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ROBERT J. LENFIELD  
REGISTER OF DEEDS  
AVERY COUNTY N. C.

Mail after recording to

✓ John M. Wright, Attorney at Law  
Main Street, PO Box 725, Banner Elk, NC 28604

These Restrictions were prepared by JOHN M. WRIGHT, Attorney at Law

**DECLARATION OF RESTRICTIONS,  
COVENANTS, AND CONDITIONS FOR  
CROOKED CREEK DEVELOPMENT**

This Declaration of Restrictions, Covenants, and Conditions is made on November 1, 1993, by and between:

GRANTOR DECLARANT	*	GRANTEE
Bio Vim, Inc., dba Crooked Creek Development Company	* * * * * * * *	Crooked Creek Development

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1. STATEMENT OF PURPOSE AND IMPOSITION OF COVENANTS

1.1. Property. Bio Vim, Inc., dba Crooked Creek Development Company is the owner in fee simple of all the Property which is located within and without the Town of Banner Elk, Township of Banner Elk, County of Avery, North Carolina and described as follows:

THE PROPERTY ("Property") is Single Family Lots #1 - 15 in Phase A1, and Lots #1 - 24 in Phase B1, Crooked Creek Development, Banner Elk, NC 28604. The Property is described on a survey which is titled, "Crooked Creek Development - Phase A1 and B1 - Property of Bio-Vim, Inc.". This survey was prepared by R. Larry Greene, RLS #L-1517, on September 20, 1993, is surveyor's map #93-268, and is of record in the Avery County Registry of Deeds in Book 31 of Maps, at page 30. The description from the survey is included in and made a part of this document as if fully set out in this document.

1.2. Imposition of Covenants. Bio Vim, Inc., dba Crooked Creek Development Company makes, declares, and establishes these covenants, conditions, restrictions, and easements ("Covenants") which shall effect all of the Property. From this day forward, the Property shall be held, sold, and conveyed subject to the Covenants. The Covenants shall run with the land and shall be binding upon all persons or entities having any right, title, or interest in all or any part of the Property, including Bio Vim, Inc., dba Crooked Creek Development Company, and their heirs, successors, and assigns, and their tenants, employees, guests, and invitees, and these Covenants shall inure to the benefit of each owner of the Property, or any portion of the Property.

1.3. Statement of Purpose. These Covenants are imposed for the benefit of all owners of parcels of land located within the Property. Bio Vim, Inc., dba Crooked Creek Development Company intends by these Covenants to impose upon the Property mutually beneficial restrictions. These Restrictions are a general plan of improvement for the benefit of all owners of residential property within Crooked Creek Development. These Restrictions include any other property which may become subject to this Declaration and its amendments by the recording of a Declaration of Annexation for the purpose of including any other property. Bio Vim, Inc., dba Crooked Creek Development Company desires to provide a flexible and reasonable procedure for the overall development of the Property and the interrelationships of all of the owners of the Property; and to establish a method for the administration, maintenance, preservation, use and enjoyment of any property that is now or may be submitted to this Declaration. These Covenants create specific rights and

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privileges which may be shared and enjoyed by all owners and occupants of any part of the Property.

1.4. **Declarant's Intent.** Bio Vim, Inc., dba Crooked Creek Development Company desires to ensure the attractiveness of the individual lots and parcels and facilities developed within the Property; to prevent any future impairment of the Property; and to preserve, protect, and enhance the values and amenities of the Property. It is the intent of Bio Vim, Inc., dba Crooked Creek Development Company to guard against the construction on the Property of improvements or structures built of improper or unsuitable materials or with improper quality or methods of construction. Bio Vim, Inc., dba Crooked Creek Development Company intends to encourage the construction of attractive permanent improvements of advanced technological, architectural, and engineering design, appropriately located to preserve the harmonious development of the Property. Bio Vim, Inc., dba Crooked Creek Development Company desires and intends to develop a quality residential project on the Property to consist of residential facilities of all types.

1.5. **Expansion.** Certain parcels of land have been planned for development in Crooked Creek Development in the future (the "Expansion Property"). However, the Expansion Property is not included in the description of the Property to this Declaration. Bio Vim, Inc., dba Crooked Creek Development Company specifically reserves the right, but shall be under no obligation, to bring the Expansion Property within the scheme of these covenants by recording a Declaration of Annexation. Such Declaration of Annexation may impose a series of restrictions and covenants to preserve the natural amenities of the Property, as expanded, to assure architectural harmony of the improvements, and to preserve the environmental values inherent in the Property, as expanded.

2. **DEFINITIONS**

The following terms, as used in this Declaration, are defined as follows:

2.1. **"Assessments"** shall mean annual, special, and default Assessments levied pursuant to Paragraph 5 to meet the estimated cash requirements of the Association.

2.2. **"Association"** shall mean the Crooked Creek Development Association, a nonprofit membership unincorporated association, or any successor of the Association by whatever name, charged with the duties and obligations set forth in this Declaration.

2.3. **"Bylaws"** shall mean the Bylaws of the Association which establish the methods and procedures of its operation.

2.4. **"Common Elements"** shall mean the property, if any, in which the Association owns an interest for the common use and enjoyment of all of the Members. Such interest may include, without limitation, estates in fee, for terms of years, easements, utilities, or improvements. The Common Elements include certain areas which are classified as Wetlands. These are shown on surveys of the Property and may have certain requirements and obligations concerning development. The Wetlands will remain unsurveyed, natural open space after completion of all surveying by Declarant in accordance with the Master Plan of Crooked Creek Development approved by Banner Elk, NC.

2.5. **"Crooked Creek Development"** shall mean the planned community created by this Declaration, consisting of the Property and all of the Improvements located on the Property as may be expanded from time to time.

2.6. **"Crooked Creek Development Documents"** shall mean the basic documents creating and governing Crooked Creek Development, including, but not limited to, this Declaration, the Bylaws of the Association, the Design Guidelines, and any procedures, rules, regulations or policies adopted under such documents.

2.7. **"Declarant"** shall mean Bio Vim, Inc., dba Crooked Creek Development Company, the parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

2.8. **"Design Review Committee" or "Committee"** shall mean the committee formed pursuant to Paragraph 7 to maintain the quality and architectural harmony of Improvements in Crooked Creek Development.

2.9. **"Expansion Property"** shall mean such additional real property owned by Declarant as Declarant shall make subject to the provisions of this Declaration, by a duly recorded Declaration of Annexation. The property is more particularly described in the following deeds, the descriptions of which are incorporated herein by reference:

Tracts One (1), Two (2), and Five (5) as described in the Deed of record in the Avery County Registry of Deeds in Book 235 of Deeds, at Page 1194;

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Three Tracts as described in the Deed of record in the Avery County Registry of Deeds in Book 233 of Deeds, at Page 1236;

Tract 2 as described in the Deed of record in the Avery County Registry of Deeds in Book 233 of Deeds, at Page 1234;

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The total area which can be expanded to be included within Crooked Creek Development shall never exceed the area described within the Expansion Property.

2.10. "Lot" shall mean a parcel of land designated as a lot on any Survey of Crooked Creek Development and reserved for any purpose.

2.11. "Owner" shall mean the record owner, whether one or more persons or entities, of a fee simple title to any Lot, but shall not mean or refer to any person or entity who holds such interest merely as security for the performance of a debt or other obligation, including a Mortgage, unless and until such person or entity has acquired fee simple title pursuant to foreclosure or other proceedings.

2.12. "Property" shall mean and include the Property initially subjected to this Declaration and any additional real property from time to time made subject to these Covenants pursuant to the provisions of this Declaration.

2.13. "Supplemental Covenants" shall mean additional or further restrictive covenants imposed on a portion or portions of the Property from time to time.

2.14. "Survey" shall mean any survey maps affecting the Property filed in the office of the Register of Deeds for Avery County, as such maps may be amended from time to time.

3. **PROPERTY USE RESTRICTIONS**

3.1. **General Restriction.** The Property shall be used only for the purposes set forth in these Covenants, as permitted by applicable laws of the Town of Banner Elk, County of Avery, State of North Carolina, and the United States, and as set forth in this Declaration, its amendments, or other specific recorded covenants affecting all or any part of the Property.

3.2) **Land Use.** No structure shall be erected, altered, placed or permitted to remain on any Lot other than for use as a single-family residential dwelling. Only one single-family residential dwelling shall be erected or permitted to remain upon any Lot.

3.3) **Dwelling Size:** Any dwelling erected upon any Lot shall contain not less than 1650 square feet, outside measurement, of enclosed floor heated area, exclusive of open porches and garages.

3.4. **Motorized Vehicles.** No trucks, motor trail bikes, recreational vehicles, motor homes, motor coaches, snowmobiles, campers, trailers, boats or boat trailers, or similar vehicles other than passenger automobiles or pickup or utility trucks with a capacity of one-half ton or less or any other motorized vehicles shall be parked, stored, or in any manner kept or placed on any portion of the Property except in an enclosed garage. This restriction, however, shall not be deemed to prohibit commercial and construction vehicles, in the ordinary course of business, from making deliveries or otherwise providing service to the Property for the initial construction by Declarant or the other Owners.

3.5. **Electrical and Telephone Service.** All electrical and telephone service installation will be placed underground.

3.6. **Signs.** No signs of any kind shall be displayed to the public view on or from any portion of the Property except those signs approved by the Committee, or signs of Declarant or its affiliates or assigns, or signs required by law.

3.7. **Animals and Pets.** No animals, livestock, or poultry of any kind shall be kept, raised, or bred on any portion of the Property, except dogs, cats, or other household pets (the kind and number of which may be regulated, permitted, or prohibited from time to time by the Crooked Creek Development Rules or applicable Project Documents).

3.7.1. Household pets, such as dogs and cats, must be contained upon the Owner's Lot, and such pets may not be permitted to run at large at any time. Approved fencing is required to assure that domestic pets do not stray from the owner's property. In lieu of fencing the Lot and as the Committee may approve, Owners may construct a fenced run on the Lot.

3.7.2. Pedestrians within the Property who are accompanied by dogs must have the dogs under the pedestrians' direct control by use of a leash not to exceed 10 feet in length.

3.8. **Trash and Outside Burning.** No trash, ashes, garbage or other refuse shall be thrown or dumped on any land or area within the Property. There shall be no burning or other disposal of refuse out of doors. Each Owner shall provide suitable receptacles for the temporary storage and collection of refuse, and all such receptacles shall be screened from the public view and from the wind and protected from animal and other

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disturbance.

There shall be no exterior fires, except barbecues and outside fireplaces contained within facilities or receptacles and in areas designated and approved by the Committee. No Owner shall permit any condition upon its portion of the Property which creates a fire hazard or is in violation of fire prevention regulations.

3.9. **Construction Regulations of the Design Guidelines.** All owners and contractors shall comply with the construction regulations portions of the Design Guidelines. Such regulations may affect, without limitation, the following: trash and debris removal; sanitary facilities; parking areas; outside storage; restoration of damaged property; conduct and behavior of builders, subcontractors, and Owners' representatives on the Property at any time; the conservation of landscape materials; and fire protection.

3.10. **Temporary Structures.** No temporary structures shall be permitted except as may be determined to be necessary during construction and as specifically authorized by the Committee.

3.11. **No Outside Clotheslines.** No laundry or wash shall be dried or hung outside any Building.

3.12. **Antennae.** No exterior radio, television, microwave or other antenna or antenna dish or signal capture and distribution device shall be permitted without the prior written consent of the Committee, and appropriate screening.

3.13. **Noise.** No exterior horns, bells or other sound devices, except security devices used exclusively to protect the security of property or improvements shall be placed or used within the Development.

3.14. **Continuity of Construction.** All Improvements commenced on the Property shall be prosecuted diligently to completion and shall be completed within 12 months of commencement, unless an exception is granted in writing by the Committee. If an Improvement is commenced and construction is then abandoned for more than 90 days, or if construction is not completed within the required 12 month period, then after notice and hearing as provided in the Bylaws, the Association may impose a fine of not less than \$500 per day on the Owner of the Lot until construction is resumed, or the Improvement is completed, as applicable, unless the Owner can prove to the satisfaction of the Board of Directors that such abandonment is for circumstances beyond the owner's control. Such charges shall be a default Assessment and lien as provided in Paragraph 5.8.

3.15. **General Practices Prohibited.** The following practices are prohibited in Crooked Creek Development:

3.15.1. Allowing concrete suppliers and contractors to clean their equipment other than at a location designated for that purpose by the Committee;

3.15.2. Removing any rock, plant material, top soil or similar items from any property of others;

3.15.3. Carrying firearms on the Property;

3.15.4. Use of surface water for construction;

3.15.5. Careless disposition of cigarettes and other flammable materials; or

3.15.6. the presence, use, disposal, storage, or release of any Hazardous Substances (as such is defined by applicable local, state, or federal environmental law), except that small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance.

3.16. **Leasing.** The Owner of a Lot shall have the right to lease such Lot, subject to the following conditions. The lease shall be specifically subject to this Declaration, and any failure of a tenant to comply with this Declaration shall be a default under the lease. The Owner shall be liable for any violation of this Declaration committed by the Owner's tenant, without prejudice to the owner's right to collect any sums paid by the Owner on behalf of the tenant.

4.

THE ASSOCIATION

4.1. **Dedication of Common Elements.** Declarant may deed to the Association certain parts of the Property as Common Elements intended for common ownership by the Owners in Crooked Creek Development. The designated areas are dedicated to the common use and enjoyment of owners, and their family, tenants, employees, guests and invitees, and not to the use of the general public, unless so required by law.

4.2. **Association's Responsibility for Common Elements.** The Association, subject to the rights of the owners set forth in this Declaration, shall be responsible for the management and control of the Common Elements deeded under Paragraph 4.1 and all Improvements on the Common Elements, and shall keep it in good, clean, and attractive condition and repair consistent with the requirements of a first class residential community, pursuant to the terms and conditions of this Declaration.

4.3. **Membership.** Every Owner, by virtue of being an Owner, and for so long as he is an owner, shall

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be a Member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot. No Owner, whether one or more persons, shall have more than one membership per Lot owned, but all of the persons owning each Lot shall be entitled to rights of membership and of use and enjoyment appurtenant to such ownership. The Bylaws of the Association are on record at the office of the Association.

4.4. **Roads and, Streets.** It is the intention of the Declarant to dedicate to the Town of Banner Elk, NC, all roads within Crooked Creek Development.

4.5. **Successor to Declarant.** The Association shall succeed to all of the rights, duties and responsibilities of Declarant under this Declaration upon termination of the Class B membership in accordance with the By-Laws of the Association. The Association shall not succeed to any rights of Declarant regarding any portion of the Expansion Property which has not then been annexed to the Property. The Association may delegate any of such rights, duties or responsibilities to the Design Review Committee or to any other committee or entity which it may choose to form.

4.6. **Implied Rights and Obligations.** The Association may exercise any other right or privilege given to it expressly by the Crooked Creek Development Documents, and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association under this Declaration or reasonably necessary to effectuate any such right or privilege. The Association shall perform all of the duties and obligations imposed on it expressly by the Crooked Creek Development Documents, together with every other duty or obligation reasonably to be implied from the express provisions of the Crooked Creek Development Documents or reasonably necessary to satisfy any such duty or obligation.

5. **COVENANT FOR MAINTENANCE ASSESSMENTS**

5.1. **Creation of the Lien and Personal Obligation for Assessments.** The Declarant, for each Lot owned within the Property, covenants, and each Owner of any Lot, by acceptance of a deed, whether it shall be so expressed in any such deed, are deemed to covenant and agree to pay to the Association:

5.1.1. Annual Assessments or charges as provided in this Declaration for the purpose of funding the Maintenance Fund;

5.1.2. Special Assessments for capital improvements and other purposes as stated in this Declaration, such annual and special Assessments to be fixed, established, and collected from time to time as provided below;

5.1.3. Specific Assessments against their Lot as described in Paragraph 5.7; and

5.1.4. Default Assessments which may be assessed against an Owner's Lot pursuant to the Crooked Creek Development Documents for failure to perform an obligation under the Crooked Creek Development Documents or because the Association has incurred an expense on behalf of the Owner under the Crooked Creek Development Documents.

The annual, special, and default Assessments, together with interest, costs, and reasonable attorneys' fees, to the extent such are allowed by applicable law, shall be a charge on the land and shall be a continuing lien upon the Lot against which each such Assessment is made until paid. Each such Assessment, together with interest, costs, and reasonable attorneys' fees, shall also be the personal obligation of the Owner of such Lot at the time when the Assessment fell due.

5.2. **Purpose of Assessments.** The Assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the Owners and occupants of Crooked Creek Development and for the improvement and maintenance of the Common Elements, including, but not limited to, the payment of taxes and insurance on the Common Elements, and repair, replacement, and additions to any Improvements on the Common Elements, reserve accounts, the cost of labor, equipment, materials, management, and supervision, and the salary or fee of the Manager.

5.3. **Calculation and Apportionment of Annual Assessments.** The Board of Directors shall prepare a budget by October 1 of each year estimating its net cash flow requirements for the next year and an estimate of the Assessments to be charged each Owner, and the Board shall distribute the proposed budget to the Owners. On or before November 30 of each year, the Board shall approve the budget in final form, and shall determine, levy, and assess the Association's annual Assessments for the approaching year. Each budget shall include funds for establishing and maintaining reserves for periodic repairs, replacement, and maintenance of any improvements on the Common elements which must be replaced on a periodic basis, and for taxes, capital improvements, deficiencies from the prior year's Maintenance Fund, and other purposes, and shall include any expected income and surpluses from the prior year's Maintenance Fund.

5.4. **Special Assessments.** In addition to the annual Assessments authorized by Paragraph 5.1, the

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Board of Directors may levy in any fiscal year, one or more special assessments, applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of a described capital improvement upon the Common Elements, including the necessary fixtures and personal property related thereto, or to make up any shortfall in the current year's budget. Notice of the amount and due dates for such special assessments must be sent to each Owner at least 30 days prior to the due date.

5.5. **Uniform Rate of Assessment.** Both annual and special assessments must be fixed at a uniform rate for each Lot.

5.6. **Date of Commencement of Annual Assessments: Due Dates.** The annual Assessments shall commence as to all Lots on the first day of the month following the conveyance of the first Lot to an Owner. The first annual Assessment shall be prorated according to the number of months remaining in the calendar year. The annual Assessments shall commence for Lots contained in each phase of Expansion Property on the first day of the month following the recording of the Declaration of Annexation incorporating them into the Property, and shall be prorated according to the number of months remaining in the calendar year. Assessments shall be collected on a periodic basis as the Board of Directors may determine from time to time, but until the Board directs otherwise, Assessments shall be payable quarterly in advance on the first day of each calendar quarter.

5.7. **Assessments Against Specific Owners.** Notwithstanding the requirement of Paragraph 5.5 that assessments be levied against each Owner according to a uniform rate, the Association shall assess the Owner of any Lot for the cost of utilities and/or the waste disposal pumps which are part of the Town of Banner Elk, NC, waste disposal system, if not separately metered to that Lot.

5.8. **Default Assessments.** All monetary fines assessed against an Owner pursuant to the Crooked Creek Development Documents, or any expense of the Association which is the obligation of an Owner or which is incurred by the Association on behalf of the Owner pursuant to the Crooked Creek Development Documents, shall be a default Assessment and shall become a lien against such Owner's Lot which may be foreclosed or otherwise collected as provided in this Declaration. Notice of the amount and due date of such default Assessment shall be sent to the Owner subject to such Assessment at least 30 days prior to the due date.

5.9. **Effect of Nonpayment of Assessment: Lien; Remedies of Association.** Any Assessment installment, whether pertaining to annual, special, or default Assessments, which is not paid within 30 days of its due date shall be delinquent. In the event that an Assessment installment becomes delinquent, the Association, in its sole discretion, may take any or all of the following actions:

5.9.1. assess a late charge in an amount of 4.0% of the overdue assessment (this late charge shall be charged only once on each late payment);

5.9.2. assess an interest charge from the date of delinquency at the rate per annum of two points above the prime rate charged by the Association's bank, or such other rate as shall have been established by the Board of Directors;

5.9.3. suspend the voting rights of the Owner during any period of delinquency;

5.9.4. accelerate all remaining Assessment installments for the fiscal year in question so that unpaid Assessment for the remainder of the fiscal year shall be due and payable at once;

5.9.5. bring an action at law against any Owner personally obligated to pay the delinquent installments;

5.9.6. file a statement of lien with respect of the Lot and foreclose as set forth in more detail below. This lien is extinguished unless proceedings to enforce the lien are instituted within three years after the date the assessment becomes due.

The Association may file a statement of lien by recording with the Clerk of Court of Avery County, a written statement with respect to the setting forth the name of the owner, the legal description of the Lot the name of the Association, and the amount of delinquent Assessments then owing, which statement shall be duly signed and acknowledged by the President or a Vice-President of the Association or by the Manager, and which shall be served upon the Owner of the Lot by mail to the address of the Lot or at such other address as the Association may have in its records for the Owner. Thirty days following the mailing of such notice, the Association may proceed to foreclose the statement of lien in the same manner as provided for the foreclosure of condominium units under power of sale under Article 3 of Chapter 47C of the North Carolina General Statutes. Such lien shall be in favor of the Association and shall be for the benefit of all other Owners. In either a personal or foreclosure action, the Association shall be entitled to recover as a part of the action, the interest, costs, and reasonable attorneys' fees (to the extent allowed by applicable law) with respect

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to the action. No Owner may waive or otherwise escape liability for the Assessments provided for herein by nonuse of the Common Elements or abandonment of his Lot. The remedies herein provided shall not be exclusive, and the Association may enforce any other remedies to collect delinquent Assessments as may be provided by law.

5.10. **Successor's Liability for Assessment.** In addition to the personal obligation of each Owner to pay all Assessments and the Association's perpetual lien for such Assessments, all successors to the fee simple title of a Lot except as provided in Paragraph 5.11, shall be jointly and severally liable with the prior owner or owners for any and all unpaid Assessments, interest, late charges, costs, expenses, and attorneys' fees against such Lot without prejudice to any such successor's right to recover from any prior owner any amounts paid by such successor. This liability of a successor shall not be personal and shall terminate upon termination of such successor's fee simple interest in the Lot. In addition, such successor shall be entitled to rely on the statement of status of Assessments by or on behalf of the Association under Paragraph 5.13.

5.11. **Subordination of the Lien.** The lien of the Assessments provided for in this Declaration shall be prior to other liens and encumbrances on a Lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the Lot) recorded before the docketing of the lien in the office of the Clerk of the Superior Court for Avery County, NC; and (ii) liens for real estate taxes and other governmental assessments or charges against the Lot. The amount of any extinguished lien may be reallocated and assessed to all Lots as a common expense at the direction of the Board of Directors. No sale or transfer shall relieve the purchaser or transferee of a Lot from liability for, nor the Lot from the lien of, any Assessments made after the sale or transfer.

5.12. **Notice of Action.** Any First Mortgagee who makes a prior written request to the Secretary of the Association and furnishes its name and address and the legal description of the Lot in which it has an interest to the Secretary shall be entitled to timely written notice of any delinquency in payment of an Assessment levied against the Lot encumbered by its First Mortgage, or of any other default by the Owner under the Project Documents, which has continued for a period of 60 days or more. In addition, any such First Mortgagee shall be entitled to cure such delinquency and obtain a release from the lien imposed or perfected by reason of such delinquency.

5.13. **Statement of Status of Assessments.** Upon ten days' written notice to the Treasurer of the Association or the Manager, any owner, prospective purchaser, or Mortgagee of a Lot shall be furnished a statement of the account for such Lot setting forth:

5.13.1. the amount of any unpaid Assessments (whether annual, special, or default Assessments), interest, late charges, costs, expenses, and attorneys' fees then existing against a particular Lot;

5.13.2. the amount of the current periodic installments of the annual Assessment and the date through which they are paid; and

5.13.3. any other information deemed proper by the Association.

The information contained in such statement, when signed by the Treasurer or Manager, shall be conclusive upon the Association as to the person or persons to whom such statement is issued and who rely on it in good faith.

5.14. **Failure to Assess.** The omission or failure of the Board to fix the Assessment amounts or rates or to deliver or mail to each Owner an Assessment notice shall not be deemed a waiver, modification, or a release of any Owner from the obligation to pay Assessments. In such event, each Owner shall continue to pay annual Assessments on the same basis as for the last year for which an Assessment was made until a new Assessment is made, at which time any shortfalls in collections may be assessed retroactively by the Association.

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### PROPERTY RIGHTS OF OWNERS

6.1. **Owners: Easements of Enjoyment.** Every owner shall have a nonexclusive easement for the use and enjoyment of the Common Elements (subject to the rights of the public in the area denoted on surveys of the Property as Wetlands which shall be appurtenant to and shall pass with the title to every Lot, subject to the easements set forth in this Declaration.

6.2. **Delegation of Use.** Any Owner may delegate, in accordance with the Crooked Creek Development Documents, his right of enjoyment in the Common Elements, to his tenants, employees, family, guests or invitees.

6.3. **Recorded Easements.** The Property, and all portions thereof, shall be subject to all easements shown on any recorded Survey affecting the Property, or any portion thereof, and to any other easements of

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record or of use as of the date of recordation of the Original Declaration.

6.4. **Utility Easements.** There is created a general easement 10 feet to either side of all lot lines upon, across, over, in, and under the Property for ingress and egress and for installation, replacement, repair, and maintenance of all utilities, including but not limited to water, sewer (including the individual waste disposal pumps or other similar systems), gas, telephone, electrical, and a master communications system. By virtue of this easement, it shall be expressly permissible and proper for the companies providing electrical and telephone and other communication services to install and maintain necessary equipment on the Property and to affix and maintain electrical, communications, and telephone wires, circuits, and conduits under the Property. No water, sewer, gas, telephone, electrical, or communications lines, systems, or facilities may be installed or relocated on the surface of the Property unless approved by Declarant prior to termination of the Class B membership, or after such termination, by the Design Review Committee. Such utilities temporarily may be installed above ground during construction, if approved by the Declarant or the Design Review Committee as stated above. Any utility company using this general easement shall use its best efforts to install and maintain the utilities provided for without disturbing the uses of the Owners, the Association, and the Declarant; shall prosecute its installation and maintenance activities as promptly and expeditiously as reasonably possible; and shall restore the surface to its original condition as soon as possible after completion of its work. Should any utility company furnishing a service covered by the general easement request a specific easement by separate recordable document, either Declarant or the Association shall have, and are hereby given, the right and authority to grant such easement upon, across, over, or under any part or all of the Property without conflicting with the terms of this Declaration. This general easement shall in no way affect, avoid, extinguish, or modify any other recorded easement on the Property.

6.5. **Reservation of Easements, Exceptions, and Exclusions.** Declarant reserves to itself and grants to the Association the concurrent right to establish from time to time, by declaration or otherwise, utility and other easements, permits, or licenses over the Common Elements, for purposes including but not limited to streets, paths, walkways, drainage, recreation areas, parking areas, conduit installation areas, and to create other reservations, exceptions, and exclusions for the best interest of all the Owners and the Association, in order to serve all the Owners within Crooked Creek Development as initially built and expanded.

6.6. **Maintenance Easement.** An easement is reserved to the Declarant, and granted to the Association, and any member of the Board of Directors or Manager, and their respective officers, agents, employees, and assigns, upon, across, over, in, and under the Lots, and a right to make such use of the Lots, as may be necessary or appropriate to make emergency repairs or to perform the duties and functions which the Association is obligated or permitted to perform pursuant to the Crooked Creek Development Documents, including the right to enter upon any Lot, for the purpose of performing maintenance to the landscaping or the exterior of Improvements to such Lot as required by the Crooked Creek Development Documents.

6.7. **Easements Deemed Created.** All conveyances of Lots made after the date of the Original Declaration whether by Declarant or otherwise, shall be construed to grant and reserve the easements contained in this Declaration, even though no specific reference to such easements or to this Declaration appears in the instrument for such conveyance.

6.8. **Partition or Combination of Lots.** No part of a Lot may be partitioned or separated from any other part thereof, and no Lots may be combined, except as provided in this Paragraph. A Lot may be subdivided into two Lots; or two or more Lots may be combined into one, only with the written consent of Declarant (or of the Association after the termination of Class B membership) and full compliance with all applicable state and local zoning and subdivision regulations and all applicable Crooked Creek Development Documents. Declarant's consent may be, at the sole choice of Declarant, conditioned upon payment by the Owner or Owners concerned of all expenses incident to giving the consent, including legal and accounting fees. Every agreement and recorded instrument for partition or combination of Lots shall make adequate provision for the adjustment of voting rights and liability for payment of Assessments appurtenant to or imposed on such Lots. Whether partitioned, combined, or unchanged each Lot shall be conveyed, transferred, gifted, devised, bequeathed, encumbered, or otherwise disposed of, as the case may be, with all appurtenant rights and interests created by law or by this Declaration, including the Owner's membership in the Association and with the appropriate adjustments to the voting rights, as provided in the ByLaws of the Association, and liability for Assessments as established for such Lot by the Board of Directors being made as applicable.

6.9. **No Partition of Common Elements.** The Common Elements shall be owned by the Association, and no Owner shall bring any action for partition or division of the Common Elements. By acceptance of a deed or other instrument of conveyance or assignment, each Owner shall be deemed to have specifically waived such Owner's rights to institute or maintain a partition action or any other action designed to cause a division

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of the Common Elements, and this Paragraph may be pleaded as a bar to any such action. Any Owner who shall institute or maintain any such action shall be liable to the Association, and agrees to reimburse the Association for its costs, expenses, and reasonable attorneys' fees in defending any such action.

7.

**DESIGN REVIEW COMMITTEE**

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There is established a Design Review Committee which shall be responsible for the establishment and administration of Design Guidelines to carry out the purposes and intent of this Declaration. The Committee shall review, study and either approve or reject proposed Improvements on the Property, all in compliance with this Declaration and as further set forth in the rules and regulations of the Committee and the Design Guidelines adopted and established from time to time by the Committee. The Committee is described in more detail in the By-Laws of Crooked Creek Development Association which are attached hereto and made a part of this document.

8.

**CONSTRUCTION AND ALTERATION OF IMPROVEMENTS**

**8.1. General.** The Design Guidelines and the general instructions set forth in these Covenants shall govern the right of an Owner, developer, or other entity to construct, reconstruct, refinish, alter or maintain any Improvement upon, under, or above any of the Property (except as provided in the By-Laws of the Association), and to make or create any excavation or fill on the Property, or make any change in the natural or existing surface contour or drainage, or install any utility line or conduit on or over the Property.

**8.2. Approval Required.** Except to the extent permitted in the By-Laws of the Association, any construction or reconstruction, or the refinishing or alteration of any part of the exterior of any Building or other Improvement on the Property is absolutely prohibited until and unless the Owner or developer first obtains approval from the Design Review Committee and otherwise complies with the provisions of these Covenants. All Improvements shall be constructed only in accordance with approved plans.

**8.3. Deemed Nuisances.** Every violation of these Covenants is declared to be and to constitute a nuisance, and every public or private remedy allowed for such violation by law or equity against a Member shall be applicable. These Covenants may be enforced as provided in this Declaration.

**8.4. Removal of Nonconforming Improvements.** The Association, upon request of the Committee and after reasonable notice to the offender and to the Owner, may remove any Improvement constructed, reconstructed, refinished, altered, or maintained in violation of these Covenants, and the Owner of the Improvement shall immediately reimburse the Association for all expenses incurred in connection with such removal.

**8.5. Construction Methods.** Specific rules regarding construction methods, including but not limited to excavation, drainage, utility lines, loading areas, waste storage, trash removal, materials storage, and transformers and meters, shall be set forth in the Design Guidelines, and all Owners shall comply with those rules.

9.

**MAINTENANCE**

**9.1. Association's Responsibility.** The Association shall maintain and keep the Common Elements in good repair, such maintenance to be funded as provided in this Declaration. This maintenance shall include, but not be limited to, maintenance, repair, and replacement, subject to any insurance then in effect, of all landscaping and other flora, structures, and improvements situated within the Common Elements as described in Paragraph 4.1.

**9.2. Owner's Responsibility.** Except as provided otherwise in this Declaration, applicable Project Documents, or by written agreement with the Association, all maintenance of the Lots (except Common Elements) and all structures, landscaping, parking areas, and other Improvements shall be the sole responsibility of the owner, who shall maintain said Lot in accordance with the community wide standard of Crooked Creek Development. The Association shall, in the discretion of the Board, assume the maintenance responsibilities of such Owner if, in the opinion of the Board, the level and quality of maintenance being provided by such Owner does not satisfy such standard. Before assuming the maintenance responsibilities, the Board shall notify the Owner in writing of its intention to do so, and if such Owner has not commenced and diligently pursued remedial action within 30 days after mailing of such written notice, the Association shall proceed. The expenses of such maintenance by the Board shall be reimbursed to the Association by the owner, together with interest at one point above the prime rate charged by the Association's bank, or such other rate set by the Board of Directors, from the date of expenditure. Such charges shall be a default assessment and lien on the Lot of the Owner as provided in Paragraph 5.8.

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9.3. **Individual Waste Disposal Pumps.** THE ASSOCIATION SPECIFICALLY ASSUMES THE OPERATION AND MAINTENANCE RESPONSIBILITIES OF THE INDIVIDUAL WASTE DISPOSAL PUMPS (OR OTHER SIMILAR SYSTEM IF THIS SYSTEM IS REPLACED) WHICH ARE PLACED UPON EACH LOT AND WHICH ARE A PART OF THE TOWN OF BANNER ELK, NC, WASTE DISPOSAL SYSTEM WITHIN THE DEVELOPMENT. All costs of such operation and maintenance of these pumps shall be assessed only against the Owner, or Owners, who receive the benefit of the pump.

9.4. **Access.** Any Person authorized by the Executive Board shall have the right of access to all portions of the Property for the purpose of correcting any condition threatening a Lot or the Common Elements, and for the purpose of performing installations, alterations or repairs, and for the purpose of reading, repairing, replacing utility meters and related pipes, valves, wires and equipment, provided that such requests for entry are made in advance and that any such entry is at a time reasonably convenient to the affected Lot Owner. In case of an emergency, no such request or notice is required and such right of entry shall be immediate, whether or not the Lot Owner is present at the time.

10. **EXPANSION**

10.1. **Reservation of Right to Expand.** Declarant reserves the right, but shall not be obligated, to expand the effect of this Declaration to include all or part of the Expansion Property. Declarant shall have the unilateral right to transfer to any other person this right to expand by an instrument duly recorded. The Declarant shall pay all taxes and other governmental Assessments relating to the Expansion Property until expansion.

10.2. **Declaration of Annexation.** Such expansion may be accomplished by recording a Declaration of Annexation in the records of the Register of Deeds of Avery County, before January 01, 1998, describing the real property to be expanded, submitting it to the covenants, conditions, and restrictions contained in this Declaration, and providing for voting rights and Assessment allocations as provided in this Declaration. Such Declaration of Annexation shall not require the consent of Owners. Any such expansion shall be effective upon the filing for record of such Declaration of Annexation, unless otherwise provided therein. The expansion may be accomplished in stages by successive supplements or in one supplemental expansion. Upon the recordation of any such Declaration of Annexation, the definitions used in this Declaration shall be expanded automatically to encompass and refer to Crooked Creek Development as expanded. Such Declaration of Annexation may add, delete, or modify provisions of this Declaration as it applies to the Expansion Property added. However, this Declaration may not be modified with respect to that portion of the Property already subject to this Declaration, except as provided below for amendment.

11. **FHLMC REQUIREMENTS**

11.1. **FHLMC Approval Requirements.** Unless at least 67 percent of the First Mortgagees (based on one vote for each First Mortgage owned) and Owners representing at least 67 percent of the total allocated votes in the Association have given their prior written approval, the Association shall not be entitled to:

11.1.1. By act or omission seek to abandon, partition, subdivide, encumber, sell, or transfer all or part of the Common Elements (provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Elements shall not be deemed a transfer within the meaning of this clause);

11.1.2. Change the method of determining the obligations, Assessments, dues, or other charges which may be levied against an owner;

11.1.3. Fail to maintain fire and extended coverage on insurable common property in an amount not less than 100 percent of current replacement cost; or

11.1.4. Use hazard insurance proceeds for losses to common property for other than the repair, replacement, or reconstruction of such common property.

11.2. **Mortgagees' Rights.** First Mortgagees of Lots, jointly or singularly, may pay taxes or other charges which are in default and which may or have become a charge against any of the Common Elements and may pay overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for the Common Elements. First Mortgagees making such payments shall be owed immediate reimbursement from the Association.

12. **ENFORCEMENT OF COVENANTS**

12.1. **Violations Deemed a Nuisance.** Every violation of this Declaration or any other of the Crooked Creek Development Documents is deemed to be a nuisance and is subject to all the remedies provided for the

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abatement of the violation. In addition, all public and private remedies allowed at law or equity against anyone in violation of these Covenants shall be available.

12.2. **Compliance.** Each Owner or other occupant of any part of the Property shall comply with the provisions of the Crooked Creek Development Documents as the same may be amended from time to time.

12.3. **Failure to Comply.** Failure to comply with the Crooked Creek Development Documents shall be grounds for an action to recover damages or for injunctive relief to cause any such violation to be remedied, or both. Reasonable notice and an opportunity for a hearing as provided in the Bylaws shall be given to the delinquent party prior to commencing any legal proceedings.

12.4. **Who May Enforce.** Any action to enforce the Crooked Creek Development Documents may be brought by the Declarant, the Board, or the Manager in the name of the Association on behalf of the Owners. If, after a written request from an aggrieved owner, none of the foregoing persons or entities commence an action to enforce the Crooked Creek Development Documents, then the aggrieved owner may bring such an action.

12.5. **Remedies.** In addition to the remedies set forth above in this Paragraph, any violation of the Crooked Creek Development Documents shall give to the Board, the Manager, or the Declarant, on behalf of the Owners, the right to enter upon the offending property or take appropriate peaceful action to abate, remove, modify, or replace, at the expense of the offending Owner, any structure, thing or condition that may exist contrary to the interest and meaning of the Crooked Creek Development Documents. If the offense occurs on any easement, walkway, within a Common Element or the like, the cure shall be at the expense of the Owner or other person responsible for the offending condition.

12.6. **Nonexclusive Remedies.** All the remedies set forth herein are cumulative and not exclusive.

12.7. **No Waiver.** The failure of the Board of Directors, Declarant, the Manager, the Design Review Committee or any aggrieved owner to enforce the Crooked Creek Development Documents shall not be deemed a waiver of the right to do so for any subsequent violations or of the right to enforce any other part of the Crooked Creek Development Documents at any future time.

12.8. **No Liability.** No member of the Board of Directors, the Declarant, the Design Review Committee, the Manager or any Owner shall be liable to any other Owner for the failure to enforce any of the Crooked Creek Development Documents at any time.

12.9. **Recovery of Costs.** If legal assistance is obtained to enforce any of the provisions of the Crooked Creek Development Documents, or in any legal proceeding (whether or not suit is brought) for damages or for the enforcement of the Crooked Creek Development Documents or the restraint of violations of the Crooked Creek Development Documents, the prevailing party shall be entitled to recover all costs incurred by it in such action, including reasonable attorney's fees as may be incurred, or if suit is brought, as may be determined by the court.

13. **DURATION OF THESE COVENANTS AND AMENDMENT**

13.1. **Term.** This Declaration and any amendments or supplements shall remain in effect from the date of recordation until January 01, 2013. Thereafter these Covenants shall be automatically extended for five successive periods of ten years each, unless otherwise terminated or modified as provided herein.

13.2. **Amendment.** This Declaration, or any provision of it, may be terminated, extended, modified, or amended, as to the whole or any portion of the Property, upon the written consent of Declarant and Owners representing more than 60 percent of the Lots in the Property. Amendments made pursuant to this Paragraph shall inure to the benefit of and be binding upon all owners of any part of the Property, their family, tenants, guests, invitees, and employees, and their respective heirs, successors, and assigns.

13.3. **When Modifications Permitted.** Notwithstanding the provisions of Paragraph 13.2, no termination, extension, modification or amendment of this Declaration shall be effective in any event prior to termination of the Class B membership, unless the written approval of Declarant is first obtained.

13.4. **Amendment by Declarant.** Notwithstanding Paragraph 13.2 or any other provisions of this Declaration, Declarant, acting alone, reserves to itself the sole right and power to modify and amend this Declaration by executing and recording an instrument setting forth the amendment. This right and power of the Declarant, acting alone, to amend this Declaration in whole or in part, at any time and from time to time, shall be effective only with respect to any amendments recorded on or before the termination of the Class B membership.

13.5. **Notice of Amendment.** Except in the case of amendments made by Declarant no amendment of this Declaration shall be effective unless a written notice of the proposed amendment is sent to every Owner at least 60 days in advance of any action taken or purported to be taken and such Owner has been given the

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opportunity to vote or give its consent.

13.6. **Effective on Recording.** Any modification or amendment shall be immediately effective upon recording a copy of such amendment or modification, executed and acknowledged by Declarant, if so required, or upon the recording of a copy of the amendment or modification together with a duly authenticated Certificate of the Secretary of the Board stating that the required number of consents of Owners were obtained and are on file in the office of the Association, in the office of the Register of Deeds of Avery County.

14. **PRINCIPLES OF INTERPRETATION**

14.1. **Severability.** This Declaration, to the extent possible, shall be construed or reformed so as to give validity to all of its provisions. Any provision of this Declaration found to be prohibited by law or unenforceable shall be ineffective to the extent of such prohibition or inability to enforce without invalidating any other part of this Declaration.

If any of the covenants, conditions, restrictions, or other provisions of this Declaration shall be unlawful, void or voidable for violation of the Rule Against Perpetuities, then such provision shall continue only until twenty-one (21) years after the death of the last surviving member of the now living descendants of Bill Clinton, President of the United States.

14.2. **Construction.** In interpreting words in this Declaration, unless the context shall otherwise provide or require, the singular shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders.

14.3. **Headings.** The headings are included only for purposes of convenient reference, and they shall not affect the meaning or interpretation of this Declaration.

14.4. **Registration of Mailing Address.** Each Member shall register his mailing address with the Secretary of the Association from time to time, and notices or demands intended to be served upon or given to a Member shall be personally delivered to or sent by mail, postage prepaid, addressed in the name of the Member at such registered mailing address.

14.5. **Notice.** All notices or requests required shall be in writing. Notice to any Member shall be considered delivered and effective upon personal delivery, or three days after posting, when sent by certified mail, return receipt requested, to the address of such Member on file in the records of the Association at the time of such mailing. Notice to the Board, the Association, the Design Review Committee, or the Manager shall be considered delivered and effective upon personal delivery, or three days after posting, when sent by certified mail, return receipt requested, to the Association, the Board, the Committee, or the Manager, at such address as shall be established by the Association from time to time by notice to the Members. General notices to all Members or any classification thereof need not be certified, but may be sent regular first class mail.

14.6. **Limitation of Liability.** Neither the Association, the Design Review Committee, nor any officer or member of the Board shall be liable to any party for any action or for any failure to act with respect to any matter arising by, through or under the Crooked Creek Development Documents if the action or failure to act was made in good faith. The Association shall indemnify all of the Committee members and officers and Board members with respect to any act taken in their official capacity to the extent provided in this Declaration and by law and in the Articles and Bylaws of the Association.

14.7. **Conflicts Between Documents.** In case of conflict between this Declaration and the Articles of Incorporation or the Bylaws, this Declaration shall control. In case of conflict between the Articles of Incorporation and the Bylaws, the Articles of Incorporation shall control. In case of conflict between this Declaration and Design Guidelines, the Design Guidelines shall control.

14.8. **Assignment.** Declarant may assign all or any part of its rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor shall be identified, the particular rights being assigned shall be specified, and, to the extent required, concomitant obligations shall be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Register of Deeds of Avery County.

IN WITNESS WHEREOF, Bio Vim, Inc., dba Crooked Creek Development Company has caused this instrument to be signed in its corporate name by its duly authorized officers and its seal to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

**Bio Vim, Inc.**  
**dba Crooked Creek Development Company**

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By: Eugene C. Dooner  
Eugene C. Dooner, President

(Corporate Seal  
of Bio Vim, Inc.)

Attest:

Nancy S. Dooner  
Nancy S. Dooner, Secretary

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State of North Carolina/Florida

County of Collier

I, a Notary Public of the County and State aforesaid, certify that Nancy S. Dooner personally came before me this day and acknowledged that she is Secretary of Bio Vim, Inc., dba Crooked Creek Development Company, a Delaware corporation, and that by authority duly given and as the act of the corporation, this Declaration was signed in its name by its President, sealed with its corporate seal and attested by him/her as its Secretary.

WITNESS my hand and notarial seal, this 8<sup>th</sup> day of December, 1993.

Patricia Lee Penn (SEAL)  
NOTARY PUBLIC'S SIGNATURE  
Print Notary's Name: Patricia Lee Penn  
My comm. expires: 4/26/96



STATE OF NORTH CAROLINA

COUNTY OF AVERY

The foregoing certificate(s) of \_\_\_\_\_  
is/are certified to be correct. This Declaration and this certificate are duly registered at the date and time and in the Book and Page shown on the first page of this document.

R.J. BENFIELD, REGISTER OF DEEDS FOR AVERY COUNTY

BY: \_\_\_\_\_  
Deputy/Assistant-Register of Deeds

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