_\_\_%, with all Principal and interest due and payable by the following date: \_\_\_\_\_.
- 2. Payment Plan:** Borrower shall pay Lender \_\_\_\_\_ [monthly/quarterly/annual] installments of at least \$ \_\_\_\_\_ commencing on or before January 1, 2013. Each payment under this Note shall be credited first to interest then due and any remainder to Principal. This Note may be prepaid, at any time, in whole or in part, without premium or penalty, as long as any Principal prepayment is accompanied by a payment of interest accrued to the date of prepayment on the amount prepaid.
- 3. Default:** If Borrower fails to pay any sum due under this Note within six months of when it becomes due and payable, this shall be considered a Default. In the event of a Default, the Lender may, at his/her option, declare this Note to be immediately due and payable.
- 4. Collection Costs:** Borrower agrees to reimburse the holder of this Note for all costs of collection or enforcement of this Note, whether or not suit is filed (including, but not limited to, reasonable attorney fees and expenses), incurred by the Lender.
- 5. No Intention to Resell this Note:** Lender represents and warrants that he/she is purchasing this Note for his/her own account and not for the purpose of re-selling the Note to someone else.
- 6. Lender is a California Resident:** Lender represents that he/she is a resident of California.

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7. **Relationship Between Borrower and Lender:** Lender represents that he/she has a preexisting personal or business relationship with \_\_\_\_\_ [name or names of Cambria Cohousing, LLC members that lender has a relationship with], and this relationship has involved sufficient contact to enable Lender to be aware of the character, business acumen, and general business and financial circumstances of Cambria Cohousing, LLC and some of its managing members. [For the purpose of demonstrating a preexisting relationship under section 25102(f) of the California Corporations Code, it helps to add more detail about the nature and duration of the relationship].
  
8. **Acknowledgment of Information Provided to the Lender:** Lender acknowledges he/she has received the following information from Cambria Cohousing, LLC, prior to purchasing this Note, and that this information is:
  - a. [List documents you'll be providing to the Lender]
  
9. **Governing Law:** This Note shall be governed by and construed in accordance with the laws of the State of California.

By signing below, Borrower and Lender agree to the above terms and conditions of this Note.

Executed at \_\_\_\_\_, California:

Dated: \_\_\_\_\_

Cambria Cohousing, LLC, **Borrower**

Signature: \_\_\_\_\_

By: [Name of member who will sign on behalf of LLC]

Address: [LLC Address]

Dated: \_\_\_\_\_

Name: \_\_\_\_\_, **Lender**

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

## TAX STUFF AND COHOUSING

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This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).

### Individual Income Tax Implications

Property ownership, and particularly ownership of one's primary residence, generally comes with tax benefits to the individual. The ownership arrangement in intentional communities may affect the availability of certain tax benefits, which include:

- a. **The capital gains exclusion:** The IRS currently allows homeowners to exclude from taxation the first \$250,000 (or \$500,000 for a married couple) of capital gains on the sale of a primary residence.<sup>39</sup> Unfortunately, individuals that own their property through an entity that does not meet the IRS definition of a "cooperative housing corporation"<sup>40</sup> or that is a disregarded entity, such as a single-member LLC,<sup>41</sup> will not be eligible to use this exclusion if they sell their share of a landholding entity and realize a gain.
  
- b. **The mortgage interest tax deduction:** Payment of interest on home mortgages is generally a tax deduction for an individual.<sup>42</sup> This is a substantial tax benefit, since a significant portion of mortgage payments consist of interest during the first years of payment, and the deduction could reduce an individual's taxable income by tens of thousands of dollars. This tax deduction is available to tenant-shareholders of housing that meets the IRS' definition of "cooperative housing corporation," and it allows the tenant to deduct his/her share of the interest on the cooperative blanket mortgage.  

The availability of the mortgage interest tax deduction is a major consideration when a group of people is contemplating purchasing a multi-unit residential property together and choosing between ownership as tenants in common or a limited liability company. Although the members of the LLC cannot claim the deduction in the same way direct homeowners may, an LLC passes the mortgage interest through to members as a business expense, which usually results in a business loss shown on the member's K-1 (the statement of a member's share of profits, losses, deductions, and credits in the LLC).
  
- c. **The property tax deduction:** Homeowners can generally deduct from income amounts paid toward local real property taxes. This benefit is available to direct homeowners and

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<sup>39</sup> See IRS Publication 523, "Selling Your Home," available at <http://www.irs.gov/pub/irs-pdf/p523.pdf>

<sup>40</sup> See Internal Revenue Code Section 216(b), the text of which is included in a footnote above.

See Internal Revenue Code Section 216(b), the text of which is included in a footnote above.

or when a single-member LLC may be considered a disregarded entity.

<sup>42</sup> See IRS Publication 530, "Tax Information for Homeowners," available at <http://www.irs.gov/pub/irs-pdf/p530.pdf>

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tenant-shareholders of cooperatives, but must be passed through to members as a business expense in the case of ownership by an LLC that does not meet the IRS' definition "cooperative housing corporation."

- d. Sweat equity:** Another tax issue to consider is the effect of an agreement to grant a property interest to a person in exchange for work they do on a property. Clients are frequently shocked when I tell them that such a "sweat equity" arrangement generates taxable income to the person contributing work, as measured by the value of the land interest that they are granted.

### **Property Taxes**

In California, where property tax assessors generally do not re-appraise a property unless there has been a change of ownership, a group of co-owners may want to find a way to prevent frequent changes of ownership. For example, if a California property is owned by 8 people as a TIC, chances are that every several years an owner may wish to leave and relocate. If that person sells his/her share, this could trigger partial re-appraisal of the property and, if the property value has risen, higher property taxes. One way to avoid frequent re-appraisal is to own the property through an entity, such as a partnership, corporation, or LLC. Under California law, a change of ownership may not take place unless there is a transfer of more than 50% of the interests in the entity.<sup>43</sup>

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<sup>43</sup> California Revenue and Taxation Code Section 64

## ZONING AND COHOUSING

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**This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).**

### **Local Zoning and Land Use Laws:**

Residential zoning laws have carved up cities and suburbs into single-family homes and units, largely separating household units into isolated spaces. As a result, many cohousing communities encounter zoning law barriers to the development of their communities. Here is a brief summary of the types of zoning barriers shared housing and cohousing groups may face:

1. **Restrictions on the number of units on a parcel:** Most municipalities restrict residential land uses by capping or setting a minimum number of units that must be put on a parcel. While the purposes of density capping are often rooted in management and protection of limited resources such as water, clean air, healthy ecosystems, and the capacity and upkeep of infrastructure such as sewage treatment systems, transportation, and schools, density caps can present obstacles to groups wishing to create community-oriented housing with shared spaces.

Many people wishing to create semi-shared housing arrangements have worked around such restrictions by, for example, building an addition onto a house and including a shared kitchen in between two otherwise separate living spaces. This is because a dwelling constructed without a kitchen sometimes does not meet the legal definition of a dwelling unit.<sup>44</sup>

In some places, states have passed laws mandating that cities allow residents to build accessory dwelling units, also known as ADUs, granny flats, in-law units, second units, accessory apartments. For example, recognizing that ADUs may provide the most important means by which we will house our growing population, the California legislature passed AB 1866 in 2003, requiring that cities adopt more streamlined policies for the permitting of ADUs.

Where possible, cities could increase allowable density, even in single-family residential areas, if the land will be used in a way that mitigates the typical impacts of density. For example, if a cohousing community or ecovillage is built with systems to capture, purify, and recycle water, to manage its own waste and wastewater, to produce its own energy, and to provide residents with a car-sharing program and easy access to public transit, this would mitigate the impact on the surrounding community, local ecosystems, and city infrastructure.

Form-based zoning codes,<sup>45</sup> already implemented in cities around the U.S., may offer groups a unique opportunity for shared housing. Such codes focus on urban planning based on, among other things, the form, shape, size, and impact of buildings on parcels. This model may provide groups with the opportunity to participate in the planning and

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<sup>44</sup> For example, the International Residential Code (2009) defines “Dwelling Unit” as, “A single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.”

<sup>45</sup> For more information on form based codes, see the Form Based Codes Institute: [www.formbasedcodes.org](http://www.formbasedcodes.org)

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development of compact urban multiuse communities that accommodate the needs of shared living.

- 2. Restrictions on the relationships of or number of occupants per unit:** In many municipalities, zoning laws still restrict the number of legally unrelated individuals that may live together in a unit. Such laws have presented barriers to groups that intentionally seek to live in a shared and/or supportive living arrangement. Mental Health Advocacy Services, Inc. has issued a set of recommendations for how cities can redefine household and occupancy standards.<sup>46</sup>

Other laws require that unrelated individuals in a unit be part of a “household unit” or “single housekeeping unit,” meaning that they share financial responsibilities and chores, and act, in some respects, like a family. Such a law prevents a single owner of a three-bedroom house from renting out her other two bedrooms to students or other people found on a classified ads site such as Craigslist.<sup>47</sup>

- 3. Mandatory parking spaces:** Mandatory parking requirements can be a significant barrier to shared housing. In Mountain View, California, the cost of one cohousing development significantly increased, due to the city’s inflexible requirement that the development provide 2.3 parking spaces per new unit.<sup>48</sup> This is unfortunate, because cities could actually incentivize shared housing, car sharing, ride sharing, and public transit use by loosening requirements that each new unit be accompanied by off-street parking, and by finding other ways to ensure that street parking doesn’t become scarce. For example, a city could require that new unit developments be accompanied by a car-sharing plan or program, transit passes for residents, bicycle parking, and other infrastructure that enables residents to not own a car. Cities could also require residents of new units to pay higher fees for street-parking permits, since those residents would normally have incurred the expense of installing a new parking spot on the property.

### **Inclusionary Zoning Laws:**

Inclusionary zoning is a tool used by cities to ensure a supply of affordable housing units. Such laws often require that new developments contain a certain number of affordable units and/or rental units, or they impose fees when multi-unit buildings are converted from rental properties to resident-owned condos. At the same time, such laws sometimes present barriers to the creation of cohousing units. For example, in Oakland, California, if a group of 10 people were to buy a 10-unit building for the purpose of creating cohousing for themselves, they might be required to create a certain number of replacement rental units in their building or elsewhere in the city.<sup>49</sup> Such laws add significant costs to a project and can negatively impact the feasibility of

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<sup>46</sup> “Fair Housing Issues Land Use and Zoning: Definitions of Family and Occupancy Standards” by Mental Health Advocacy Services, Inc., September 1998, Available at [http://housingrights.com/pdfs/def\\_family.pdf](http://housingrights.com/pdfs/def_family.pdf)

<sup>47</sup> See, for example, a proposed Los Angeles law called the “State Licensed Facilities” ordinance, Council File 11-0262, which defines a boarding house as: “A one-family dwelling where lodging is provided to individuals with or without meals, for monetary or non-monetary consideration under two or more separate agreements or leases, either written or oral.”

<sup>48</sup> “Cohousing and Carsharing: A Great Opportunity,” by Neal Gorenflo, published by *Shareable* on October 11, 2009, available at <http://shareable.net/blog/cohousing-and-car-sharing-a-great-opportunity>

<sup>49</sup> Oakland Municipal Code Section 16.36.070.



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resident-developed cohousing projects. Cities should make special exemptions for owner-occupied units that are cooperatively developed by the people intending to live in the units.

Note that it may be possible to structure the cohousing entity in such a way that it avoids meeting the definition of a stock cooperative or condominium. For example, if a group forms an entity to purchase a multi-unit building to rent to themselves, and if there are some non-resident owners of that entity, this becomes, in effect, a hybrid between a rental property and a resident-owned property, and it may not be restricted by inclusionary zoning rules.

## COMMON INTEREST DEVELOPMENT COMPARISON TABLE

TYPE OF CID	DEFINED	COMMON AREA DESCRIBED	OWNERSHIP OF COMMON AREAS	SEPARATE INTEREST
<p><b>COMMUNITY APARTMENT PROJECT</b> CA Civ. Code §4105</p>	<p>Undivided interest in land coupled with right of exclusive occupancy of an apartment.</p>	<p>Entire project, except the apartments occupied by residents and any incidental exclusive use common areas such as parking spaces and storage areas.</p>	<p>Common area owned by individual owners as tenants in common.</p>	<p>The exclusive right to occupy an apartment.</p>
<p><b>STOCK COOPERATIVE</b> CA Civ. Code §4190</p>	<p>Corporation holds title to land and improvements and shareholders have right of exclusive occupancy in a portion of real property (usually a unit). Shareholders may deduct share of mortgage interest and property taxes if the cooperative meets IRS requirements.</p>	<p>Entire project, except the units occupied by residents (shareholders) and any incidental exclusive use common areas such as parking spaces and storage areas.</p>	<p>Common area owned by corporation formed to hold title to the land and improvements.</p>	<p>The exclusive right to occupy a portion of the developed real property, title to which is held by corporation. The owner's interest may be held as a share of stock, a certificate of membership, or another way and is deemed to be an interest in the CID.</p>

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TYPE OF CID	DEFINED	COMMON AREA DESCRIBED	OWNERSHIP OF COMMON AREAS	SEPARATE INTEREST
<p><b>CONDOMINIUM</b> CA Civ. Code §4125</p>	<p>An estate in real property. Undivided interest in common in portion of real property with separate real property interest in unit – land or structure. Boundaries of unit must be described and recorded in a final map, parcel map, or condominium plan.</p>	<p>All land and improvements constituting the CID except individually owned units. Interests conveyed by deed and set out in final map, parcel map or condo plan.</p>	<p>Common area owned by undivided interests of owners in equal shares, one per unit, unless CC&amp;Rs provide otherwise. May be held as tenants in common or by a home owners association.</p>	<p>Separate ownership of unit which can be described as land on a map, as physical structures planned or in existence, like ceilings, floors and walls, an entire structure, or any combination of these.</p>
<p><b>PLANNED DEVELOPMENT</b> CA Civ. Code §4175</p>	<p>Development other than the above three having either or both of these:</p> <ul style="list-style-type: none"> <li>◆ Common area owned as described;</li> <li>◆ Association has power to enforce obligations of separate owners by assessment that may become lien against separate property.</li> </ul>	<p>Common area is the entire development except for lots and residences owned by owners. Common area rights may be conveyed by mutual or reciprocal easement rights appurtenant to the separate interests.</p>	<p>Common area owned by an association or in common by owners of separate interests with appurtenant rights to use of common area. May be owned in equal shares as tenants in common but title by association minimizes liability to owners.</p>	<p>Separate ownership of a lot, parcel, area, or space.</p>

## LAWS THAT DICTATE COMMUNITY ASSOCIATION GOVERNANCE

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**Parts of this section have been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).**

Many states<sup>50</sup> have laws that govern the operation of associations, such as homeowners associations and condo owners association, formed for the management of property rights and undivided interests in land. In a community where the ownership or lease of a unit is coupled with an undivided interest in property, such as in a condo community or cooperative, and/or where the Conditions, Covenants, and Restrictions (CC&Rs) provide for a common management scheme for property rights in a neighborhood, it may be necessary to adhere to certain regulations pertaining to the structure and operation of the community association. Such statutes tend to set minimum standards for meeting procedures, notice requirements, quorum, number of votes required to pass certain proposals, election procedures, requirements for the adoption of increased assessments or special assessments, remedies for nonpayment, use of liens as a mechanism for enforcement, and so on. Such statutes may also impose limits on the rights of associations to dictate how a property may or may not be used. For example, California<sup>51</sup> and Florida<sup>52</sup> have both passed laws prohibiting a community association from making grass lawns mandatory, and allowing residents to install drought tolerant landscapes. Colorado state law prohibits homeowners associations from banning clothes lines and solar panels.<sup>53</sup>

The Uniform Condominium Act (UCA)<sup>54</sup> and the Uniform Planned Community Act (UPCA)<sup>55</sup> are examples of regulations on community associations, and these acts have been adopted in some states. In California, the applicable law is called the Davis-Stirling Act. These laws set mandatory procedures or mandatory minimums, which can override rules placed in an association's governing documents. Other times, these laws set default rules that will apply when an association's governing documents are silent.

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<sup>50</sup> California and Florida, for example, both impose extensive regulations on the operation of community associations.

<sup>51</sup> California AB 1061, passed in 2009, amending Section 1353.8 of the Civil Code.

<sup>52</sup> Florida SB 2080, Enrolled in 2009

<sup>53</sup> Colorado Revised Statutes Section 38-30-168, "Unreasonable restrictions on renewable energy generation devices."

<sup>54</sup> Uniform Condominium Act, available at [http://www.uniformlaws.org/shared/docs/condominium/uca\\_80.pdf](http://www.uniformlaws.org/shared/docs/condominium/uca_80.pdf)

<sup>55</sup> Uniform Planned Community Act, available at <http://www.uniformlaws.org/shared/docs/planned%20community/upca80.pdf>

## THE DAVIS-STIRLING ACT

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The Davis-Stirling Act is California's law that governs common interest developments (CIDs). Other states have legal frameworks for governing CIDs sometimes called condominium acts or planned community acts.

### **IN CALIFORNIA THE DAVIS-STIRLING ACT INVOLVES FOUR TYPES OF COMMUNITY DEVELOPMENTS.**

Common interest developments in California governed by the Davis-Stirling Act are:

- ◆ Community apartment projects
- ◆ Condominium projects
- ◆ Planned developments
- ◆ Stock cooperatives

Each of these types of developments involves interest in a separate residence or space and an interest in a common area. Please see the attached table for a description of each type of CID.

If your intentional community falls within the legal description of one of these developments, it is subject to the regulations imposed by the Davis-Stirling Act.

### **REQUIREMENTS THAT MAY CONFLICT WITH GOVERNANCE OF INTENTIONAL COMMUNITIES**

The Davis-Stirling Act was written to protect individuals who buy into a common interest development. Many intentional communities find that some requirements of the Act are not well suited to their design of their community governance and operations.

For example, CIDs must adhere to strict rules for elections and voting. Under the Act, when a CID association elects or removes officers, makes a decision about assessments, or decides to amend its governing documents, it is required to use a secret ballot. The use of a secret ballot would be contradictory to the nature of a consensus process which rests on every person expressing his or her ideas and views on a given proposal or decision. In this case, the community could still use the consensus process to reach a proposal that is accepted, but in the end, to conform to the Act, members would need to vote with a secret ballot.

### **DEFAULT PROVISIONS**

Another important issue to spot in the Davis-Stirling Act and other state laws is that there are default provisions that will automatically apply unless they are changed in the governing documents.

A group will need to decide whether it wants the default provision or wants to make up its own rules. For example, in California if a group wants to create its own:

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- ◆ rules for conflict resolution,
- ◆ late charges for assessments,
- ◆ the time for noticing meetings and the place for meetings, and
- ◆ responsibility for repair and maintenance of separately owned areas and common areas and facilities, or
- ◆ duties of a board of directors of the association

it will need to write its own provisions on these issues in governing documents.

### **REQUIREMENTS FOR ENFORCEABLE OPERATING RULES**

Another issue is that if a group wants to enforce its operating rules – like, for example, what management teams will be formed and what authorities they will have – the rules will have to meet certain standards. To be valid and enforceable rules:

- ◆ have to be in writing,
- ◆ have to be adopted by the association,
- ◆ have to be consistent with the provisions of the governing documents, and
- ◆ the board of directors has to be authorized by the governing documents to make the rule.

### **ALL GOVERNING DOCUMENTS NEED TO BE CONSISTENT**

This brings up another issue to be aware of – that all the documents should be consistent – meaning they should not contradict each other. The articles of incorporation, bylaws, policies, agreements, rules and procedures have to be consistent and back each other up.

For example, the rules for the group’s consensus process could be backed up by the foundational values to reach decisions that are supported by the whole community and to promote trust among community members and the policy that decisions will include the input and ideas of all members into a final decision that is acceptable to all within a consensus process.

### **CHANGES TO UNITS OR COMMON AREAS**

Another issue that is important to spot for many communities is how to make sure that the community gets final approval of changes owners want to make to their own units and properties. The community association will have to make sure that the requirement for approval of changes is spelled out in the governing documents, and the procedure for reviewing and approving or disapproving proposed changes conforms to the Act’s requirements.

## GETTING APPROVAL TO SELL COHOUSING UNITS

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**This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).**

In many states, there are laws that are designed to regulate the sale of subdivided lands by developers to purchasers. In the same way that securities laws were meant to protect investors from losing money in investment schemes, subdivision regulations are meant to protect purchasers from losing money through the purchase of a property in a common interest development that has been improperly managed, fiscally or otherwise.

Laws designed to protect the purchasers of subdivided properties are somewhat awkward to apply when the purchaser is part of a group of people that also developed and is selling the land, such as in a cohousing community. The legal hoops that such groups have to jump through may feel incredibly high, considering that the hoops were designed for a relationship where the developer may not even know the purchaser.

In California, where there are five or more units in a condominium project, cooperative, planned unit development, community apartment project, or tenancy in common, the project must undergo a long and expensive approval process with the state Department of Real Estate (DRE) before the units in the project can be sold or, in the case of cooperatives and community apartment projects, leased. In approving a project, the DRE examines the planned division of the property, ensures clear title to the land, examines proposed governing documents, and must feel satisfied that all necessary services (utilities, roads, etc.) are provided for each unit. The DRE also looks at budgets and considers whether the financing structure for the project will put buyers at too much risk, in the event that another buyer can't make mortgage payments. The DRE ultimately produces something called a Public Report on a project, which serves as a set of disclosures that will be provided to anyone who buys a unit.<sup>56</sup>

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<sup>56</sup> Cal. Bus. & Prof. Code § 11018

## LANDLORD/TENANT LAWS AND SHARED HOUSING

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This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).

Landlord/tenant laws are designed primarily to protect tenants in what is seen as an economically dependent relationship. Landlords control a valuable resource, and landlord/tenant laws generally ensure that people that do not own land will be able to have a stable relationship with the land they occupy. Such laws may give tenants the assurances that they will not be arbitrarily evicted, that their dwelling will be habitable, and that their rent will not be raised to unreasonable rates. Landlord/tenant laws are a constraint on the freedom to contract, justified by the unequal bargaining power between landlords and tenants.

At the same time, landlord/tenant laws do not necessarily apply helpfully in situations where the landlord *is* the tenant, where the tenant is part of a cooperative that serves as “landlord,” or where parties seek to collaboratively create unique agreements for the sharing of land. Many groups form entities to purchase land and proceed to lease parts of the land to themselves. Although the tenants are, indirectly, owners of the property, the creation of a leasehold interest may trigger the application of landlord/tenant laws. Many groups find the application of landlord/tenant laws counter-intuitive, since they think of themselves as owners and want the flexibility to set the terms of their agreements for the use of the land. A question remains for further research: Under what circumstances, if at all, have courts declined to apply landlord/tenant laws to a situation where the tenant owns a significant share of the entity that is the landlord?

In the meantime, here are some of the primary ways that landlord/tenant laws may restrict the kinds of agreements group can form to occupy land as both owners and tenants:

1. **Tenantability laws and the warranty of habitability:** If a group forms an entity to purchase land, and then grant leases to themselves to occupy self-constructed units, this brings up the question of whether the entity is responsible for ensuring the “tenantability” or “habitability” of the spaces occupied by the member-tenants. This is especially important to consider when group members are living “off-the-grid” and using composting toilets, captured rainwater, and other alternatives to regular plumbing or other common amenities. Many state laws prohibit a property owner from renting a residential unit to a tenant if the unit has certain defects that could affect the health and safety of the tenant. Even if no requirements exist in statutes, courts may impose certain requirements on landlords to provide a space that is habitable to a tenant. Over time, courts have even adapted the definition of habitable to include modern amenities, such as flush toilets and running water.<sup>57</sup> The fact that courts have used their discretion in

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<sup>57</sup> A leading California Supreme Court case on the warranty of habitability, *Green v. Superior Court*, 517 P. 2d 1168 (Cal Supreme Court 1974) provides the following summary of habitability standards in footnote number 22: “The recent case of *Academy Spires, Inc. v. Brown* (1970) 111 N.J. Super. 477 [268 A.2d 556] gives a good indication of the general scope of the warranty of habitability. In that case, a tenant in a multi-story apartment building complained of a series of defects, including (1) the periodic failure to supply heat and water, (2) the malfunctioning of an incinerator, (3) the failure in hot water supply, (4) several leaks in the bathroom, (5) defective venetian blinds, (6) cracks in plaster walls, (7) unpainted condition of walls and (8) a nonfunctioning elevator. The *Academy Spires* court held: “Some of these clearly go to bare living requirements. In a modern



determining what is a reasonable way to live means that courts could probably also recognize that some people consciously choose to live off the grid. Courts would hopefully allow for tenants to voluntarily assume this way of life. Now, however, some courts have also held that the warranty of habitability cannot be waived.<sup>58</sup> Other courts have allowed the warranty to be waived under circumstances where it is demonstrated that the tenant or homebuyer is fully informed of the condition of the property.<sup>59</sup>

Note that states have also likely adopted statutes that define what is or is not a “tenantable” dwelling, but these laws may allow for a landlord and tenant to waive the laws. For example, in California Civil Code Section 1941 provides that a landlord “of a building intended for the occupation of human beings must, *in the absence of an agreement to the contrary*, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable” (emphasis added). The definition of tenantable in Section 1941.1 includes requirements for running hot and cold water and connection to a “sewage disposal system.”

In sum, if groups wish to live in such modest, “off-the-grid,” and/or experimental dwellings, and if groups have formed an entity for the ownership of properties, it may be important to ensure that there is an adequate written waiver of habitability and tenantability between the individual occupants and the entity. Attorneys should also research state statutes on tenantability/habitability and common law cases on the implied warranty of habitability, in order to know if, when, and how the requirements can be waived.

2. **Just-cause eviction laws:** When groups form intentional communities, they may envision that community members will cooperate in various activities and make agreements to engage in or withhold from engaging in certain activities. However, in jurisdictions with just cause eviction ordinances, it may be difficult to use eviction as a means of upholding such agreements. This is because the law leans heavily in favor of protecting the tenure of renters. For example, a community may, for health reasons, wish to adhere to some of 25 Principles for Building Biology,<sup>60</sup> and agree to create a community free of certain chemicals, noises, vibrations, radiation, synthetic materials, and so on. If a community member repeatedly violates lease provisions related to chemical use, the community *may* not be able to evict the tenant on the grounds that the tenant is in default under the lease. This is because a court may consider such provisions unreasonable as grounds for eviction. The community must instead seek other legal remedies, such as obtaining an injunction mandating that the tenant comply with the no-chemical rule.
  
3. **Rights of tenants in condo conversion:** When a property is converted into resident-owned housing, such as a stock cooperative or condominium, local laws sometimes require that tenants present at the time of conversion be given additional rights, such as

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society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability.”

<sup>58</sup> See, for example, *Centex Homes v. Buecher*, 95 SW 3d 266 (Texas Supreme Court 2002), holding that the implied warranty of habitability cannot be waived except under very specific circumstances, and also examining the approach taken by other state courts.

<sup>59</sup> See *Crowder v. Vandendeale*, 564 S.W.2d 879, 881 (Mo. 1978)

<sup>60</sup> See the Principles of Building Biology at <http://www.baubiologie.de/international/25-principles-baubiologie-building-biology/>

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the first right to purchase the condo unit, or the right to lease the property and not be evicted, but for just cause.

4. **Rent control laws:** Rent control laws cap the rates at which landlords may raise rents, thereby ensuring that a tenant can continue to afford living in a unit. In the case of resident-owned housing, residents may want to vote to raise rents in order to cover operation costs. If rent control laws prevent this, however, it may be possible for the tenants to demand that everyone make additional payments as *owners* of a business entity, rather than as the entity's renters.

## BUILDING AND FIRE CODES AND COHOUSING

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**This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).**

Building codes can sometimes present a barrier to the “outside of the box” ways that people wish to house themselves, or “inside the box” ways, for that matter, in the case of people living in very tiny dwellings. The documentary film “Garbage Warrior,”<sup>61</sup> for example, documented the plight of New Mexico eco-architect Michael Reynolds in his attempts to build experimental housing (“earthships”) out of recycled materials. He was repeatedly cited for building code violations until he, at last, successfully lobbied the New Mexico legislature to pass a bill creating limited circumstances under which people may construct and live in experimental buildings.

The clustering of tiny houses in combination with shared spaces may offer an affordable and sustainable housing option, yet building codes may act as a barrier. Owners of such units may encounter difficulty in getting legal clearance for the occupancy of such tiny homes, since many cities have adopted International Residential Code requirements that a dwelling unit include a minimum of one room that is at least 120 square feet in area,<sup>62</sup> and other minimum area and height requirements for rooms within a dwelling unit.

Fire codes sometimes apply more strict requirements in multi-unit buildings or other shared housing arrangements. For example, in Colorado, some cohousing communities have been required to include expensive fire protections in their common house kitchens, including a \$10,000 exhaust system installed over the stove.

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<sup>61</sup> <http://www.garbagewarrior.com/>

<sup>62</sup> See California Residential Code Section R304.1: “Minimum Room Areas,” providing that “Every *dwelling* unit shall have at least one habitable room that shall have not less than 120 square feet (11 m<sup>2</sup>) of gross floor area.”

## FAIR HOUSING LAWS AND COHOUSING

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**This section has been adapted from  
*Practicing Law in the Sharing Economy*, by Janelle Orsi (ABA Books 2012).**

Some groups may wish to form residential communities of a certain composition – all senior citizens, all women, or all Buddhists, for example. Title VIII of the Civil Rights Act, also known as the Fair Housing Act, prohibits discrimination on the basis of race, color, religion, sex, national origin, disability, or familial status in the sale or rental of real estate. States that have adopted similar laws may have added to list of prohibited bases of discrimination. For example, California’s Fair Employment and Housing Act also prohibits discrimination on the basis of sexual orientation, source of income, ancestry, mental disability, and HIV status.<sup>63</sup>

Certain exemptions have been made to the law to allow, for example, the creation of senior housing. The 1988 Amendments and the adoption of the Housing for Older Persons Act (HOPA) of 1995 allow for the exclusion of families with children in communities designed for seniors, so long as those communities meet certain requirements.<sup>64</sup>

The Fair Housing Act also exempts some small owner-occupied communities, renting of single family homes, and “housing operated by organizations and private clubs that limit occupancy to members,”<sup>65</sup> which is what allows, under certain circumstances, fraternity houses to provide housing only to men or sorority houses to provide housing only to women.

However, the Act’s advertising restrictions may apply even to the advertising of a room rental in a single family home or the sale of a unit in a small owner-occupied community. In those cases, it is still likely illegal to “advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap.”<sup>66</sup> A group that wants to create a community of a certain character may still communicate such a vision in advertising without expressing a preference for a certain protected class of people. For example, the community may state that part of its mission is to create a safe and welcoming place for lesbian and gay parents and their children, but the community should not express a preference that prospective renter or purchaser *be* lesbian and gay parents.

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<sup>63</sup> Cal. Gov. Code § 12900-12996

<sup>64</sup> “Fair Housing – It’s Your Right” U.S. Department of Housing and Urban Development, available at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights)

<sup>65</sup> Id.

<sup>66</sup> Id.

## SAMPLE CAR SHARING AGREEMENT

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Adapted from  
*The Sharing Solution: How to Save Money, Simplify Your Life & Build Community,*  
by Janelle Orsi and Emily Doskow (Nolo 2009)

This agreement is between Catherine Love and Theo Dancer, who agree as follows:

1. **AGREEMENT TO SHARE A CAR:** We agree to share ownership and use of a 2008 Toyota Camry, VIN#: 9723ks65, ("the car").
2. **TRANSFERRING TITLE:** Within one week of signing this agreement, Catherine will transfer title of the car from her name to both of our names, "Catherine Love and Theo Dancer, as tenants in common." Theo will pay all taxes and title fees related to the transfer.
3. **OWNERSHIP OF THE CAR:** In consideration for 50% ownership of the car, Theo will pay Catherine \$4,150, which we agree is half of the current Blue Book value of the car.
4. **ACCESSORIES:** We agree that the following accessories in the car will remain Catherine's separate property: the roadside emergency kit and the steering wheel locking device.
5. **PARKING:** We will keep the car at Theo's apartment on Parker Street.
6. **USE OF THE CAR:** Catherine can use the car on Sundays, Mondays, and Tuesdays, and Theo can use the car on Wednesdays, Thursdays, and Fridays. We will take turns using the car every other Saturday. We may from time to time negotiate a new schedule. If either of us needs to use the car on a day when the other person is designated to use the car, that person may ask the other for permission to use the car. The person to whom the car is designated may refuse without giving a reason.
7. **LONG TRIPS:** Unless we agree otherwise, if one of us wants to use the car for a trip longer than three days, that person will rent a car for the other to use on the days the other normally would have had the car.
8. **DECISIONS:** We will both take part equally in decisions related to the car. Neither of us will agree to sell, encumber, or make expensive repairs or improvements to the car without the other's permission.
9. **RESPONSIBILITIES:** We will each be equally responsible for filling the gas tank and keeping the car clean. Catherine agrees to take the car for regular maintenance.
10. **RULES:** Each of us agrees not to lend the car to anyone without first discussing it with and getting permission from the other. We will never lend the car to an unlicensed driver. Smoking is not allowed in the car.

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11. **COSTS:** We will divide all insurance, registration, maintenance, and repair costs equally. We will each keep our receipts in separate envelopes in the glove compartment. Every six months, we will add up our costs and reimburse each another for any differences in expenses. Each of us will pay for the gas we use. Rather than keep strict records of our mileage and gas expenses, we will try to buy gas in rough proportion to the number of miles we drive. The car gets about 30 miles per gallon.

12. **INSURANCE:** We will carry an auto insurance policy that will cover up to \$500,000 per victim, \$1,000,000 per accident, and \$50,000 for property damage. Catherine will be listed as the primary driver and Theo as a secondary driver. We will each pay half of the insurance premiums. If one of us receives a speeding ticket or does anything to mar his or her driving record, that person will be responsible for any increase in insurance premiums that result. If the insurance company deems that the car is “totaled” and pays us to replace it, we will split those proceeds.

13. **INDEMNIFICATION:** If one owner is involved in an accident for which that owner is partially or completely at fault, that owner will pay any insurance deductibles, and will indemnify and compensate the other owner for any expenses related to the accident that are not covered by insurance. That owner will also pay for any increases in the insurance premium rates.

If one owner is involved in an accident for which that owner is *not* at fault, owners will each pay half of the insurance deductible (if applicable), any costs related to fixing the car, and any increase in insurance premiums. Any other costs related to the accident, such as medical bills, will be paid by the owner involved in the accident.

14. **DISPUTE RESOLUTION:** If a conflict or dispute arises that we are unable to solve through discussion, we agree to attempt to resolve the dispute through mediation. We will seek to mediate through SEEDS Community Resolution Center.

15. **TERMINATION:** If one of us wants to stop sharing the car, we will consider these options in the following order: 1) the other owner will keep the car and pay the departing owner half of the Blue Book value of the car at that time; 2) the departing owner will keep the car and pay the remaining owner half of the Blue Book value of the car at that time; or 3) we will sell the car and split the proceeds.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
Catherine Love

Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
Theo Dancer

## TIPS FOR EFFECTIVE MEETINGS

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Meetings are important for sharing groups: They create a time and structure for making decisions, talking about concerns and developments, and checking in with one another about how things are going. Even if your group is just you and your neighbor, you should still set aside time specifically for discussing how your sharing arrangement is working out. Although meetings play an important role in keeping a sharing group functioning well, you may be hesitant to schedule them. Perhaps a meeting seems too formal, or you're not sure you have anything to discuss. Maybe you've sat through too many dull meetings at work or for charitable causes, and you aren't eager to have more of them with your friends and neighbors. But meetings don't have to be stilted or boring: You can have productive, interesting, and even fun meetings. Here are some guidelines:

**Keep meetings as short as possible and keep track of time.** These days, free time seems to be many folks' most valuable commodity, and few of us look forward to spending any of our free time in a meeting. One way to keep things short is to have a tight agenda and set a time limit for each agenda item. Also, it helps to reserve meetings for important deliberation or decisions only. Less important decisions can take place outside of meetings or by email. For example, if possible, don't put "Report on last week's gardening class" on the agenda if there is nothing that needs to be discussed or decided about that event; write up your notes and circulate them by email instead.

**Do something fun.** Meeting time is valuable, but you should spend a bit of it lightening up a little. Starting with a fun activity can break the ice, perk people up, get their attention, lighten the mood, and help people feel more connected. For ideas, see *The Big Book of Meeting Games*, by Marlene Caroselli.

**Designate a meeting facilitator.** The purpose of having a meeting facilitator is to ensure that the group moves through the agenda, to keep the discussion on track, to ensure that everyone's input is taken into account, and to guide the group to a vote when appropriate. (See "Tips for Facilitators," below.) Take turns facilitating the meetings, to give each member a turn at being the leader and guiding the group.

**Designate someone other than the facilitator to take notes or write on a flip-chart.** A facilitator juggles many tasks: calling on people, following the agenda, restating parts of the discussion, moderating votes, and most importantly, listening to what is being said and how. Taking notes might add one too many balls to juggle. Let a separate notetaker be responsible for writing on the flip-chart and figuring out how to spell "cooperatively." A notetaker can also serve as an extra ear and help organize information.

**If a decision can be delegated, delegate it!** If the group decides to hold a potluck on a certain date, it can appoint a person or committee to take care of the rest of the details. There is no point in wasting meeting time sorting out the details if people are happy to delegate.

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**Send out meeting notes ASAP.** Meetings can build a lot of momentum in a group. Decisions are made and people commit to taking on certain tasks . . . which they may promptly forget as soon as they leave the room. To keep the group from losing momentum, have someone take notes on the discussions and decisions. When someone commits to doing something, underline and bold **that person's name** in the notes so they can easily see what they committed to. Send out those notes right away.

**Serve a meal or snacks.** Often, the biggest challenge is getting people to fit a meeting into their busy schedule. But the promise of coffee, bagels, and fruit salad can improve attendance dramatically.

**Arrange seats in a circle when practical.** This allows everyone to make eye contact with each other and prevents a feeling of hierarchy in the meeting.



## RESTRICTIONS ON RENTALS OF UNITS

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A common issue in cohousing communities arises when original owners want to rent out space in their home or they move away and want to rent the house. Can the members of a cohousing or other intentional community require owner occupancy of units? Can they restrict how and to whom an owner rents? Can they limit the percent of units rented out at any one time? Can they restrict the rights of renters?

**IN GENERAL** the law disfavors any restriction on a property owner's right to rent his or her property.

### **RIGHTS ARE BALANCED WITH RESPONSIBILITIES.**

However, the rights and conveniences of living in a community that shares common areas and facilities are balanced with the responsibilities of governing those rights. In common interest communities, the law accommodates the limited loss of rights including an owner's right to rent the property without restriction. So, in California and in some other states, common interest developments can, under certain conditions, impose reasonable restrictions on rentals.

### **SUPPORT ANY RESTRICTIONS WITH PURPOSES LISTED IN GOVERNING DOCUMENTS**

In California,<sup>67</sup> if you want to put restrictions on rental units in a cohousing or intentional community, you should support the restriction with reasonable purposes that are spelled out in your governing documents and designed to protect the interests of the community, such as:

- ◆ Preservation of property values
- ◆ Protection of a safe community for children
- ◆ Protection of stable community
- ◆ Costs of maintenance
- ◆ Need for enforcement of rules
- ◆ Need to preserve the ability of homeowners to obtain financing

### **PUT RENTAL RESTRICTIONS IN THE ORIGINAL CC&Rs.**

In California, restrictions on rental of units are more likely to be upheld in court if the restrictions are in the original CC&Rs. Why? Because if a restriction on use of property is in the CC&Rs and is recorded with the county recorder, the buyer is presumed to have known of the restriction before buying in and the restriction is presumed to be reasonable. The person challenging the rental restrictions would have the uphill battle of showing that the restriction is not reasonable and why they should not be subject to a rule they knew about before buying in.

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<sup>67</sup> If you are from another state, you need to check the law there.

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Another important reason to put restrictions on rentals in the original recorded CC&Rs is that, in California, owners are exempt from rent restrictions if they bought in before the restrictions came into effect. And, if the city or county that approved the development required land use conditions to be recorded in the CC&Rs, later amendment of the CC&Rs may require approval of that city or county.

If you didn't put rental restrictions into your original documents and you have owners who bought in before new restrictions go into effect, you can ask those owners to sign an agreement to abide by the newly adopted restrictions, which would be binding.

### **DISCRIMINATION IS PROHIBITED**

No rental restriction can be based on excluding people or families based on race, gender, nationality, religion, sexual orientation, disability, familial status, etc.

### **FAIR HOUSING LAWS**

In general, community members need to be aware that processes for selecting renters may be challenged in court for violations of federal and state fair housing laws.

### **THE REASONABLENESS TEST**

In California, the terms of governing documents will be enforced only if they are reasonable. Reasonableness is determined not only by common sense but is considered within the context of the purposes of the community. An analysis of whether a particular rent restriction might be considered to be reasonable would involve the specific circumstances and a review of related cases to see how the courts dealt with those circumstances in the past.

## EXPELLING MEMBERS

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Many intentional communities want to know if members can be expelled, and if so, how.

Typically, laws that allow enforcement in common interest developments (CIDs) make it clear, as the Davis Stirling Act does for California CIDs, that enforcement of the terms of the governing documents may not prohibit an owner from access over common areas to his or her property and cannot prohibit full use of their property. However, a member of the community *may* be expelled, and the method of expulsion varies depending on the type of community.

### **Condominiums:**

The only way in civil law you can expel a person from property that they own – as in a condominium – is to foreclose on and force a sale of their residence, due to nonpayment of assessments. This can be done by a judicial foreclosure where the community sues to sell the property and to collect a money judgment or a non-judicial foreclosure where the community places a lien on the property and forces a sale. (Past due assessments may also be collected by a small claims suit for the money owed.)

### **Cooperatives:**

The situation is different for stock cooperatives which are deemed in California and other states to form a landlord/tenant relationship between the corporation and the shareholding occupants. In this case, landlord/tenant law would apply and residents could be evicted from the development for not paying rent or assessments under all the rules of landlord/tenant law. Note that the cooperative would likely also need to adhere to rules in the Corporations Code governing the termination of a membership in a corporation.

## **ENFORCEMENT OF RULES IN COHOUSING COMMUNITIES**

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While other states may have similar rules, common interest developments in California, including those that are owned as condominiums, are subject to the Davis-Stirling Act which provides terms for enforcement of governing documents. Terms for enforcement may also be included in a cohousing entity's governing documents.

### **REMEDIES ALLOWED BY LAW**

**Fines.** Typically, communities can enforce rules, including failure or refusal to pay assessments, with fines. If fines are used, the community is required to state ahead of time what the fine will be for each kind of violation and produce a schedule of fines that is distributed to all members.

**Suspension of rights.** Enforcement can include suspension of rights, like the right to participate in decision making and the right to use common areas and facilities. A member cannot be prohibited from entering and using their own property and they cannot be suspended from using common access to reach their property or unit.

**Legal remedies for collecting assessments.** When an owner in a cohousing condominium fails or refuses to pay assessments, there are three options:

- 1) a judicial foreclosure where the community sues to sell the property and to collect a money judgment;
- 2) a non-judicial foreclosure where the community places a lien on the property and forces a sale; and
- 3) a lawsuit in superior court – which can be a small claims suit depending on the amount – for the money owed.

### **STANDING TO SUE**

**Violations of governing documents.** A CID homeowners association has standing to sue a member for violations of the association's CC&Rs (Covenants, Conditions & Restrictions). The association is required by law to enforce the CC&Rs and if they don't, members have the right to sue the association for a court order compelling the board of directors to enforce. Both the association and individual members have the right to sue in court for enforcement of the terms of other governing documents such as bylaws. If the association sues it has to be in the name of the association and not of its board of directors.

**Harms to property and people.** Where members or their guests cause harm to property or to people, the association and/or a member have standing to sue in court for injunction to stop the harm and for money damages.

## LAND USE, ZONING, & ENVIRONMENTAL LAWS

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### **START WITH A RESPECTFUL AND FRIENDLY RELATIONSHIP WITH PLANNING STAFF**

When you know the county or city where your cohousing project will be, the first step is to designate a couple of friendly and patient group members as representatives to visit the local planning department. Make contact with staff members and start learning about the land use laws and the processes you will need to go through to get permits for what you want to do. When you describe your project to planning staff, describe it in planning terms – not as an intentional community or cohousing but in land use planning terms as, for example, a condominium or planned development. You may also want to hire a local land use planner that has a pre-existing positive relationship with staff in the city or county planning department.

### **KNOW WHAT YOU WANT**

Before you even go to the planning department, you and your group need to know what you want to do. If you want to divide up spaces in an existing structure and raise chickens on the land, you will need to find areas where chicken farms are allowed along with multi residential development and you will need to know all the laws that regulate the retrofit of existing buildings and the development and operation of chicken farms. Many if not most county and city governments have digital access to land use areas or zones. You can also go into your city or county planning departments and ask to see the zoning maps.

### **SUBDIVISIONS**

If your project includes development of five or more units or residences you will need to make sure the project complies with the Subdivision Map Act and Department of Real Estate rules for subdivision disclosures in the Subdivided Lands Act.

### **LONG RANGE GENERAL PLANS AND POLICIES**

In addition to knowing what land use zone your project will have to fit into, some states such as California require all cities and counties to develop long range policies and plans that all development and changes in land use must fit into. In California this is the General Plan. You may find policies, plans and ordinances for things like density restrictions, resource management, affordable housing programs, and infrastructure requirements. The message is to shape your project to fit with these long range planning goals so you can avoid time consuming redesigns and other roadblocks.

### **VARIANCES**

If your project just can't fit exactly into what's required, it's important to know the local rules for getting a variance – which is typically a process that requires a separate application.

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## **CALIFORNIA COASTAL ACT**

If you want to develop a cohousing or intentional community near the coast in California you will need to check to see if your chosen site is in the coastal zone. If it is in the coastal zone, you will be required to conform to another layer of laws that protect public resources like beach access, and natural resources like plants and animals and their habitats in the coastal areas. The coastal zone ranges from several hundred feet to several miles inland.

## **NATIONAL ENVIRONMENTAL POLICY ACT / CALIFORNIA ENVIRONMENTAL QUALITY ACT**

NEPA is an environmental review process that applies to all federal projects and development that is federally funded. So if your project will be using HUD funds – department of housing and urban development – or other federal funds you will need to make sure that the project complies.

The California Environmental Quality Act (CEQA) applies to all projects in California that may cause a physical change in the environment – both human made and natural.

Both NEPA and CEQA require a developer to provide information about and analyses of the possible impacts a project may have on the environment. The purpose is to create an informed public decision making process based on publically available information about the proposed project, the environment that may be affected by the project, and the possible environmental effects the project may have.

If the site you've chosen involves, for example, the retrofit of a historical building, has a stream, lake or wetland, or includes habitats for protected plants or animals you will need to allocate additional funds for analyses and reports on your project's impacts on these public resources.

Approvals of permits and documents related to NEPA and CEQA will require public administrative review and approval processes. Unless someone in your group knows, or can learn about these processes and guide your community through them, you may want to consider working with a planning consultant or lawyer.

## PROTECTING PLACE WITH CONSERVATION EASEMENTS

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### WHAT IS A CONSERVATION EASEMENT?

A conservation easement is a legal limitation on the use of land in a written document that is executed by the property owner and binding on successive owners for the purpose of retaining the land in its natural, scenic, historic, agricultural, forested, or open space condition. While a conservation easement is an agreement between two parties – the property owner and the easement holder – it is far more than just a contract. The conservation easement deed is an estate in real property that is recorded, can be sold, and is perpetual in duration, that is, future owners buy the land with the easement restrictions. The specific interest in the land that is transferred to the easement holder is described in the recorded conservation easement deed and includes, among other things, the area of land to be protected, the specific values to be protected, the uses and activities to be allowed on the land, and the uses and activities to be prohibited. The federal and state governments allow charitable tax deductions for the donation of conservation easements that conform to specific statutory requirements. In some states, property tax reductions are also available.

### ISSUES RELATED TO CONSERVATION EASEMENTS

**Conservation easement holders.** To qualify for federal tax deductions, the easement holder must be a state or local government entity, a 501(c)(3) nonprofit corporation, a federally recognized Native American Tribe, or, in limited circumstances, a non-federally recognized Native American Tribe. To be an easement holder, a 501(c)(3) nonprofit corporation must be organized for the primary purpose of preservation of easement values - natural, scenic, historic, agricultural, forested, or open space resources. The best source of information about land trusts that hold conservation easements is the Land Trust Alliance at [www.landtrustalliance.org](http://www.landtrustalliance.org).

**Perpetuity and the termination of conservation easements.** Even though a conservation easement may state that the easement is in perpetuity and binding on successive owners, there are differing legal opinions as to whether conservation easements can be terminated. In general, the basis for termination is the *doctrine of changed circumstances*. This doctrine allows one of the parties (usually the property owner) to petition a court to terminate an easement because the conditions that called for its existence have changed. For example, if a conservation easement protects a forest, and a drought or fire causes a major die off of the forests' trees, would the doctrine of changed circumstances apply to allow termination of the conservation easement and development of the land? Or if the surrounding land uses changed such that the prohibited uses became more valuable economically than the permitted uses, would the property owner be allowed to terminate the easement?

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To protect the natural resources “in perpetuity,” a conservation easement should include a statement of agreement by the landowner and the easement holder that specified conditions are not grounds for termination based on impossibility or impracticability. In the above cases, easement terms could include a statement, for example, that weather and other events that eliminate species or harm ecosystems shall not be grounds for terminating the easement or that changes in the surrounding land uses that cause the easement to be economically impractical shall not be a ground for terminating the easement.

What you want to protect and how you decide to protect it in light of foreseeable or anticipated economic and climate-related changes should be well thought through in order to craft an easement that will protect land, environment, and community over time.

**Tax deductions for donation of conservation easements.** The donation of a conservation easement is a gift of an interest in real property. To be eligible for federal income tax deductions as a charitable donation, a conservation easement must restrict the use of the land, the use restriction must promote specific conservation purposes, the easement must be perpetual, and the easement holder must be a qualified organization as described above. States also provide tax incentives for conservation easements. For example, in California, county tax assessors are required to consider the effect of enforceable land use restrictions on property value. The federal government also allows estate tax deductions to reflect the value of the property with the easement restrictions.

**Conservation purposes.** The conservation purposes required for federal tax deductions are preservation of land for public recreation or education, protection of natural habitat for fish and other wildlife, plants or ecosystems, preservation of open space including farmland and forested land for public scenic enjoyment, or preservation of a historically important area or structure.

**Baseline documentation report.** A baseline documentation report is a written description with maps and photographs of the conservation values and public benefits that exist on the land. The report records both the existence and condition of the resources at the time the conservation easement is created. The report supports qualification for tax benefits and provides the baseline data for monitoring and enforcement of the easement’s terms.

**Mineral rights.** The right to extract minerals, gas, and oil may be owned by someone other than the owner of the surface of land. Anyone interested in buying land for preservation in a conservation easement should carefully search the title records to determine if the underlying mineral rights are separately owned. The holder of mineral rights has the legal right to access the minerals, gas, or oil to be removed and to disturb the land’s surface to remove them. Once they are removed they are the personal property of the mineral right holder. For the purpose of federal tax benefits, the requirement for protection of the conservation purposes in perpetuity may not be met if there are underlying separately owned mineral rights on the land that may be removed in the future.



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If you have purchased the surface rights to land without the underlying mineral rights and you want to protect the land and its resources from disruption caused by mining and drilling activities, a quiet title action may be an available option to re-attach the mineral rights to the surface of the land.

**Recordation of the easement.** A conservation easement should be recorded immediately. Recordation is essential to provide legal notice of the easement because an unrecorded easement may be challenged or terminated if the land is sold to a buyer without notice of the easement. A prospective buyer is considered to have been notified when an easement is recorded.

**Amendment of easements.** While California and several other states do not provide for legal amendments of conservation easements, many states do. The federal requirement for perpetuity, however, may conflict with an easement that allows amendments to the terms related to protection and preservation of the conservation values.

**Marketable record title acts – another possible threat to perpetuity.** One of the overarching land use policies in this nation is promotion and encouragement of the salability of land. To support the policy, many states have statutes that cause antiquated liens, easements, and options that may hamper the sale of property to be extinguished after a specified time. While some states, including California, exclude conservation easements from expiration under the act, a marketable record title act without that exclusion could be detrimental to the perpetuity of a conservation easement.

**Co-owned property.** One owner of an undivided interest in land, such as an owner of land as a tenant in common, cannot create an easement that binds the shares of other co-owners. All owners must participate in execution of a conservation easement.

## ADDITIONAL RESOURCES FOR SHARING AND COHOUSING

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- **Fellowship for Intentional Community:** [www.ic.org](http://www.ic.org) (Has a directory of ecovillages, cohousing and other intentional communities throughout the U.S. and the world).
- **Cohousing Association:** [www.cohousing.org](http://www.cohousing.org) (A national directory of cohousing, with detailed information and statistics about each community, and lots of great articles).
- **Global Ecovillage Network:** [www.ecovillage.org](http://www.ecovillage.org) (includes a global directory of ecovillages)
- **Coop Directory Service:** [www.coopdirectory.org](http://www.coopdirectory.org)
- **East Bay Cohousing:** [www.ebcoho.org](http://www.ebcoho.org)
- **Sharing Solution Website and Blog:** [www.sharingsolution.com](http://www.sharingsolution.com)
- **Shareable:** [www.shareable.net](http://www.shareable.net)
- **Housing Co-ops and Other Housing Alternatives:**  
[www.uwcc.wisc.edu/manual/chap\\_10.html](http://www.uwcc.wisc.edu/manual/chap_10.html) (chapter in a co-op manual produced by the University of Wisconsin Center for Cooperatives)
- **National Housing Institute:** [www.nhi.org/](http://www.nhi.org/)
- **Shared Equity Homeownership:** [www.nhi.org/pdf/SharedEquityHome.pdf](http://www.nhi.org/pdf/SharedEquityHome.pdf)
- **National Housing Conference Library:** [www.nhc.org/#!/inclusivity-research/iiia5](http://www.nhc.org/#!/inclusivity-research/iiia5)
- **National Association of Housing Cooperatives:** [www.coophousing.org/](http://www.coophousing.org/)
- **Urban Homesteading Assistance Boards:** <http://www.uhab.org/>

### Websites designed to facilitate neighborhood sharing:

- [www.nextdoor.com](http://www.nextdoor.com)
- [www.rblock.com](http://www.rblock.com)
- [www.rentalic.com](http://www.rentalic.com)
- [www.neighborgoods.com](http://www.neighborgoods.com)

### Books:

- **The Sharing Solution: How to Save Money, Simplify Your Life & Build Community**, by Janelle Orsi and Emily Daskow (Nolo 2009)
- **Sharing Housing: A Guide For Finding and Keeping Good Housemates**, by Annamarie Pluhar (Bauhan Publishing)
- **Superbia: 31 Ways to Create Sustainable Neighborhoods**, by Dan Chiras and Dave Wann (New Society Publishers)
- **Cohousing: A Contemporary Approach to Housing Ourselves**, by Kathryn McCamant, Charles R. Durrett, and Ellen Hertzman (Ten Speed Press)
- **Creating Cohousing: Building Sustainable Communities**, by Kathryn McCamant and Charles R. Durrett (New Society Publishers)
- **The Cohousing Handbook: Building a Place for Community**, by Chris Scott Hansen and Kelly Scott Hansen (New Society Publishers)
- **Senior Cohousing: A Community Approach to Independent Living**, by Charles Durrett (Ten Speed Press)

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- **Collaborative Communities: Cohousing, Central Living, and Other New Forms of Housing With Shared Facilities**, by Dorit Fromm (Van Nostrand Reinhold)
- **The Great Neighborhood Book: A Do-it-Yourself Guide to Placemaking**, by Jay Walljasper and Project for Public Spaces (New Society Publishers)
- **Creating a Life Together: Practical Tools to Grow Ecovillages and Intentional Communities**, by Diana Leafe Christian, (New Society Publishers)
- **Toolbox for Sustainable City Living: A Do-it-Ourselves Guide**, by Scott Kellogg, et. al. (South End Press)
- **The Conservation Easement Handbook**, by Elizabeth Byers and Karin Marchetti Ponte (The Trust for Public Land and The Land Trust Alliance)

## LIST OF RESOURCES FOR LESS EXPENSIVE HOUSES

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<a href="http://www.oasisdesign.net">www.oasisdesign.net</a>	Earth plaster building
<a href="http://www.grisb.org">www.grisb.org</a>	Geiger Research Institute Sustainable Building low cost house plans
<a href="http://www.tumbleweedhouses.com">www.tumbleweedhouses.com</a>	Tumbleweed Tiny House Company
<a href="http://www.tinyhousedesign.com">www.tinyhousedesign.com</a>	Tiny House Design – More Attainable and Sustainable
<a href="http://www.thistinyhouse.com">www.thistinyhouse.com</a>	“This tiny house - be well, travel light, and give it all away”
<a href="http://www.tinyhouseblog.com">www.tinyhouseblog.com</a>	Living Simply in Small Spaces including shipping container homes
<a href="http://www.tinyfreehouse.com">www.tinyfreehouse.com</a>	For creative use of used pallets
<a href="http://www.tinypallethouse.com">www.tinypallethouse.com</a>	Pallet houses
<a href="http://www.designboom.com">www.designboom.com</a>	Tiny houses – small dwellings of every shape and size
<a href="http://www.smallhousestyle.com">www.smallhousestyle.com</a>	Plans, photos, and builders of small houses
<a href="http://www.dornob.com">www.dornob.com</a>	Shipping container home plans
<a href="http://www.newavenuehomes.com">www.newavenuehomes.com</a>	Designs and builds small homes
<a href="http://www.instructables.com/id/How-to-Build-Dirt-Cheap-Houses">www.instructables.com/id/How-to-Build-Dirt-Cheap-Houses</a>	

### **Additional Resource:**

**Excellent Article Series on Making Cohousing Affordable:** With articles by Betsy Morris, Brad Gunkel and Renee Hart: [http://www.cohousing.org/cm/article/affordable\\_1](http://www.cohousing.org/cm/article/affordable_1)