

2011-196126

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

RECEIVED
JUN 17 2013
S.C. Supreme Court

Case No. 04-CP-07-633

Robert L. Cullen, Andrew A. Corriveau,
John Caldwell, Andrea Hucks, Jamie Bellamy,
Michael Pearson, and David Mandell, ...Plaintiffs,

v.

J. Bennet McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc. Respondents/Appellants,

Of whom Robert L. Cullen, Andrew A. Corriveau
and Andrea Hucks are Appellants/Respondents.

RECORD ON APPEAL
VOLUME I

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CERTIFICATE OF COUNSEL

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) C/A # 04-CP-07-633

ROBERT L. CULLEN, ANDREW
A. CORRIVEAU, JOHN
CALDWELL, ANDREA HUCKS,
JAMIE BELLAMY, MICHAEL
PEARSON and DAVID
MANDELL,

Plaintiffs,

vs.

J. BENNETT McNEAL, B.
McNEAL PARTNERSHIP, L.P.,
ANTHONY R. PORTER, and
WRIGHT'S POINT HOME
OWNERS ASSOCIATION, INC.

Defendants.

ORDER

RECEIVED

JUN 17 2013

S.G. Supreme Court

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2007 OCT 26 PM 3:18

This matter came to be heard before me without a jury on March 28-30th, 2007. The Plaintiffs are present or former property owners in Phase I of Wright's Point, also know as Wright's Point Plantation, a planned community located within the city limits of Port Royal in Beaufort County, South Carolina. The Defendants J. Bennett McNeal and Anthony R. Porter are real estate developers involved with the development of Wright's Point. The Wright's Point Home Owner's Association is named as a nominal defendant, against whom no relief is sought.

PROCEDURAL HISTORY

This case involves the Wright's Point subdivision and their declaration of restrictive covenants. The dispute concerns whether the developer gave up certain rights as laid out in the declaration of restrictive covenants and passed them on to the owners of lots within the subdivision.

The Plaintiffs assert in their Complaint that they are "Owners" of "Lots" in Wright's Point, "as those terms are defined in the Declarations." They further assert that they are members of, and were elected as directors of, the Defendant Wright's Point Home Owners Association,

Inc. The Complaint further states, "Many of the Plaintiffs' claims herein are derivative in nature and are brought to redress wrongs to the Association."

The Complaint's first cause of action seeks a declaratory judgment, asking that this Court find (a) that the right of the Defendant Porter to control the appointment of directors and officers of the Defendant Association has terminated, and that this right belongs to the owners of the lots "within Wright's Point Subdivision," (b) that the Plaintiffs be declared to be the "validly elected directors of the Association," (c) that the Defendant McNeal "has no right to act as the 'Developer' or the Developer's representative in connection with the business and affairs of the Association," (d) that the Defendants McNeal "have no right to annex real estate owned by either of them to Wright's Point Subdivision or to permit owners of any part of that real estate access to or use of the common areas and amenities owned by the Association and located within Wright's Point Subdivision," (e) that only those owners of lots depicted on the plat of the development and recorded in Plat Book 64 at page 150 (Phase I) have the "rights of access or use of the common areas of Wright's Point Subdivision owned by the Association," and (f) that the Defendants Porter and McNeal "have no right to include additional real estate within the scope of the Declarations."

The third cause of action¹ in the Complaint sought injunctive relief in the form of (a) "restraining and enjoining Defendants from asserting or attempting to assert control over the business or affairs of the Association," and (b) "restraining and enjoining Defendants ... from granting to any owner of real estate outside of Wright's Point Subdivision any purported right to access or use of the common areas of the Association."

¹The second cause of action in the Complaint sought an accounting from the Defendants "of all income and expenses of the Association and restoration to the Association of the amounts, if any, over which the Defendants, or any of them, may have wrongfully exerted control." Prior to the trial, however, the Plaintiffs dismissed this cause of action, and it was not presented as part of Plaintiffs' submissions to me.

The Defendants filed an Answer and Counterclaim wherein they set forth a qualified general denial, five affirmative defenses and a counterclaim stating six causes of action seeking monetary damages against the Plaintiffs, as well as three additional causes of action seeking equitable relief in the form of declaratory relief, injunctive relief and specific performance. The gist of the Defendants' position is that they deny that the Plaintiffs were validly elected as directors of Wright's Point Homeowners Association, Inc., maintaining that only the Developer has the right to appoint and remove officers and directors of the Association under the restrictive covenants, unless relinquished as provided by such covenants. The Defendants contend that the Developer never relinquished this right, and remains in control of the Association, which includes the right to control the Architectural Review Committee.

The Plaintiffs filed a Reply "to the Counterclaim of the Defendants" on July 12, 2004. The Reply was essentially a qualified general denial of the allegations set forth in the Defendants' Counterclaim. At the end of the second day of trial, counsel for the Plaintiffs submitted a motion to be allowed to amend Paragraph 1 of the Plaintiffs' Reply, which had admitted the Defendants' allegations of sub-paragraph "k" of Paragraph 29, so as to deny such allegations. This sub-paragraph had alleged that both the Defendant Anthony R. Porter and his father Jimmy Porter were the developers of Wright's Point. I permitted the amendment requested by Plaintiffs' counsel after he stipulated that, had Jimmy Porter been called as a witness, his testimony would have included confirmation of the allegation that both he and the Defendant Anthony R. Porter were developers of Wright's Point. This stipulation is deemed to eliminate any prejudice to the Defendants by virtue of the amendment.

Prior to the date of the trial, the Defendant McNeal conveyed a portion of the property in Phase II to Richard Ratcliff Homes, Inc., which then conveyed a portion of the same to JBB Holdings, LLC. Plaintiffs counsel contended that these entities should be made parties to this litigation, which would have necessitated a continuance. By a document dated March 27, 2007 and entitled "Consent and Agreement," however, Richard Ratcliff Homes, Inc. and JBB

Holdings, LLC agreed "to forego active participation in (this) litigation and to be bound by the Judgment and Decree of the Court with respect to the land of Wright's Point Development (other than the original 44 Lots in Phase I) to the same extent as if they had been parties." As a result, Plaintiffs' counsel withdrew his request these entities be made parties or, alternatively, for a continuance.

Subsequent to the trial, the Defendant Porter and his father executed a document entitled "Assignment of Developer's Rights," wherein they assigned their rights as Developer of Wright's Point to Defendant McNeal Partnership, L.P. Counsel for the Plaintiffs' moved for permission to submit supplemental evidence relating to this assignment, which I granted.

FINDINGS OF FACT

Based upon the documentary evidence and testimony presented, I hereby find the following to be true and accurate facts relevant to this matter.

1. Wright's Point is a planned community located within the city limits of Port Royal in Beaufort County, South Carolina, and was created by combining the following four (4) separate parcels of land: (a) a parcel containing approximately 19.74 acres, shown as Parcel "B" on a Plat dated December 17, 1997, and filed in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, in Plat Book 64 at page 98; (b) a parcel containing approximately 10.45 acres, shown as Parcel "C" on said plat; (c) a parcel containing approximately 8.41 acres, shown as Parcel "D" on said plat; and (d) a parcel containing approximately 1.7 acres, shown as a portion of Belleview Plantation and a portion of Magnolia Bluff Plantation on a separate plat for Mary P. Logan prepared by R.D. Trogon, Jr., and dated November 9, 1988.

2. The 19.74 acre tract (Parcel "B") and the 10.45 acre tract (Parcel "C") were obtained by the Defendant Anthony R. Porter from Lewis H. Wright and John D. Wright. The 8.41 acre tract (Parcel "D") was obtained by Jimmy W. Porter, father of the Defendant Anthony

R. Porter, from Lewis H. Wright and John D. Wright. The 1.7 acre tract was obtained by the Defendant Anthony R. Porter from Mary P. Logan.

3. Prior to the Defendant Porter and his father obtaining title to these four (4) parcels, the Defendant McNeal had obtained an option to purchase them from their prior owners. The Defendant Porter wanted to construct his personal residence on a section of waterfront property located within the 1.7 acre Logan tract, and had a plan for a multi-use, multi-phase development for the entire property encompassed by these four (4) parcels. The Defendants Porter and McNeal then agreed to have Porter and his father act as the official developers of the development, with McNeal to participate in the development in other ways.

4. Under their agreement, the first phase of Wright's Point to be developed was a waterfront section restricted to single family residential use; this phase included portions of the 1.7 acre Logan tract, most of Parcel "C", and portions of Parcels "B" and "D" as shown on the boundary survey located in Plat Book 64 at page 98. The overall plan was for a walking community consisting of all four (4) parcels, containing various amenities accessible to all owners, in a style patterned after similar existing communities in the Beaufort area. The conceptual plan called for a relatively low density development which would include approximately 44 single family residential lots located in Phase I, and approximately 125 lots in subsequent phases which would be available for commercial, multi-family and mixed uses.

5. In furtherance of their development plan, the Defendants retained the services of other professionals, including architects, engineers, surveyors and attorneys, and presented a Master Plan for approval to the respective governing agencies, including the town of Port Royal. The initial conceptual drawing of the development, which was submitted to and approved by these governmental agencies, was admitted into evidence in this case and clearly shows that the development consisted of the four (4) parcels described above, was to be a mixed use community and was to be developed in multiple phases.

6. Also in furtherance of their development plan, the Defendants contacted a professional surveyor, David E. Gasque, R.L.S. of Gasque and Associates, and commissioned the preparation of various plats of the property.

7. On March 3, 1998, David E. Gasque prepared a plat, entitled "Plat Showing Wright's Point Phase I," which was then recorded on April 14, 1998 in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, in Plat Book 64 at page 150. This plat primarily showed that portion of the area of the four (4) parcels which was to be included in Phase I of the development, but also showed an adjacent area designated as Phase II; the latter area was part of an area shown under the designation, "FUTURE DEVELOPMENT."

8. Following the platting of the lots in Phase I, the Defendant Porter and his father had their legal counsel prepare the restrictive covenants for Wright's Point. The document is entitled, "Declarations of Covenants, Conditions, Restrictions and Easements For Wright's Point," states that it is "made this 24th day of April, 1998 by Anthony R. Porter and Jimmy W. Porter (hereinafter referred to as 'Developer'))" and was signed by both Anthony R. Porter and Jimmy W. Porter as "Developer." Furthermore, the signatures of the Defendant Porter and his father were witnessed and notarized; the affirmation of the witness states:

PERSONALLY appeared before me the undersigned witness, who under oath states that s/he saw the within named Anthony R. Porter and Jimmy W. Porter, Developer, sign, seal and as their act and deed, deliver the within written instrument and that s/he with the other witness, witnessed the execution thereof.

9. Notwithstanding the designation of both the Defendant Porter and his father as "Developer" in the Declaration paragraph on page 1 of the document, and their joint execution of the document under the designation "Developer," Jimmy W. Porter's name was not included in the definition section under the term "developer;" that section (§ 1.12) only made reference to the Defendant Anthony R. Porter. Based upon the evidence presented, I have concluded that this omission was not intentional, but was a clerical error, similar to that contained in the Plaintiff's Reply to the Defendants' Counterclaims.

10. Pursuant to the restrictive covenants, the Defendant Porter incorporated the Wright's Point Homeowners Association, Inc. as a non-profit corporation under the laws of South Carolina for the purpose of maintaining and administering the development and enforcing the covenants and restrictions, as well as collecting all assessments and charges relating to the same. By Deed dated March 29, 1999, the Defendant Porter and his father conveyed the open spaces, ponds, community spaces, streets and certain other areas in Wright's Point to the Wright's Point Homeowners Association, Inc..

11. As part of their development agreement, the Defendant Porter retained several lots in Phase I. He sold all but two (2) of these lots upon which he built his personal residence. The Defendant McNeal received from the Defendant Porter and his father deeds to the remaining properties in Wright's Point outside of Phase I. These remaining properties were to be included in subsequent development phases of Wright's Point, with the Defendant Porter remaining in his role as Developer in order that the entire community would be developed in accordance with his original plan and design.

12. Each of the Plaintiffs herein purchased lots in Phase I subsequent to the filing of the restrictive covenants for Wright's Point.

13. Pursuant to the restrictive covenants, all construction and improvements made in Wright's Point were subject to review and approval by the Wright's Point Architectural Committee. This committee initially consisted of the Defendant Porter and his father, but subsequently included their appointees, including the Defendant McNeal.

14. During the early part of 2003 in an attempt to eventually turn control of the Association over to the homeowners, McNeal suggested to Cullen and some of the other property owners in Phase I, they begin the transition to self-governance relating to the administration of the subdivision. In this regard, the Defendant McNeal met with the Plaintiff Cullen to discuss the role of the Phase I property owners concerning the input process.

15. Following discussions with the Defendant McNeal, Plaintiff Cullen convened a meeting of a group of property owners in Phase I and formed a separate entity called the Wright's Point Property Owners Association. This meeting occurred on May 6, 2003, during the course of which the Plaintiff Cullen maintains that he was elected President of this association; the Plaintiffs Hucks and Bellamy were purportedly elected as co-treasurers, and the Plaintiff Corriveau purportedly elected as a board member. The Plaintiffs also purported to elect the Defendant McNeal as a board member, even though he was not present at this meeting.

16. The minutes of the May 6th meeting reflect that those present "wanted a total revamping of the ARB" so as to permit the use of hardi-plank siding on houses. This material was not approved by the Architectural Committee, and the committee had earlier refused the requests of Plaintiffs Cullen and Corriveau to use this material on their homes. The minutes also clearly reflect the Plaintiffs' knowledge and awareness of the fact that areas in Wright's Point outside of Phase I were about to be developed, and their concern over the use of amenities in Phase I by new owners located in subsequent phases.

17. Although the Plaintiff Cullen maintains that the actions taken at the May 6th meeting were taken with the consent of the Defendant McNeal, this is disputed by McNeal. In any event, it does not appear from the record that the Plaintiffs took any significant overt actions as officers or directors immediately following this meeting.

18. On October 1, 2003, the Plaintiff Cullen sent a letter to "Wright's Point Home Owners" in which he purported to relate the substance of certain conversations which he had with the Defendant McNeal and with Mr. Wayne Webb, who was the broker in charge of Mr. McNeal's realty company. In this document, Cullen confirms that McNeal had informed him that Phase I was only a part of the total Wright's Point development, and that plans for the development of the remaining properties were moving forward. Cullen also confirmed that McNeal informed him that the various phases "were always tied together as a 'Walking

Community, and that the families in the new area should have access to both our common areas and our docks." The letter also acknowledges the existence of "vacant lots" in Phase I.

19. On November 2, 2003, Cullen presented McNeal with a document purporting to "represent a consensus of the existing homeowners and residents." In this document, he asserted the position that Phase I should be a "separate and independent" area from the remaining phases of Wright's Point. The document also voices an opposition to the Developer's plans for a walking community whereby all residents have equal access to all amenities.

20. Cullen called for a meeting of the Board of Directors for Wright's Point to take place at his home on December 9, 2003. The "Board of Directors", as used by Mr. Cullen, referenced the Plaintiffs who had been "elected" at the earlier meeting on May 6, 2003.

21. The Defendant Porter learned of the December 9th meeting, and provided written notification to Cullen on December 8, 2003 that the meeting was unauthorized. In his letter, the Defendant Porter informed Cullen that only the Developer could appoint or remove officers or members of the board of the association under the applicable provisions of the Wright's Point restrictive covenants.

22. Notwithstanding the written notification from the Defendant Porter, Plaintiffs went forward with the meeting on December 9th. Minutes of that meeting reflect that the Plaintiffs took the position that "the 'Developer Phase' of the covenants had ended and we (Plaintiffs) had the right to manage our own expenses and affairs." The minutes also reflect that Mr. Porter's letter was "passed out" at the meeting, so that those present were fully aware of his position. The minutes further reflect that the Plaintiff Corriveau "brought up his concerns about the ARB, as he was in the process of getting his building plans approved." According to the minutes, the Plaintiffs then "agreed that the Board should appoint a new ARB..."

23. On January 21, 2004, Plaintiffs Cullen, Pearson, Corriveau, Hucks, Bellamy and Caldwell, together with certain other property owners in Wright's Point, attended a meeting convened by the Plaintiffs. The Defendant Porter appeared at the meeting location with his

attorney and presented the attendees with a "memorandum" in which he affirmatively stated, *inter alia*, that (1) he was the Developer of Wright's Point and still owned lots there, so that he retained "the sole authority under the Restrictive Covenants to appoint and remove the directors of the Home Owners Association"; (2) the meeting being held was "not an official meeting" and several property owners, including himself, had not been given notice of the meeting; and (3) any meetings convened by the Plaintiffs had been done without his knowledge and were "not legal." Mr. Porter and his attorney left after presenting his letter to the Plaintiffs, and before the meeting was convened.

24. Notwithstanding actual notice of Mr. Porter's position, the Plaintiffs and other attendees proceeded with the meeting on January 21, 2004. The first order of business conducted was to approve the minutes of the May 6th meeting. The Plaintiffs then proceeded to "elect" officers and directors. In this "election" Plaintiff Cullen was confirmed as president, Plaintiff Caldwell as vice-president, Plaintiff Hucks as treasurer, Plaintiff Corriveau as secretary and Plaintiffs Bellamy, Mandell and Pearson as directors.

25. On February 10, 2004, Plaintiff Cullen, purporting to act as "president" of the Wright's Point Homeowners Association, sent a letter to other owners stating that the Plaintiffs were "considering filing a motion for a Declaratory Judgment." The letter also provided a "Notice of Annual Meeting of Owners of Wright's Point Home Owners Association, Inc." which was to take place on March 10, 2004. The meeting was to "review the legal issues facing our Association" and to "review the actions taken at the meeting of January 21, 2004..." The evidence presented at trial revealed that the Plaintiffs were aware at this time that they did not have a quorum, as defined under the Wright's Point restrictive covenants, for their prior meetings held on May 6, 2003 and January 21, 2004.

26. On March 10, 2004, the Plaintiffs convened another meeting of Wright's Point property owners which they designated as a "supplemental annual meeting." At this meeting, the Plaintiffs purported to confirm the actions taken at the January 21st meeting and to authorize the

filing of a declaratory judgment action. Prior to this meeting, the Defendant Porter presented Plaintiffs' attorney with a memorandum dated March 10, 2004 which (1) informed him that Mr. Porter had not received written notice "of the upcoming property owners meeting," (2) reiterated Mr. Porter's position "that as the Developer of Wright's Point I am still in control of the Wright's Point Homeowners Association," (3) that any position contrary to Mr. Porter's retained role as developer was "in violation of the Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point," and (4) stated his intention to continue to develop property owned by Mr. Porter in Wright's Point.

Additionally, on March 10th, prior to the meeting, the Defendant McNeal delivered a letter to Plaintiffs' attorney in which he stated (1) that he had never received any notice of prior meetings convened by the Plaintiffs, (2) that he objected to such meetings "as they are in violation of the restrictive covenants," (3) that "Tony Porter still controls the Wright's Point Homeowners Association," and (4) that he formally objected "to any meeting of the Association called by a person other than the Developer, Tony Porter."

27. On March 16, 2004, Plaintiff Corriveau wrote to Plaintiff Cullen, as "President, Wright's Point Homeowners Association," asking for changes in the prior rulings of the Architectural Review Committee concerning the construction of his home. Specifically, Corriveau asked Cullen to approve "faux windows" in lieu of actual windows on one side of his home and "use of cement board siding." This request was granted by Plaintiff Cullen unilaterally. This was the only transaction involving architectural review to come before the Plaintiffs group once they attempted to assume control over the Association.

28. On March 31, 2004, the Plaintiffs instituted the present action against the Defendants. Five days earlier, the Defendant Association had filed a suit against the Plaintiff Corriveau in order to compel his compliance with the Wright's Point restrictive covenants and the directives of the Association and the Architectural Committee with respect to the construction of

his home in Wright's Point. The Association's action against Mr. Corriveau has been held in abeyance, pending the decision in this case.

29. On June 12, 2007, the Defendant Porter and his father, Jimmy Porter, assigned their rights as Developer of Wright's Point to Defendant McNeal Partnership, L.P.

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

This matter is before me to decide all issues, whether arising at law or in equity, and whether legal or factual in nature. The relief sought in the Complaint consists of causes of action for declaratory relief, an accounting and injunctive relief; Plaintiffs also assert that many of their claims are derivative in nature. As a general rule, "actions for an accounting, for an injunction, and shareholder derivative actions are all actions in equity." *Historic Charleston Holdings, LLC v. Mallon, et al.*, 365 S.C. 524, 617 S.E.2d 388 (SC App. 2005) citing *Lee v. Lee*, 251 S.C. 533, 164 S.E.2d 308 (1968) (action for an accounting is equitable in nature); *Wiedemann v. Town of Hilton Head*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) ("Actions for injunctive relief are equitable in nature."); *Anthony v. Padmar*, 320 S.C. 436, 445, 465 S.E.2d 745, 750 (Ct. App. 1995) (noting that derivative actions are equitable).

A cause of action for declaratory relief may be equitable in nature or may be a matter at law, depending upon the nature of the actual relief sought. *Cedar Cove Homeowners Association, Inc. v. DiPietro*, 368 S.C. 254, 628 SE2d 284 (Ct. App. 2006). In the instant case, both parties seek declaratory relief. The nature of the declaratory relief sought by the Plaintiffs' Complaint is primarily an interpretation of the applicable restrictive covenants for Wright's Point, and secondarily the enforcement of such covenants against the Defendants. Insofar as the enforcement of the restrictive covenants is concerned, the action is clearly one in equity. *Anderson v. Buonforte*, 365 S.C. 482, 617 SE2d 750 (Ct App 2005); *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 SE2d 299 (2001). The interpretation or construction of the covenants, however, is generally regarded as one at law. See

Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 SE2d 1 (Ct. App. 1988) (a declaratory judgment action to determine the parties' rights under a written easement agreement is an action at law); See also *dicta* in *Hardy v. Aiken*, 369 S.C. 160, 631 SE2d 539 (2006).

The fact that a party seeks equitable relief does not require that the case be treated as an equitable action *in toto*. Rather, we must look to the "main purpose" of the suit to determine its characterization. *Sloan v. Greenville County*, 356 S.C. 531, 590 SE2d 338 (Ct App. 2003), citing *Williams v. Wilson*, 349 S.C. 336, 563 S.E.2d 320 (2002). Whether an action is legal or equitable must be determined from the character of the action as framed in the complaint. *Nat'l Bank of South Carolina v. Daniels*, 283 S.C. 438, 322 S.E.2d 689 (Ct.App.1984).

The primary purpose of the Complaint in this case is for the court to interpret or construe the applicable restrictive covenants so as to determine the rights of the respective parties.

Restrictive covenants "are contractual in nature and bind the parties thereto in the same manner as would any other contract." *Queens Grant II, Horizontal Property Regime vs. Greenwood Development Corp.* 368 SC 342, 628 SE2d 902 (Ct. App. 2006), *Seabrook Island Property Owners Association vs. Pelzer*, 292 SC 343, 356 SE2d 411 (Ct. App. 1987); *Hardy v. Aiken*, 369 S.C. 160, 631 SE2d 539 (2006). "Restrictive covenants are construed like contracts and may give rise to actions for breach of contracts." *Queens Grant, supra*, citing *Manning vs. City of Columbia*, 297 SC 451, 377 SE2d 335 (1989) and *Hoffman v. Cohen*, 262 SC 71, 202 SE2d 363 (1974). "Generally, an action to construe a contract is one at law." *Patricia Grand Hotel, LLC vs. MacGuire Enterprises, Inc.* 2007 SC App. Lexis 48, citing *Barnacle Broadcasting, Inc. vs. Baker Broadcasting, Inc.* 343 SC 140, 538 SE2d 672 (Ct. App. 2000); see also *Hofer v. St. Clair*, 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989) ("Contract actions are actions at law.")

"In interpreting contracts, the court should ascertain and give legal effect to the parties intentions." *Patricia Grand Hotel, supra*, citing *Gilbert v. Miller* 356 SC 25, 586 SE2d 861 (Ct. App. 2003). "The main guide in contract interpretation is to ascertain and give legal effect to the

intention of the parties as expressed in the language of the (document).” *Gilbert, supra*. “Where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary and popular sense.” *Patricia Grand Hotel, supra*, citing *Schulmeyer vs. State Farm Fire & Casualty Insurance Company*, 353 SC 491, 579 SE2d 132 (2003). “Thus, where an agreement is clear and capable of legal construction, the court’s only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Patricia Grand Hotel, supra*, citing *Messer v. Messer*, 359 SC 614, 598 SE2d 310 (Ct. App. 2004).

CONCLUSIONS OF LAW

Applying these legal principles to the instant case, I hereby find as follows:

As to the right of the Developer of Wright’s Point to appoint and remove officers and directors of the Wright’s Point Home Owners Association, Inc.

The pertinent language of the covenants with respect to the Developer’s ability to appoint or remove officers and directors of the Association is found in §7.01, which states in relevant part:

Developer shall have the right to appoint and remove all members of the Board and any officer or officers of the Association until such time as the first of the following events shall occur: (i) the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder, or (ii) the surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer.

Thus, unless the Developer voluntarily surrenders the right to appoint and remove the officers and directors of the Association under (ii), or conveys the last Lot in the Subdivision to someone other than the Developer or a Builder, as those terms are defined in the covenants, he retains such right of appointment and removal.

The evidence presented at the trial of this case clearly demonstrates that neither of the conditions set forth in § 7.01, which are prerequisites to the relinquishment of the developer's control of the association has occurred. There is no evidence that there has been any voluntary surrender by either the Defendant Porter or Jimmy W. Porter of such authority as provided in §7.01 (ii), and no evidence was produced by the Plaintiffs to show any "express amendment to this Declaration executed and recorded by Developer." In fact, the evidence and testimony of the Plaintiffs' witnesses at trial acknowledged that this event has not occurred.

Furthermore, the Plaintiffs failed to prove that "the last Lot in the Subdivision" has "been conveyed to a Person other than Developer or Builder," as provided in §7.01 (i). Plaintiffs introduced documentary evidence and testimony which demonstrated that they actually recognized the Defendant Porter as possessing an ownership interest in one or more lots in Phase I at the very time they were attempting to take over the control of the Association, as Porter was included on the list of owners contacted by the Plaintiffs and was counted as part of their "quorum" in their meeting of January 21, 2004.

The Plaintiffs claim that Mr. Porter's transfer of title to his lots in Phase I from his individual name to himself as Trustee of a Personal Residence Trust and/or the temporary change in title due to a tax sale of one of these lots divested him of such property for purposes of control under §7.01. The evidence produced at the trial does not support this contention.

The Defendant Porter testified that he had not received legal notice of the tax sale, had retained legal counsel to set aside the sale upon learning of it, and that the property was then returned to him because the sale was nullified due to the notice defect. The Plaintiffs produced no testimony or other credible evidence to refute or discredit Mr. Porter's testimony. Mr. Porter also testified that the transfer of title of his lots in Phase I from himself individually to himself as trustee of a Personal Residence Trust was solely for tax purposes and not for the purpose of divesting himself of control of the Association.

It should be noted that this transfer occurred by deed dated June 19, 2001. Thereafter, according to the evidence presented, the Plaintiffs continued to acknowledge the Defendant Porter as the Developer of Wright's Point, he continued to be billed for and paid his annual homeowners dues and was included in the Plaintiffs' quorum count as a Phase I property owner as late as January 21, 2004. These facts are inconsistent with the Plaintiffs' contention that Mr. Porter had conveyed the last lot to someone other than the Developer. Plaintiffs' contention that §1.12 and § 7.01 require that the Defendant Porter maintain title solely in his individual name is not persuasive, nor is it supported by the credible evidence presented. Having heard and reviewed the evidence, I find that the Defendant Anthony R. Porter has maintained an ownership interest in his lots in Phase I of Wright's Point sufficient to maintain his position as Developer of Wright's Point and to maintain control of the Wright's Point Homeowners Association under §7.01.

Even if the Plaintiffs had met their burden of proof with respect to showing that the Defendant Porter had conveyed his interest in his lots in Phase I to someone other than "Developer," this would not have altered his ability to control the appointment and removal of the officers and directors of the Association, provided a "Builder", as defined in the covenants, retained a lot in Phase I. Section 1.5 of the covenants defines the term "Builder" as "any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots." The Plaintiffs' own witnesses acknowledged that lots within Phase I have been and are still owned by persons or entities who are engaged in the construction business. Mr. Ratcliff and Mr. Denny are both licensed general contractors, and each testified as to their ownership interest in lots in Phase I, and that such lots were conveyed to them directly by the Defendant Porter, who is acknowledged by the Plaintiffs as "Developer" of Wright's Point. The testimony of Mr. Ratcliff and Mr. Denny clearly shows that they meet the

definition of a "Builder" under § 1.05.² The deeds to them from Mr. Porter were also introduced into evidence. Thus, the Plaintiffs have clearly failed to prove either of the two prerequisites required to be met by §7.01 in order for the Developer to relinquish control of the Association.

Section 12.01 reiterates the Developer's rights of appointment and removal under §7.01. The language of §§ 7.01 and 12.01 of the restrictive covenants concerning the control of the Association is clear and unambiguous. The Developer retains the sole right to appoint and remove the officers and directors of the Association unless such right is relinquished in the manner provided under §7.01. I find no credible evidence that either of the prerequisites identified in §7.01 has occurred, and the Plaintiffs have not met their burden of proof in this regard. Owners in Wright's Point, including the Plaintiffs, had no right to elect officers or directors of the Association until one of the two prerequisites set forth in § 7.01 has taken place. Accordingly, the Plaintiffs' request for declaratory relief as set forth in Paragraph 21.a. and 21.b. of their Complaint is denied. The Defendants' request for declaratory relief, insofar as it requests a finding that the Developer has not relinquished his right to appoint and remove officers and directors of the Association, and thus remains in control of the Association, is granted.

**As to the right of the Developer of Wright's Point to appoint and remove members of the
Wright's Point Architectural Review Committee**

²Plaintiffs' counsel contended at trial that the title to the property of Mr. Ratcliff and Mr. Denny was held in their individual names, whereas they conducted their construction businesses in the names of their corporations, and that this removed them from the definition of "Builder" under §1.05 of the restrictive covenants. This contention is not persuasive. These witnesses testified that, in South Carolina, they must hold their general contractor's licenses in their individual names. Furthermore, §1.05 clearly covers a "Person or legal entity" and the term "Person" is defined in §1.17 as meaning "a natural person, corporation, partnership, association, trust or other legal entity, or any combination thereof."

The constitution of the membership of the Wright's Point Architectural Committee is provided for in § 1.01 of the restrictive covenants. That section provides that the committee consists of "Anthony R. Porter and Jimmy W. Porter or such other individual(s) as Developer may appoint ... until all improvements (are) constructed thereon and sold to permanent residents. At such time as all of the Lots in the Subdivision have been fully developed, the Developer shall notify the Board and all the Owners of Lots in the Subdivision to that effect, at which time the Developer's rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate. Notice ... under this provision shall be in writing."

The evidence produced in this case clearly shows that not all of the lots in Phase I have improvements on them, nor are they all owned by permanent residents. There is also no evidence that the notification by the Developer as referenced in this section has occurred.

Accordingly, the request of the Defendants for declaratory relief, insofar as it requests a finding that the Developer has retained his right to appoint and remove members of the Wright's Point Architectural Review Committee, is granted.

As to the relationship of properties in Phase I to remainder of Wright's Point property.

The Plaintiffs contend that the Wright's Point development is limited to the 44 lots, amenities and common areas shown on the plat of Phase I of Wright's Point, which is filed in Plat Book 64 at page 150, and does not encompass the additional areas shown as "Phase II" or "Future Development" on the boundary survey recorded in Plat Book 64 at page 98. They also contend that the amenities, open spaces and community spaces located within Phase I are restricted to use only by owners of lots within that phase, and are not accessible to any owners or residents in Phase II or any additional developmental phases. They further contend that the Developer has no ability to subject additional properties or phases to the development, other than the present Phase I.

I find that the Plaintiffs' contentions concerning the relationship of properties located in Phase I *vis a vis* properties located in other portions of Wright's Point are contrary to both the documentary and testimonial evidence presented in this case. The preponderance of the evidence supports the contention that the Wright's Point development includes Phase II and "Future Development" as shown on the master plan for Wright's Point (Defendants' Exhibit 17). The boundary survey for Wright's Point (Defendants' Exhibit 3) and the plat of Phase I, filed in Plat Book 64 at page 150 clearly show that Wright's Point included a Phase II and an area designated for FUTURE DEVELOPMENT (Plaintiffs' Exhibit 19).

Further, the marketing materials used to sell the properties in Phase I clearly state that the development will entail multiple phases, and will consist of properties which can be used commercially and/or for mixed uses, not just the single family residence usage reserved for properties in Phase I (Plaintiffs' Exhibit 15, Defendants' Exhibits 2 and 18).

Based upon the preponderance of the credible evidence presented in this case, I find that Wright's Point development is not confined to the properties within Phase I. I find that the development consists of the four parcels described in Exhibit "A" attached to the Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point previously described herein.

As to the use of the amenities, common areas, open spaces and community spaces which are located in Phase I of Wright's Point

The Plaintiffs also contend in their Complaint that "no provision within the Declarations gives any right to the owners or occupants of land outside of Wright's Point Subdivision to become members of the Association or to use the common areas of Wright's Point Subdivision."

The Plaintiffs contend that the development of Phase II, or any other development subsequent to Phase I, is an attempt to "annex" additional real estate into Wright's Point. The Defendants refute this contention, and maintain that they have not attempted to annex any

additional properties into Wright's Point. The contentions of the parties are based, at least in part, upon their views concerning whether or not the Wright's Point development is confined to the properties within Phase I. Since I have already made a finding that it is not so confined, the land outside Phase I which the Defendants wish to develop as Phase II or subsequent phases is already in Wright's Point.

Even if there is no true "annexation" of additional *properties*, however, the Plaintiffs contend that § 2.03 of the Covenants, which deals with the mechanism whereby "Developer" can "develop and submit additional phases to this Declaration" supports their position that no additional *phases* of existing properties can be added to Wright's Point. The elimination of Jimmy W. Porter as an official Developer of Wright's Point is crucial to the Plaintiffs' argument concerning the Defendants' ability to develop additional phases subsequent to Phase I.

The Plaintiffs allege in their Complaint that "a portion of the real estate sought to be ... developed by (Defendants) McNeal and/or McNeal Partnership was acquired from a source other than the Developer." This appears to be a reference to Parcel "D" which was acquired by McNeal from Jimmy W. Porter rather than the Defendant Anthony R. Porter. The Plaintiffs contend that the Defendant Anthony R. Porter, by virtue of § 1.12 of the restrictive covenants, was the *only* official developer of Wright's Point; they maintain that the omission of Jimmy W. Porter from this section, notwithstanding his inclusion in the other portions of the covenants mentioned above, precludes a finding that he is an official developer of Wright's Point. The Defendants contend the omission of Jimmy W. Porter's name in § 1.12 is simply a clerical error. As hereinafter discussed, the Plaintiffs seek to use this discrepancy to assert their position concerning incorporating any properties other than the Phase I properties into Wright's Point.

The language of § 2.03 upon which Plaintiffs rely is found in the second paragraph, which states, in relevant part, as follows:

Developer reserves unto himself, his heirs and assigns, the right to develop and submit additional phases to this Declaration ..., Wright's Point Homeowners Association, Inc. and related documents. Such additional phases shall be limited to the property which Developer has acquired from Lewis H. Wright, et al and/or Mary P. Logan, or any properties contiguous thereto.

Under the Plaintiffs' logic, only lands which the official "Developer" has obtained may be developed as additional phases. The evidence demonstrates that the Defendant Anthony R. Porter is an official "Developer" under §1.12, that he acquired Parcels "B" and "C" from Lewis H. Wright *et al*, and that he acquired the 1.7 acre tract from Mary P. Logan. Since Parcel "D" was obtained by Jimmy W. Porter, albeit from Lewis H. Wright *et al*, the Plaintiffs contend this property cannot be included in subsequent phases, because Jimmy W. Porter's name is not included in the definition of the term "Developer" under § 1.12. This contention of the Plaintiffs is without merit.

The Plaintiffs produced no credible testimony or other credible evidence in support of their contention. The Defendant Porter testified, however, that the omission of his father's name from §1.12 was an oversight and a clerical error. A reading of the entire document, together with the vast preponderance of the other credible evidence submitted, supports the Defendant Porter's position. In addition to being included as "Developer" in the initial Declaration language on page 1 and on the signature page, Jimmy W. Porter's name is included with that of his son in the language of § 1.01, which relates to the constitution of the Wright's Point Architectural Committee and the Developer's control thereof.

Of equal or greater importance is the fact that the first "Whereas" clause on page 1 of the document states that "Developer is the owner of certain real property ... described in Exhibit A" to the covenants. As discussed above, Exhibit "A" contains a description of all four (4) parcels referenced above, one of which (Parcel D) was owned at the time by Jimmy W. Porter. In order for the official Developer to be the owner of the property described, the owner(s) of record, *i.e.*, both Anthony R. Porter and Jimmy W. Porter, had to be the official "Developer." Furthermore,

as shown in Plaintiffs' Exhibit # 21, both the Defendant Anthony R. Porter and Jimmy W. Porter are listed as grantors on the deed conveying certain common areas in Phase I to the Wright's Point Homeowners Association, Inc.

Based upon an examination of the restrictive covenants in their entirety, I find that Jimmy W. Porter, together with the Defendant Anthony R. Porter, was the official Developer of Wright's Point. This finding is consistent with and supported by the evidence and testimony introduced on this issue, including evidence introduced by the Plaintiffs in the form of a recent document executed in order to close the sale on the Phase II property conveyed to Richard Ratcliff Homes, Inc., wherein this very issue was addressed. This document, dated February 28, 2007 and entitled "Supplemental Declaration to Declaration of Covenants, Conditions, and Restrictions For Wright's Point," was received into evidence as Plaintiffs' Exhibit # 40. In the Supplemental Declaration, it is stated "that Jimmy W. Porter is a Developer, even though his name was not set forth in Article I, Section 1.12 ..." This Supplemental Declaration, like the original Declaration, is executed by both Anthony R. Porter and Jimmy W. Porter under the designation of "Developer."

Accordingly, Parcel "D" of Wright's Point may be included in any additional phases of the Wright's Point development. Contrary to the Plaintiffs' contention, the Defendant McNeal did, in fact, acquire Parcel "D" from the Developer of Wright's Point. In any event, § 2.03 permits the inclusion of "any properties contiguous" to properties acquired by the Developer from Lewis H. Wright et al and/or Mary P. Logan. The plat referenced in Exhibit "A" to the Declarations and found in Plat Book 64 at page 98 clearly shows that Parcel "D" is contiguous to the other parcels obtained by the Defendant Porter from these sources. Even if Jimmy W. Porter were not an official "Developer" of Wright's Point, Parcel "D" could be included in future phases as a "contiguous" property under § 2.03. Therefore, the Plaintiffs' request for declaratory relief as set forth in Paragraph 21.d and 21.f of their Complaint is denied. The Defendants'

request for declaratory relief, insofar as it requests a finding that the Developer may proceed with the development of additional phases of Wright's Point, is granted.

Finally, I find that there is no merit to the Plaintiffs' contention that the amenities and common areas located in Phase I are restricted for use solely by owners of properties in Phase I. To exclude the amenities and common areas contained in Phase I from the use and enjoyment of other property owners in Wright's Point whose properties will be located in subsequent phases is clearly inconsistent with the evidence presented as to the overall design and plan for this development. Both the Defendants Porter and McNeal testified that Wright's Point was conceived, designed and developed as a "walking community" whereby property owners have access to all amenities and designated common areas, regardless of which phase of the development their properties may be located. This testimony is supported by the documentary evidence introduced in this case.

Accordingly, the Plaintiffs' request for declaratory relief as set forth in Paragraph 21.d and 21.e of their Complaint is denied. The Defendants' request for declaratory relief, insofar as it requests a finding that the use of or access to the amenities and common areas located in Phase I is not limited to the owners of properties within Phase I, is granted.

As to the assignment of Developer rights to McNeal Partnership, LLC.

The restrictive covenants provide in § 1.12 for a "successor-in-title or ... successor in interest" to the Developer of Wright's Point, "provided in the instrument of conveyance to any such successor-in-title or interest is expressly designated as the 'Developer' hereunder by the grantor of such conveyance, which grantor shall be the 'Developer' hereunder at the time of such conveyance."

On June 12, 2007, the Defendant Porter and his father, Jimmy W. Porter, signed a document entitled, "Assignment of Developer's Rights," wherein they purport to convey and assign their development rights in Wright's Point to Defendant B. McNeal Partnership, L.P. A

review of this document reveals that, as an "instrument of conveyance" of the Developer's rights to a "successor-in-title or interest", it meets the requirements of § 1.12 of the covenants. It expressly identifies and designates Anthony R. Porter and Jimmy W. Porter "collectively, as 'Developer'... (under) that certain Declaration of Covenants, Conditions, Restrictions and Easements for Wright's Point ..." I have previously determined herein that Anthony R. Porter and Jimmy W. Porter were the "Developer" of Wright's Point, so that they would have the authority to act in that position at the time of this conveyance of their rights as Developer.

I find that the assignment of Developer rights by the Defendant Porter and his father was done properly, and was executed in accordance with the applicable language of the covenants. Accordingly, McNeal Partnership, LLC, as assignee and successor Developer of Wright's Point, has received all powers and duties of Defendant Porter and his father with respect to their role as Developer of Wright's Point, as set forth in the said Assignment of Developer's Rights.

As to injunctive or Other Equitable Relief

Both parties seek injunctive relief in this matter. Plaintiffs seek "both a temporary and permanent injunction against the Defendants" in two (2) particulars: (1) "restraining and enjoining Defendants from asserting or attempting to assert control over the business or affairs of the Association" and (2) "restraining and enjoining Defendants ... from granting to any owner of real estate outside of Wright's Point Subdivision any purported right to access or use of the common areas of the Association." The Defendants seek injunctive relief, "both permanently and *pendente lite*," which (1) prohibits the Plaintiffs "from taking any action reserved to the Developer under the Declarations ...; (2) prohibits the Plaintiffs "from taking any action in the name of the Wright's Point Architectural Committee ...; (3) prohibits the Plaintiffs "from taking any action in the name of Wright's Point Home Owners Association, Inc., or any other entity purporting to be legally entitled to act on behalf of the members of such association ...; and (4)

requiring the Plaintiffs to account for and return all monies collected from Wright's Point Plantation property owners or others ..."

Insofar as the Plaintiffs' claim for injunctive relief is concerned, the Plaintiffs' version of the relief requested is inconsistent with the rulings I have made herein regarding the ability of the Developer to control the Association, and the ability of all property owners in Wright's Point to use and access the amenities and common areas of the development. For the reasons stated in those rulings, the Plaintiffs' request for permanent injunctive relief is hereby denied.

The Defendants' request for permanent injunctive relief is granted, in essence, by my rulings herein regarding the ability of the Developer to control the Association, and the ability of all property owners in Wright's Point to use and access the amenities and common areas of the development.

The only other surviving equitable relief sought was by the Defendants' counterclaim for specific performance. This, in essence, seeks to require the Plaintiffs to specifically perform their contractual obligations under the Declarations, particularly with respect to recognizing and adhering to the rights of the Developer to control the Association and complete the development. The Defendants' request for specific performance is deemed to be granted in light of my rulings herein concerning these issues.

Damages claimed by the Defendants

The Defendants asserted counterclaims for damages under multiple causes of action, including civil conspiracy, breach of contract, conversion, tortious interference with contractual relationships and defamation. Based upon the preponderance of the evidence submitted at the trial of this case, I have determined that the Defendants have not met their burden of proof as to each of the counterclaims and are not entitled to recover damages from the Plaintiffs.

Attorney Fees

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Williamson v. Middleton*, 2006 S.C. App. LEXIS 139 (S.C. Ct. App. 2006), citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001).

With respect to Plaintiffs' and Defendants' claims for attorneys' fees, I decline to award the Plaintiffs or Defendants any recovery of attorneys' fees associated with this action as they are not authorized by contract or statute.

ORDER OF JUDGMENT

Based on the foregoing, I determine that the Plaintiffs have not met their burden of proof in this case and are not entitled to declaratory or injunctive relief sought in their Complaint. Additionally, I find that the Defendants are not entitled to recover under any of the causes of action set forth in their Counterclaims.

AND IT IS SO ORDERED.

5/Carmen Mullen
Carmen T. Mullen, Presiding Judge

Beaufort, South Carolina

October 26th, 2007

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF BEAUFORT

CASE NO: 2004CP0700633

IN THE COURT OF COMMON PLEAS

Robert L. Cullen vs. J. Bennet Mcneal

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

2008 JAN 23 AM 10:07
CLERK OF COURT
BEAUFORT, S.C.

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Plaintiff's Motion to Alter or Amend this Court's Order signed on October 26, 2007 is respectfully denied.

Dated at Beaufort, South Carolina, this 22nd day of January, 2008.

Court Reporter: Mia Perron

C. Mullen

PRESIDING JUDGE - Carmen Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

John F. North Jr NORTH & BLACK 1103
BAY STREET BEAUFORT, SC 29902
Melissa Helms Estes Estes Law Firm, LLC 808-
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Joel D Bailey BAILLY LAW FIRM POB 1437
BEAUFORT, SC 299011437

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Elizabeth M. Smith - Clerk of Court

CPFORM4M

0027

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 04-CP-07-633

ROBERT L. CULLEN,
ANDREW A. CORRIVEAU,
JOHN CALDWELL, ANDREA
HUCKS, JAMIE BELLAMY,
MICHAEL PEARSON, AND
DAVID MANDELL,

Plaintiffs,

v.

J. BENNET McNEAL, B.
McNEAL PARTNERSHIP, L.P.,
ANTHONY R. PORTER, and
WRIGHT'S POINT HOME
OWNERS ASSOCIATION,
INC.,

Defendants.

COMPLAINT
(Equity)

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2007 MAR 21 PM 2:56

Come now the Plaintiffs, for their causes of action against the Defendants,
state and allege as follows:

THE PARTIES, JURISDICTION, AND VENUE

1. The Plaintiffs are each residents of Beaufort County, South Carolina.
2. The Defendant, J. Bennet McNeal ("McNeal") is a resident of Beaufort County, South Carolina.
3. The Defendant, B. McNeal Partnership, L.P. ("McNeal Partnership") is a South Carolina limited partnership doing business in Beaufort County, South Carolina.

4. The Defendant, Anthony R. Porter ("Porter") was at all times relevant hereto a resident of Beaufort County, South Carolina, and, on information and belief, continues to be a resident of Beaufort County, South Carolina.
5. Wright's Point Home Owners Association, Inc., ("Association") is a South Carolina non-profit corporation doing business in Beaufort County, South Carolina.
6. Venue is proper in this Court because of all the causes of action alleged herein arose in Beaufort County, South Carolina.

FACTUAL ALLEGATIONS – CONTROL OF ASSOCIATION

7. On March 29, 1999, Porter and his father, Jimmy W. Porter, jointly conveyed to Association portions of real estate depicted on a plat, which is recorded in plat book 66, page 184, of the Register of Mesne Conveyances for Beaufort County, South Carolina. The portions conveyed were those designated as "open spaces, ponds, community spaces, streets, roadways, right-of-ways, including, but not limited to, Wright's Point Circle, Wright's Point Subdivision".
8. On March 30, 1999, there was filed of record Declarations of Covenants, Conditions, Restrictions, and Easements for Wright's Point ("Declarations"), which Declarations were made jointly by Porter and Jimmy W. Porter. Said Declarations are attached hereto as Exhibit "A" and incorporated herein by reference. Pursuant to said Declarations, the Developer was Porter.
9. Wright's Point Subdivision is described in the Declarations as that real estate shown on the "Final Plat of Wright's Point Subdivision" recorded in plat book 64, page 150, of the Register of Mesne Conveyances for Beaufort County, South

Carolina. Said plat shows 44 lots within Wright's Point Subdivision and "Lot or Lots" as defined in the Declarations reference those shown on said plat.

10. Each of the Plaintiffs is an "Owner" of a "Lot" as those terms are defined in the Declarations. Pursuant to the terms of the Declarations, each "Owner" of a "Lot" is deemed a member of the Association with the right to vote on matters under the authority and control of the Association.

11. Pursuant to Article 7.01 of the Declarations, the Developer had the right to appoint and remove all members of the Board of Directors of the Association and all officers of the Association until such time as the last "Lot" in the Wright's Point Subdivision was conveyed "to a Person other than Developer or Builder".

Developer has conveyed all of the "Lots" within Wright's Point Subdivision. In accordance with the terms of the Declarations, upon the last of such conveyances, the right to appoint directors and officers of the Association passed to the "Owners" of the "Lots" and a special meeting of the Association was called and the "Owners" elected a new Board of Directors to take control of the Association. At that time, individual "Owners" were elected as directors of the Association.

12. In January, 2004, the Association held its annual meeting. At that time, the Plaintiffs were elected as the directors of the Association. On March 10, 2004, at a special meeting of the "Owners", 28 of the 44 "Owners" were represented and unanimously ratified the election of the new directors and unanimously approved the filing of the claims set forth in this Compliant.

13. Porter, the original Developer, claims a continuing right to control the Association and has purported to appoint McNeal as the President of the Association. McNeal claims the right to control the Association pursuant to his purported appointment by Porter as President of the Association. Porter and McNeal have failed and refused to deliver all books, accounts, and records of the Association to its new directors. Further, Porter and McNeal have caused assessments for dues payable by "Owners" to be billed to the members of the Association and have exerted control over the management company previously retained to manage the affairs of the Association.

FACTUAL ALLEGATIONS – USE OF COMMON AREAS

14. Porter conveyed to McNeal a portion of the real estate immediately outside the gates of Wright's Point Subdivision, which real estate is described as Parcel "B" on plat book 64, page 98 of the Register of Mesne Conveyances for Beaufort County, South Carolina. The rest of the real estate immediately outside the gates of Wright's Point Subdivision is owned by McNeal Partnership, which obtained title to the land from Jimmy W. Porter and not from Porter. Said real estate is described as Parcel "D" on plat book 88, page 110 of the Register of Mesne Conveyances of Beaufort County, South Carolina.

15. McNeal and McNeal Partnership claim the right to develop Parcels B and D and they claim that Parcels B and D are entitled to the use of and access to the common areas and amenities of Wright's Point Subdivision. McNeal and McNeal Partnership have represented that buyers within Parcels B and D will have

access to and the use of the common areas and amenities of Wright's Point Subdivision.

16. No provision within the Declarations gives any right to the owners or occupants of land outside of Wright's Point Subdivision to become members of the Association or to use the common areas of Wright's Point Subdivision.

17. The right of access to and use of the Wright's Point Subdivision common areas and amenities is claimed by McNeal despite the fact that he is not the "Developer" as defined by the Declarations, despite the fact that McNeal has never purported to assume the obligations of the Developer pursuant to the Declarations, despite the fact that McNeal at no time was the successor-in-title or successor-in-interest to Porter to "all of the property then subject to this Declaration" as required by the Declarations, despite the fact that no conveyance to McNeal expressly designated him as the "Developer" as required by the Declarations, and despite the fact that a portion of the real estate sought to be so developed by McNeal and/or McNeal Partnership was acquired from a source other than the Developer.

DERIVATIVE NATURE OF CLAIMS

18. Many of the Plaintiffs' claims herein are derivative in nature and are brought to redress wrongs to the Association. Plaintiffs share a common interest with the members of the Association in pursuing the remedies sought herein. Despite demand, Porter and McNeal continue to claim to have the right to control the Association and efforts to resolve this dispute through negotiation with Porter and McNeal have failed. Porter and McNeal continue to claim the right to control the

Association. They continue to exert control over the management company who handles the administrative affairs of the Association.

19. This action will benefit all members of the Association and the Association is made a party to this proceeding to enforce its rights for the benefit of those members, including Plaintiffs, by preserving for the benefit of the Association and its members the exclusive use and enjoyment of the common areas and amenities owned by the Association and by clarifying the right of governance and control of the Association.

FIRST CAUSE OF ACTION
(FOR A DECLARATORY JUDGMENT)

20. The facts and allegations set forth in paragraphs 1-19 are incorporated herein by reference.

21. Pursuant to section S.C.Code §15-53-10 et. seq., Plaintiffs invoke the jurisdiction of this Court to declare the rights and obligations of the parties pursuant to the Declarations and other relevant documents and to find as follows:

- a. That the right of Porter to control the appointment of directors and officers of the Association has terminated and that the "Owners" of "Lots" within Wright's Point Subdivision are entitled to control the business and affairs of the Association.
- b. That Plaintiffs be found to be validly elected directors of the Association.
- c. That McNeal has no right to act as the "Developer" or the Developer's representative in connection with the business and affairs of the Association or of Wright's Point Subdivision.

- d. That McNeal and McNeal Partnership have no right to annex real estate owned by either of them to Wright's Point Subdivision or to permit owners of any part of that real estate access to or use of the common areas and amenities owned by the Association and located within Wright's Point Subdivision.
- e. That owners of real estate other than that depicted on the Final Plat of Wright's Point Subdivision, recorded in Plat Book 64 at page 150 in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina, have no rights of access or use of the common areas of Wright's Point Subdivision owned by the Association.
- f. That Porter and the assigns of Porter, including McNeal, have no right to include additional real estate within the scope of the Declarations.

SECOND CAUSE OF ACTION
(ACCOUNTING)

22. The facts and allegations set forth in paragraphs 1-21 are incorporated herein by reference.

23. The Plaintiffs are entitled to a full accounting from the Defendants of all income and expenses of the Association and restoration to the Association of the amounts, if any, over which the Defendants, or any of them, may have wrongfully exerted control.

THIRD CAUSE OF ACTION
(FOR AN INJUNCTION)

24. The facts and allegations set forth in paragraphs 1- 23 are incorporated herein by reference.

25. Absent the relief prayed for herein, the Plaintiffs and the Association will suffer immediate and irreparable injury, loss, or damage for which there is no adequate remedy at law as a result of the Defendants, or any or them, attempting to assert control over the Association.

26. By virtue of the actions of the Defendants to date, "Owners" of "Lots" within Wright's Point Subdivision are unsure as to whom assessments are to be paid, unsure as to who has the right to set the budget and approve expenditures of the Association, and are exposed to the loss of peace and tranquility and potential loss of property values.

27. Plaintiffs seek both a temporary and permanent injunction against the Defendants, and each of them, in the following particulars:

- a. Restraining and enjoining Defendants from asserting or attempting to assert control over the business or affairs of the Association.
- b. Restraining and enjoining Defendants, and each of them, from granting to any owner of real estate outside of Wright's Point Subdivision any purported right to access or use of the common areas of the Association.

WHEREFORE, Plaintiffs pray that the Court enter its Declaratory Judgment as set forth above, that the Defendants, and each of them, be ordered to account to the Association for any assets of the Association that have come

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WHEREAS, THE WITHIN RESTRICTIONS WERE RECORDED WITH INCORRECT PROPERTY DESCRIPTIONS ATTACHED AS EXHIBIT "A"

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NOW, THEREFORE, THE LEGAL DESCRIPTIONS ATTACHED AS EXHIBIT "A" HAVE BEEN CORRECTED AND THE DOCUMENT IS BEING RE-RECORDED HERewith

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DECLARATIONS OF COVENANTS, CONDITIONS,
RESTRICTIONS AND EASEMENTS FOR WRIGHT'S POINT

16190
THIS DECLARATION made this 24th day of April, 1998, by
Anthony R. Porter and Jimmy W. Porter, (hereinafter referred to as
"Developer").

W I T N E S S E T H

WHEREAS, Developer is the owner of certain real property
lying and being in Beaufort County, South Carolina, which real
property is more particularly described in Exhibit "A" attached
hereto and by reference made a part hereof; and

WHEREAS, Developer desires to provide for the preservation
and enhancement of the property values in Wright's Point and for
the maintenance of this Property (as hereinafter defined) and the
improvements thereon, and to this end desires to subject the real
property described in Exhibit "A" to the covenants, conditions,
restrictions, and easements hereinafter set forth, each and all of
which is and are for the benefit of the Property and each owner
thereof; and

WHEREAS, the Declarant, has deemed it desirable, for the
efficient preservation of the character of said development, to
create an agency to which should be delegated and assigned the
power and authority of maintaining, administering and enforcing the
covenants and restrictions governing the same and collecting and
disbursing all assessments and charges necessary for such
maintenance, administration and enforcement, as hereinafter
created; and

WHEREAS, the Developer, has or will incorporate under the
laws of the State of South Carolina, as a non-profit corporation,
Wright's Point Home Owners Association, Inc., for the purpose of
exercising the functions aforesaid, and which are hereinafter more
fully set forth;

NOW, THEREFORE, Developer hereby declares that all of the
real property described in Exhibit "A" is and shall be held,
transferred, sold, mortgaged, conveyed, leased, occupied and used
subject to the covenants, conditions, restrictions, easements,
charges and liens hereinafter set forth.

ARTICLE I - DEFINITIONS

The following words and terms, when used in this Declaration,
or in any amendment or supplement to this Declaration (unless the
context shall clearly indicate otherwise), shall have the following
meanings:

1.01 "Wright's Point Architectural Committee" shall mean and
refer to Anthony R. Porter, and Jimmy W. Porter or such other
individual(s) as Developer may appoint, or such entity to which the



Wright's Point Architectural Committee may assign its duties, until all improvements constructed thereon and sold to permanent residents. At such time as all of the Lots in the Subdivision have been fully developed, the Developer shall notify the Board and all the Owners of Lots in the Subdivision to that effect, at which time the Developer's rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate. Notice to the Board and all the owners by Developer under this provision shall be in writing. After receipt of said notice from the Developer, the Board shall have the right, power and authority to elect a successor Wright's Point Architectural Committee which shall consist of not less than two (2) Owners. The rules and regulations shall be prescribed by the Board. Notwithstanding the foregoing, the Developer may, in its sole discretion, relinquish control over the Wright's Point Architectural Committee at any time prior to completion and sale of all Lots in the Subdivision by so notifying the Board and the Owners of Lots in the Subdivision as set forth hereinabove.

1.02. "Articles of Incorporation" shall mean and refer to the Articles of Incorporation of Wright's Point Home Owners Association, Inc., as the same may be amended from time to time.

1.03. "Association" shall mean and refer to Wright's Point Home Owners Association, Inc., a South Carolina non-profit corporation.

1.04. "Board of Directors" or "Board" shall mean and refer to the Board of Directors of the Association, which is the governing body of the Association.

1.05. "Builder" shall mean any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots.

1.06. "By-Laws of the Association" or the "By-Laws" shall mean and refer to those By-Laws of Wright's Point Home Owners Association, Inc., which govern the administration and operation of the Association, as the same may be amended from time to time.

1.07. "Common Area" shall mean and refer to all real and personal property now or hereafter owned by the Association for the common use and enjoyment of the Owners.

1.08. "Common Assessment" shall mean and refer to assessments levied against all Lots in the Property to fund Common Expenses.

1.09. "Common Expenses" shall mean and refer to all expenditures lawfully made or incurred by or on behalf of the Association, together with all funds lawfully assessed for the creation or maintenance of reserves, pursuant to the provisions of this Declaration.

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1.10 "Community-Wide Standard" shall mean the standard of conduct, maintenance, or other activity generally prevailing throughout the Property. Such standard may be more specifically determined by the Board of Directors and the Wright's Point Architectural Committee.

1.11 "Declaration" shall mean the Covenants, Conditions, Restrictions, and Easements and all other provisions herein set forth in this entire document, as the same may be amended from time to time.

1.12 "Developer" shall mean and refer to (a) Anthony R. Porter, or (ii) any successor-in-title or any successor in interest to Anthony R. Porter, to all of the Property then subject to this Declaration and provided in the instrument of conveyance to any such successor-in-title or interest is expressly designated as the "Developer" hereunder by the grantor of such conveyance, which grantor shall be the "Developer" hereunder at the time of such conveyance.

1.13 "Lot" or "Lots" shall mean and refer to Lots as shown on the Plat as may be amended from time to time. Each owner of a dwelling unit within any multi-family lot shall be considered as an individual lot owner for the purposes of this document.

1.14 "Mortgage" shall mean and refer to a security deed, deed of trust, mortgage, installment land sales contract or other similar security instrument granting, creating or conveying a lien upon, a security interest in or a security title to a Lot.

1.15 "Mortgagee" shall mean and refer to the Holder of a Mortgage.

1.16 "Owner" shall mean and refer to the record owner, whether one or more Persons, including Developer, of the fee simple title to any Lot, but excluding those persons having such an interest under a Mortgage.

1.17 "Person" shall mean and refer to a natural person, corporation, partnership, association, trust or other legal entity, or any combination thereof.

1.18 "Plat" shall mean and refer to that certain Final Plat of Wright's Point Subdivision, prepared by Gasque and Associates, Inc., David E. Gasque recorded in Plat Book 64 at Page 150, in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina, as same may be amended from time to time.

1.19 "Property" shall mean and refer to that tract or parcel of land described in Exhibit A attached hereto and by reference made a part hereof.

1.20 "Structure" shall mean and refer to: (i) any thing or

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object, the placement of which upon any Lot may affect the appearance of such Lot, including by way of illustration and not limitation, any building or part thereof, garage, porch, gazebo,

1.21 "Subdivision" shall mean and refer to Wright's Point.

1.22 "Single Family" shall mean and refer to one (1) residence for one (1) family and appurtenant structures as subject to the Declaration of Covenants, Conditions, Restrictions and Easements as set forth in this document.

1.23 "Multi-Family" shall mean and refer to more than one (1) single family located upon a single parcel or lot of land including but not limited to duplexes, triplexes, quadplexes, condominiums, etc. and multiple family dwellings not to exceed sixteen (16) units per acre.

1.24 "Commercial" shall mean such use as Developer may deem proper which may in whole or in part benefit the Lot Owners of Wright's Point.

ARTICLE II-DEVELOPMENT

2.01 Development of Property. All Lots within the Subdivision shall be and are hereby restricted exclusively to the following uses:

- (a) Single Family;
- (b) Multi-Family;
- (c) Commercial; and
- (d) Mixed-Use

The uses set forth above are designated on the aforementioned plat of Gasque and Associates, Inc., David E. Gasque, R.L.S., as may be amended from time to time.

The Developer shall determine the amount of multi family uses that may occur on any lot at or prior to the initial conveyance of a lot to a Lot Owner. Such designation shall be in writing and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina. In the event the Developer is the Lot Owner such designation shall be on a recorded plat.

Developer shall have the right, but not the obligation, for so long as Developer owns any Lot primarily for the purpose of sale, to make improvements and changes to the Common Area and to all Lots owned by Developer, including, without limitation, (i) changes in the location of boundaries of any Lots owned by Developer, (ii) installation and maintenance of any water or other

utility systems and facilities; and (iii) installation of security facilities. 2282

2.02 Interest Subject to Plan of Development. Every purchaser of a Lot shall purchase such Lot and every Mortgagee and lienholder holding an interest therein shall take title, or hold such security interest with respect thereto, with notice of this Article. Any provision of this Declaration to the contrary notwithstanding, the provisions of this Article II may not be abrogated, modified, rescinded, supplemented or amended in whole or in part without the prior written consent of Developer.

2.03 Subdivision Plat. Developer reserves the right to modify, amend, revise and add to the Plat, at any time and from time to time, setting forth such information as Developer may deem necessary with regard to the Subdivision, including, without limitation, the locations and dimensions of the Lots, the private roads, utility systems, drainage systems, utility easements, drainage easements, access easements and building and set-back line restrictions.

Developer reserves unto himself, his heirs and assigns, the right to develop and submit additional phases to this Declaration of Covenants, Conditions, Restrictions and Easements, Wright's Point Homeowners Association, Inc. and related documents. Such additional phases shall be limited to the property which Developer has acquired from Lewis H. Wright, et al and/or Mary P. Logan, or any properties contiguous thereto. Such additional phases will be subject to all of the Covenants, Conditions, Restrictions and Easements and the By-Laws upon Developer, his heirs and assigns, filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development.

ARTICLE III. Property Rights

3.01 General. Each Lot shall for all purposes constitute real property which shall be owned in fee simple and which subject to the provisions of this Declaration may be conveyed, transferred and encumbered the same as any other real property. Except as provided in Section 2.01 hereof, Lots shall not be subdivided and the boundaries between Lots shall not be relocated unless the relocation thereof is made with the consent of the Board and of Developer, so long as Developer owns a Lot primarily for the purpose of sale. Each Lot in the Subdivision shall be subject to those easements, if any, which are shown on the Plat as affecting such Lot.

3.02 Easements for Developer. Developer hereby reserves for himself, his heirs and assigns, the following easements and rights-of-way in, on, over, under or through any portion of the Property owned by Developer and the Common Area for so long as Developer owns any Lot primarily for the purpose of sale.

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(a) For the erection, installation, construction and maintenance of wires, lines and conduit, and necessary or proper attachments in connection with the transmission of electricity, gas, water, telephone, community antenna, television cables and other utilities;

(b) For the construction of improvements on the Lots

(c) For the installation, construction and maintenance of storm-water drains, and for any other public or quasi-public utility facility;

(d) For maintenance and use of a sales office and parking spaces in connection with its efforts to market Lots; and

(e) For the maintenance and use of such other facilities, equipment, and signs as in the sole discretion of Developer may be reasonably required, convenient or incidental to the completion, improvement and sale of Lots or the developing of Lots.

3.03 Easements for Association. There is hereby reserved a general right and perpetual easement for the benefit of the Association, its directors, officers, agents and employees, including, but not limited to, any manager employed by the Association and any employees of such manager, to enter upon any Lot or any portion thereof (including that portion of each Lot designated for utility easements as shown on the Plat) in the performance of their respective duties and responsibilities. Said easement shall include, but not be limited to, the right to enter upon the Lots (i) to perform the maintenance responsibilities of the Association set forth in Section 5.01 hereof, and (ii) for emergency, security and safety reasons, which right may also be exercised by all policemen, firemen, ambulance personnel and similar emergency personnel in the performance of their respective duties. Except in the event of emergencies, this easement is to be exercised only during reasonable hours and then, whenever practicable, only upon reasonable advance notice to the Owner of the Lot directly affected thereby. This easement shall specifically include the right to enter in, on, under and to cross over those Lots in the Subdivision upon which any entryway treatment, fence or wall, lighting or irrigation facilities or equipment, or entryway landscaping is located for the purpose of inspecting, maintaining and repairing same.

3.04 Easement for Owners. Subject to the provisions herein, every member of the Association shall have a right and easement of use and enjoyment in and to the Common Area (including, without limitation, the right of pedestrian and vehicular access, ingress and egress over those portions of the Common Area from time to time designated for such purposes), and the right of use of all utility easements as shown on the plat, which right and easement shall be appurtenant to and shall pass with the title to every Lot,

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subject to the right of the Association, acting through the Board,
to:

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(a) Adopt and publish rules and regulations governing the use of the Common Area;

(b) Suspend an Owner's voting rights for any period during which any assessment of the Association against said Owner's Lot remains unpaid;

(c) Grant easements or rights of way on, over, across and through the Common Area to any public agency, authority or utility or to any utility company or cable television system; and

(d) dedicate or transfer all or any part of the Common Area to any public agency, authority or utility for such purposes and subject to such conditions as may be agreed to by the members. No such dedication or transfer shall be effective unless an instrument signed by two-thirds (2/3) of the Owners and Developer, if Developer owns a Lot primarily for the purpose of sale agreeing to such dedication or transfer, has been recorded in the records of Beaufort County, South Carolina.

3.05 Title to Common Area. Developer may from time to time convey to the Association, at no expense to the Association, real and personal property for the common use and enjoyment of the Owners. The Association hereby covenants and agrees to accept from Developer all such conveyances of real and personal property. Notwithstanding any legal presumption to the contrary, the fee simple title to such real and personal property designated as Common Area or for public use, together with all rights therein, shall be reserved to Developer until such time as the real and/or personal property is conveyed to the Association or to any municipality or other governmental body, agency, or authority. It is the intent of Developer to convey to the Association the private roads serving the Lots as shown on the Plat.

ARTICLE IV-MEMBERSHIP

Every Owner shall be deemed a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot, and ownership of a Lot shall be the sole qualification for such membership. In the event that fee simple title to a Lot is transferred or otherwise conveyed, the membership in the Association which is appurtenant thereto shall automatically pass to such transferee. The foregoing is not intended to include Mortgagees or any other persons who hold an interest merely as security for the performance of an obligation, and the giving of a security interest shall not terminate or otherwise affect an Owner's membership in the Association. Notwithstanding any of the foregoing to the contrary, no Owner, whether one or more persons, shall have more than one membership per Lot. The rights and privileges of membership, including the right to vote and to hold an office in the Association, may be

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exercised by a member or a member's spouse, but in no event shall more than one vote be cast or more than one office held for each Lot owned. When more than one person holds an interest in any Lot, the vote for such Lot shall be exercised as the Owners of such Lot themselves determine. The vote appurtenant to such Lot shall be suspended in the event more than one person seeks to exercise it. The voting weight appurtenant to each lot is equal and each Lot shall have one vote.

ARTICLE V-MAINTENANCE

5.01 Responsibilities of Owners. Unless specifically identified herein as being the responsibility of the Association, all maintenance and repair of Lots, together with all other improvements thereon or therein, shall be the responsibility of the owner of such Lot. Each owner shall be responsible for maintaining his or its Lot in a neat, clean and sanitary condition, and such responsibility shall include but not be limited to the maintenance and care of all exterior surfaces of all improvements, buildings and other structures located on the Lot, and all landscaping. As provided in Section 5.02(b) hereof, each Owner shall also be obligated to pay for the costs incurred by the Association for repairing, replacing, maintaining or cleaning any item which is the responsibility of such Owner but which responsibility such Owner fails or refuses to discharge. No Owner shall decorate, change or otherwise alter the appearance of any portion of the exterior of his residence or the landscaping, grounds, or other improvements within a Lot unless such decoration, change or alteration is first approved, in writing by Wright's Point Architectural Committee as provided in Article IX hereof, or do any work which, in the reasonable opinion of the Wright's Point Architectural Committee, would jeopardize the soundness and safety of the Subdivision, reduce the value thereof or impair any easement or hereditament thereto, without in each such case obtaining the prior written approval of the Wright's Point Architectural Committee.

5.02 Responsibilities of Association.

(a) Except as may be herein otherwise specifically provided, the Association shall maintain, landscape and keep in good repair, as the case may be, (i) all portions of the Common Area and improvements thereon, if any, (ii) the entryway treatment, entryway signs, entryway landscaping, entrance wall and street signs for the Subdivision, (iii) the privacy wall and/or fence, if any along boundaries serving the Subdivision, (iv) the landscaping treatment on Highway 280, if any, serving the Subdivision, (v) all lighting and irrigation facilities and equipment, if any, located within the Common Area or located within any utility easement or landscape easement as shown on the Plat and serving only the Subdivision, (vi) all utility lines, facilities and equipment located within the Common Area or located within any utility easement or landscape easement as shown on the Plat and

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serving the Subdivision, if such utility lines, facilities and equipment are not maintained by a public authority, public service district, public or private utility or other person, (vii) all roads and alleyways shown on the Plat and serving only the Subdivision, (viii) all wetlands, (ix) all drainage areas and drainage system located within the development which is not maintained by any governmental entity, and (x) all screening areas as required by any governmental entity. The Association shall not be liable for injury or damage to any person or property caused by the elements or by any Owner or any person. No diminution or abatement of assessments shall be claimed or allowed by reason of any alleged failure of the Association to take some action or to perform some function required to be taken or performed by the Association under this Declaration, or for inconvenience or discomfort arising from the making of improvements or repairs which are the responsibility of the Association, or from any action taken by the Association to comply with any law, ordinance or with any order or directive of any municipal or other governmental authority, the obligation to pay such assessments being a separate and independent covenant on the part of each owner.

(b) In the event that Developer or the Board determines that; (i) any Owner has failed or refused to discharge properly his or its obligations with regard to the maintenance, cleaning, repair or replacement of items for which he or it is responsible hereunder, or (ii) that the need for maintenance, cleaning, repair or replacement which is the responsibility of the Association hereunder is caused through the willful or negligent act of an Owner, his family, tenants, guests, or invitees, then and in either event, Developer or the Association, except in the event of an emergency situation, shall give such Owner written notice of Developer's or Association's intent to provide such necessary maintenance, cleaning, repair or replacement, at the sole cost and expense of such Owner and setting forth with reasonable particularity the maintenance, cleaning, repairs or replacement deemed necessary. Except in the event of emergency situations, such Owner shall have ten (10) days within which to complete the same in a good and workmanlike manner, or in the event that such maintenance, cleaning, repair or replacement is not capable of completion within said ten (10) day period, to commence said maintenance, cleaning, repair or replacement and diligently proceed to complete the same in a good and workmanlike manner. In the event of emergency situations or the failure of any Owner to comply with the provisions hereof after such notice, Developer or the Association may provide (but shall not have this obligations to so provide) any such maintenance, cleaning, repair or replacement at the sole cost and expense of such Owner, and to which such Owner and his Lot are subject and shall be collected as provided for herein for the collection of assessments. In the event that Developer undertakes such maintenance, cleaning, repair or replacement, the Association shall promptly reimburse Developer for Developer's costs and expenses.

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ARTICLE VI. Insurance and Casualty Losses

6.01 Insurance.

(a) The Board or its duly authorized agents shall have the authority to and may obtain and continue in effect adequate property insurance upon the Common Area, in such form as the Board deems appropriate, for the benefit of the Association and insuring all insurable improvements against loss or damage by fire or other hazards, including, without limitation, extended coverage, flood, vandalism and malicious mischief, such coverage to be in an amount sufficient to cover the full replacement cost (without depreciation but subject to such deductible levels as are deemed reasonable by the Board) of any repair or reconstruction in the event of damage or destruction from any such hazard.

(b) The Board or its duly authorized agents shall have the authority to and may obtain and continue in effect a public liability policy covering all damage or injury caused by the negligence of the Association, its members, its directors and officers, or any of its agents, and if available, at reasonable cost (in the sole discretion of the Board), a blanket fidelity bond or employee's dishonesty coverage for all officers, directors, employees and agents of the Association and all other persons handling or responsible for funds of the Association. Such public liability policy and bond shall provide such coverages as are determined to be necessary by the Board.

(c) The Board or its duly authorized agents shall have the authority to and may obtain (i) worker's compensation insurance to the extent necessary to comply with any applicable laws, and (ii) such other types and amounts of insurance as may be determined by the Board to be necessary or desirable.

(d) All such insurance coverage obtained by the Board shall be written in the name of the Association as trustee for each of the Owners and the costs of all such coverage shall be a common Expense. Exclusive authority to adjust losses under policies obtained by the Association and hereafter in force with respect to the Subdivision shall be vested in the Board.

6.02 Damage or Destruction to Improvements. Immediately after the damage or destruction by fire or other casualty to all or any part of the Association, the Board or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance, and, in any such event, the Board shall obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed property. Repair or reconstruction, as used in this Article VI, means repairing or restoring the damaged property to substantially the same condition in which it existed prior to the fire or other casualty. The Association shall restore or replace such damaged improvements. If the insurance proceeds, if any, for such damage or destruction are

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not sufficient to defray the cost thereof, and such deficiency cannot be appropriated from a reserve fund as may have been established for such purpose, the Board may levy a special assessment against all Owners, without the necessity of a vote pursuant to Section 8.04 hereof, such excess cost of repair or reconstruction. Such a special assessment shall be levied against the Owners equally in the same manner as annual assessments are levied, and additional assessments may be made at any time during or following the completion of any repair or reconstruction. Any and all sums paid to the Association under and by virtue of such assessments shall be held by and for the benefit of the Association together with the insurance proceeds, if any for such damage or destruction. Such insurance proceeds and assessments shall be disbursed by the Association in payment for such repair or reconstruction pursuant to and in accordance with such method of distribution as is established by the Board. Any proceeds remaining after defraying such costs shall be retained by and for the benefit of the Association.

6.03 Mortgagee Rights. The rights of the Board and of the Association to adjust losses under any property insurance policies insuring improvement constructed on any of the Common Area and to apply proceeds therefrom for the restoration and repair of such improvements shall be subject to the rights of any first priority mortgagee of the Common Area to adjust losses, receive insurance proceeds and, at such mortgagee's option, to apply such proceeds to the secured indebtedness owing to such mortgagee or to the restoration and repair of improvements under such conditions and safeguards as such mortgagee may deem appropriate.

ARTICLE VII. Administration

7.01 Control of Association. Except to the extent otherwise required by the provisions of the Official Code of Laws for South Carolina relating to nonprofit corporations, this Declaration, the By-Laws or the Articles of Incorporation, the powers herein or otherwise granted to the Association may be exercised by the Board, acting through the officers of the Association, without any further consent or action on the part of the Owners. Developer shall have the right to appoint and remove all members of the Board and any officer or officers of the Association until such time as the first of the following events shall occur; (i) the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder, or (ii) the surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer. Each Owner, by acceptance of a deed to or other conveyance of a Lot, vests in Developer such authority to appoint and remove directors and officers of the Association as provided by this Section 7.01 and by Section 11.01 hereof.

7.02 Duties and Powers. The duties and powers of the Association shall be those set forth in the provisions of the

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Official Code of Laws for South Carolina relating to nonprofit corporations, this Declaration, the By-Laws and the Articles of Incorporation, together with those reasonably implied to effect the purposes of the Association; provided, however, that if there are conflicts or inconsistencies between the Official Code of Laws for South Carolina, this Declaration, the Articles of Incorporation and the By-Laws, in that order, shall prevail, and each owner of a Lot, by acceptance of a deed or other conveyance therefore, covenants to vote in favor of such amendments as will remove such conflicts or inconsistencies. The Association may exercise any other right or privilege given to it expressly by this Declaration or by law, together with every other right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege given to it expressly by this Declaration or by law, together with every other right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege.

7.03 Rules and Regulations. The Association, through its Board, may make and enforce reasonable rules and regulations governing the use of the Lots and the Common Area, which rules and regulations shall be consistent with the rights and duties established by this Declaration.

ARTICLE VIII. Assessments

8.01 Purposes of Assessments. The assessments for Common Expenses provided for herein shall be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit and enjoyment of the Owners and occupants of the Subdivision, including but not limited to management fees, administration expenses, utility charges, insurance premiums, maintenance, landscaping and repair costs, and establishment of reserve funds, all as may be more specifically authorized from time to time by the Board.

8.02 Creation of Lien and Personal Obligation of Assessments. Each Owner of a Lot, other than Developer or a Builder, by acceptance of a deed or other conveyance therefore, whether or not it shall be so expressed in such deed or conveyance, is deemed to covenant and agree to pay to the Association: (a) annual assessments, such assessments to be established and collected as provided in Section 8.03 hereof, and (b) special assessments, such assessments to be established and collected as provided in Section 8.04 hereof, and (c) individual or specific assessments against any particular Lot which are established pursuant to the terms of this Declaration, including, but not limited to, fines as may be imposed against such Lot in accordance with Article XI hereof. Any such assessments, together with late charges, simple interest at the rate of twelve percent (12%) per annum, and court costs and attorneys' fees incurred to enforce or collect such assessments, shall be an equitable charge and a continuing lien upon the Lot against which each assessment is made. Each such assessment, together with late charges, interest, court

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costs and attorney's fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the assessment became due. The personal obligation for delinquent assessments shall not pass to an Owner's successors-in-title unless expressly assumed by them. Assessments shall be paid in such manner and on such dates as may be fixed by the Board.

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8.03 Computation of Annual Assessments. It shall be the duty of the Board at least thirty (30) days prior to the Association's fiscal year end to prepare a budget covering the estimated Common Expenses during the coming year, such budget to include a capital contribution or reserve account if necessary for the capital needs of the Association. The Board shall cause the budget and the proposed total of the annual assessments to be levied against Lots for the following year to be delivered to each Owner at least fifteen (15) days prior to the annual meeting. The total annual assessments shall be divided among the Lots equally, so that each Lot shall be subject to equal annual assessments. The budget and the annual assessments shall be come effective unless disapproved at the annual meeting by either (i) Developer, for so long as Developer has the authority to appoint and remove directors and officers of the Association, or (ii) a majority of the votes of all Owners of the Lots in the Subdivision. In the event that proposed budget is disapproved or the Board fails for any reason to determine the budget for the succeeding year, then and until such time as a budget shall have been determined as provided herein, the budget and annual assessments in effect for the then current year shall continue for the succeeding year. If any budget at any time proves inadequate for any reason, then the Board may call a meeting of the Association for the approval of a special assessment as provided in Section 8.04 hereof.

8.04 Special Assessment. In addition to the annual assessments authorized above, the Association, acting through the Board, may levy, in any assessment year, special assessments for Common Expenses or capital improvements, applicable to that year only, provided that except as otherwise permitted in Section 6.02 hereof, any such assessment shall be approved by (i) Developer, for so long as Developer owns any Lot primarily for the purpose of sale, and (ii) two thirds (2/3) of the votes of the Owners who are voting in person or by proxy at a meeting duly called for this purpose in accordance with the provisions of Section 8.06 hereof. The Board may make such special assessments payable in installments over a period which may, in the Board's discretion, extend in excess of the fiscal year in which adopted. Such special assessments are to be prorated among the Lots equally as provided with respect to annual assessments.

8.05 Individual Assessments. Any expenses of the Association occasioned by the conduct of less than all of the Owners shall be specifically assessed against such Owners and their respective Lots. The individual assessments provided for in this Section 8.05 shall be levied by the Board and the amount and due date of such assessment shall be as specified by the Board.

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8.06 Notice of Meeting and Quorum. Written notice of the annual meeting of the Association, as well as any other meeting called for the purpose of taking any action authorized under Sections 8.03 and 8.04 hereof, shall be sent to all members not less than fifteen (15) days nor more than forty-five (45) days in advance of such meetings. With respect to annual meetings, the presence of members or proxies entitled to cast over fifty percent (50%) of all the votes of the Association shall constitute a quorum.

8.07 Liens. All sums assessed against any Lot pursuant to this Declaration, together with court costs, reasonable attorneys' fees, late charges, and interest as provided herein, shall be secured by an equitable charge and continuing lien on such Lot in favor of the Association. Such lien shall be superior to all other liens and encumbrances on such Lot except only for (i) liens of ad valorem taxes, and (ii) liens for all sums unpaid on a first priority Mortgage or on any Mortgage to Developer, or its affiliates, successors or assigns, and all amounts advanced pursuant to any such Mortgage and secured thereby in accordance with the terms of such instrument. Sale or transfer of a Lot shall not affect the assessment lien. Notwithstanding the foregoing to the contrary, the subordination of the assessment lien to the lien of first priority Mortgages shall only apply to such assessments which have become due and payable prior to a Foreclosure. Any Mortgagee who acquires title to a Lot by Foreclosure shall be liable for assessments thereafter becoming due. All other persons acquiring liens or encumbrances on any Lot after this Declaration shall have been recorded shall be deemed to consent that such liens or encumbrances shall be inferior to such future liens for assessments as provided herein, whether or not such prior consent shall be specifically set forth in the instruments creating such liens or encumbrances.

8.08 Effect of Nonpayment; Remedies of the Association. Any assessments which are not paid when due shall be delinquent. Any assessment delinquent for a period of more than (10) days after the date when due shall incur a late charge in an amount as may be determined by the Board from time to time and shall also commence to accrue simple interest at the rate of twelve percent (12%) per annum. A lien and equitable charge as herein provided for each assessment shall attach simultaneously as the same shall become due and payable, and if an assessment has not been paid within thirty (30) days, the entire unpaid balance of the assessment may be accelerated at the option of the Board and be declared due and payable in full. The continuing lien and equitable charge of such assessment shall include the late charge established by the Board, interest on the principal amount due at the rate of twelve percent (12%) per annum, all costs of collection (including reasonable attorneys' fees and court costs), and any other amounts provided or permitted hereunder by law. In the event that the assessment remains unpaid after sixty (6) days from original due date, the

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Association may as the Board shall determine, institute suit to collect such amounts and to foreclose its lien. The equitable charge and lien provided for in this Article shall be in favor of the Association, and each Owner, by his acceptance of a deed or other conveyance to a Lot, vests in the Association and its agents the right and power to bring all actions against him personally for the collection of such assessments as a debt and/or to foreclose the aforesaid lien in the same manner as other liens for the improvement of real property. The Association shall have the power to bid on the Lot at any foreclosure sale and to acquire, hold, lease, mortgage and convey the same. No Owner may waive or otherwise escape liability for the assessments provided for herein, including by way of illustration but not limitation, abandonment of his Lot or by renunciation of membership in the Association, and no Owner shall remain personally liable for assessments, interest and late charges which accrue prior to a sale, transfer or other conveyance of his Lot.

8.09 Certificate. The Treasurer, or the manager of the Association shall, within ten (10) days of a written request and upon payment of such fee as is from time to time determined by the Board, furnish to any Owner, purchaser from such Owner, or such Owner's Mortgagee which requests the same, a certificate in writing signed by said Treasurer or manager setting forth whether the assessments for which such Owner is responsible have been paid, and, if not paid, the outstanding amount due and owing, together with all fines, accrued interest and other penalty charges. Such certificate shall be conclusive evidence against all but such Owner of payment of any assessments stated therein to have been paid.

8.10 Date of Commencement of Annual Assessments. The annual assessment provided for herein shall commence as to each Lot on the day on which such Lot is conveyed to a Person other than Developer or a Builder and shall be due and payable in such manner and on such schedule as the Board may provide. Annual assessments and any outstanding special assessments shall be adjusted for each Lot according to the number of months then remaining in the then fiscal year of the Association.

ARTICLE IX. Architectural Standards.

No construction, which term shall include within its definition staking, clearing, excavation, grading, and other site work, no exterior alteration or modification of existing improvements, and no plantings or removal of plants, trees, or shrubs shall take place except in strict compliance with this Article, until the requirements of the Wright's Point Code (as that term is defined below) and other requirements of this Article have been fully met, and until the approval of the Wright's Point Architectural Committee ("WPAC") has been obtained pursuant to Section 1 below. The WPAC may establish reasonable fees to be charged by the Committee for review of applications hereunder and

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may require such fees to be paid in full prior to review of any application. 2293

This Article shall not apply to the activities of the Declarant.

The Board of Directors shall have the authority and standing, on behalf of the Association, to enforce in courts of competent jurisdiction decision of the WPAC. This Article may not be amended without the Declarant's written consent.

9.01 Wright's Point Architectural Committee. The Wright's Point Architectural Committee (WPAC) shall consist of up to three (3), but not less than (2), persons. Members of the WPAC may include, but are not required to include, architects, professionals, or other persons who are not members of the Association. The WPAC shall have exclusive jurisdiction over all original construction and all modifications, additions, or alterations made on or to existing Lots or structures containing Lots and the open space appurtenant thereto, on any members of the WPAC who shall serve at the discretion of the Declarant. The Declarant may assign the rights and powers under this Article to the Association; provided, however, there shall be no surrender of this right except in a written instrument in recordable form executed by Declarant.

The WPAC shall promulgate the design and development guidelines consisting of the Community Standards and the Architectural Standards included in the Wright's Point Code Regulating Plan for the Properties and application and review. The Wright's Point Code may provide for different requirements and guidelines for different types of Lots within the Properties and may permit exceptions to be made by WPAC for architectural merit. Copies shall be available from the WPAC. The Wright's Point Code may be amended by the WPAC. It shall make the Wright's Point Code and review procedures available to Owners and builders who seek to engage in development of or construction upon any portion of the Properties and such Owners and builders shall conduct their operation strictly in accordance with the Wright's Point. The WPAC shall approve or disapprove plans submitted to it, or shall request additional information reasonably required by the review procedures within thirty (30) days after submission of the plans to the WPAC.

Nothing contained herein shall be construed to limit the right of an Owner to remodel the interior of a structure on a Lot, or to paint the interior of a structure any color desired; provided, modification or alterations to the interior of screened porches, patios and similar portions of a structure visible from outside the structure shall require the prior written approval by the WPAC.

9.02 Right to Inspect. Any member of the Board of Directors, the WPAC or its representatives shall have the right, during reasonable hours and after reasonable notice, to enter upon any property to inspect for the purpose of ascertaining whether or not these restrictive covenants have been or are being complied with. Such Person or Persons shall not be deemed guilty of trespass by reasons of such entry. In addition to any other noncompliance with this Section, the Board may record in the appropriate land records a notice of violation naming the violating Owner.

9.03 No Waiver of Future Approvals. The approval of the BPAC of any proposals or plans and specifications or drawings for any work done or proposed, or in connection with any other matter requiring the approval and consent of the WPAC, shall not be deemed to constitute a waiver of any right to withhold approval or consent to as to any similar proposals, plans and specifications, drawings, or matters whatever subsequently or additionally submitted for approval or consent.

9.04 Variance. The WPAC may authorize variances from compliance with any of its guidelines and procedures due to circumstances such as topography, natural obstructions, hardship or aesthetic or environmental considerations. Such variance shall be granted only in accordance with duly adopted rules and regulations. Such variances may be granted, however, when unique circumstances dictate and no variances shall (a) be effective unless in writing, (b) be contrary to the restrictions set forth in the body of this Declaration, or (c) estop the WPAC from denying a variance in other circumstances. For purposes of this Section, the inability to obtain approval of any governmental agency, the issuance of any permit, or the terms of any financing shall not be considered a hardship warranting a variance.

9.05 Compliance with Guidelines. Any contractor, subcontractor, agent, employee or other invitee of an Owner who fails to comply with the terms and provisions of the Wright's Point Code or the review procedure promulgated by the WPAC may be excluded by the Board from the Properties without liability to any Person.

9.06 No Liability.

(a) General. Review and approval of any application pursuant to this Article is made on the basis of aesthetic considerations only and the WPAC shall not bear any responsibility of ensuring the structural integrity or soundness of approved construction or modifications, nor for ensuring compliance with building codes and other governmental requirements. Neither the Declarant, the Association, the Board of Directors, the WPAC, or member of any of the foregoing shall be held liable for any injury, damages or loss arising out of the manner or quality of approved construction on or modifications to any Lot.

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(b) Encroachments. An encroachment of the chimney or ground level steps of the home built on a Lot into a right-of-way of the Properties must be authorized, by WPAC. If the encroachment is damaged by work within utility easement areas such damage shall be the responsibility of the Owner and the Owner shall indemnify and hold harmless Declarant and the WPAC.

ARTICLE X. Use Restrictions.

10.01 Use of Lots and Dwellings. Each Lot shall be used for the purposes set forth in Section 2.01. The use of a portion of a residence as an office by an Owner or his tenant shall not be considered to be a violation of this covenant if such use does not create regular customer, client or employee traffic or otherwise create a nuisance. The use of a residence or a portion thereof for business meetings, entertainment or the enjoyment or business of the Owner's employees, trustees, agents, clients or customers shall not be considered to be a violation of this covenant if such use does not create regular customer, client or employee traffic or otherwise create a nuisance.

10.02 Antennas. No television antenna, radio receiver, satellite dish or other similar device shall be attached to or installed on any portion of the Property, unless contained entirely within the interior of a building or other structure, nor shall radio or television signals, nor any other form of electromagnetic radiation, be permitted to originate from any Lot which may unreasonably interfere with the reception of television or radio signals within the Subdivision; provided, however, that Developer and the Association shall not be prohibited from installing equipment necessary for master antenna, security, cable television, mobile radio or other similar systems within the Subdivision.

10.03 Water Wells. No private water wells may be drilled or maintained on any Lot without the prior written approval of the Wright's Point architectural Committee.

10.04 Pets. No animals, livestock, birds or poultry of any kind shall be raised, bred or kept by any Owner upon any portion of the Property, provided that generally recognized house pets may be kept in residences, subject to rules and regulations adopted by the Association, through its Board, and further provided that such pet or pets are kept or maintained solely as domestic pets and not for any commercial purpose. No pet shall be allowed to make an unreasonable amount of noise or to become a nuisance. Pets shall be under leash or voice control at all times when walked or exercised outside of all fenced areas on a Lot.

10.05 Nuisances. No rubbish or debris of any kind shall be dumped, placed or permitted to accumulate upon any portion of the Property, nor shall any nuisance or odors be permitted to exist or operate upon or arise from the Property, so as to render any

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portion thereof unsanitary, unsightly, offensive or detrimental to persons using or occupying any other portions of the Property. Noxious or offensive activities shall not be carried on in any Lot and each Owner, his family, tenants, guests, invitees, servants and agents shall refrain from any act of use of a Lot which could cause embarrassment, discomfort, annoyance or nuisance to the occupants of other portions of the Subdivision or which would be in violation of any law or governmental code or regulations. Without limiting the generality of the foregoing provisions, no exterior speakers, horns, whistles, bells or other sound devices, except security and fire alarm devices used exclusively for such purposes, shall be located, used or placed within the Subdivision.

10.06 Motor Vehicles, Trailers, Boats, Etc. All automobiles owned or used by Owners or other than temporary guests and visitors shall be parked in garages to the extent that garage space is available. The Board of the Association shall have the authority to promulgate rules and regulations to govern or prohibit the outside storage or parking upon any Lot of any motor home, tractor, truck (other than pick-up trucks), commercial vehicles of any type, camper, motorized camper or motorized bicycle, motorized go-cart or any other similar vehicles, or any of them, from being kept, placed, stored, maintained or operated upon any portion of the Property if in the opinion of the Board such prohibition shall be in the best interests of the Subdivision. No Owners or other occupants of any portion of the Property shall repair or restore any vehicle of any kind upon or within any Lot except (i) within enclosed garages or workshops or (ii) for emergency repairs, and then only to the extent necessary to enable the movement thereof to a proper repair facility.

10.07 Sales and Construction Activities. Notwithstanding any provisions or restrictions contained in this Declaration to the contrary, it shall be expressly permissible for Developer, any Builder and their respective agents, employees, successors and assigns to maintain and carry on within the Property such facilities and activities as may be reasonably required, convenient or incidental to the completion, improvement and sale of Lots or the developing installation and operation of sales and construction trailers and offices, signs and model residences. The right to maintain and carry on such facilities and activities. The right to maintain and carry on such facilities and activities shall include specifically the right to use residences as model residences, and to use any residence as an office for the sale of residences, and to use any residence as an office for the sale of Lots and for related activities.

10.08 Fences. No fence or wall of any kind shall be erected, maintained or altered on any Lot by any Owner, other than Developer, without the prior written approval of the Wright's Point Architectural Committee.

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10.09 Signs. No signs whatsoever (including but not limited to commercial and similar signs) shall, without the Wright's Point Architectural Committee's prior written approval of plans and specifications thereof, be installed, altered or maintained on any Lot, or on any portion of a Structure or motor vehicle visible from the exterior thereof.

10.10 Garage Sales. All garage sales shall be conducted in accordance with applicable law and such rules and regulations as the Board may establish from time to time concerning same.

10.11 Clotheslines, Garbage Cans, Tanks, Etc. All clotheslines, garbage cans, above-ground storage tanks, mechanical equipment including, without limitation, electrical meters, gas meters and air conditioning compressors, and other similar items on Lots shall be located or screened so as to be concealed from view of adjacent streets.

10.12 Exterior Structures. No artificial vegetation, exterior sculptures, fountains or similar items shall be constructed, placed or maintained on any Lot without the prior written approval of the Wright's Point Architectural Committee.

10.13 Construction of Improvements. Construction of all dwellings on a Lot shall be completed within twelve (12) months of the commencement date of said construction. If any dwelling on a Lot is not completed within twelve (12) months of the commencement date of said construction, the Association, its employees, and agents, shall have the right, but not the obligation, to enter upon said Lot and to take such action as is necessary to complete construction of such dwelling, with the costs thereof being assessed against the owner of such Lot. Such Owner shall be personally liable to the Association for the direct and indirect costs of completion of said dwelling, and the liability for such costs shall constitute an equitable charge and continuing lien upon the Lot enforceable by the Association in the same manner as other liens for the improvement of real property or by any other appropriate proceeding in law or in equity. The Association shall give notice to the Owner of such Lot prior to commencing any work and the provisions thereof shall be applicable with respect to the foregoing.

10.14 Zoning and Private Restrictions. None of the covenants, restrictions or easements created or imposed by this Declaration shall be construed as permitting any action prohibited by applicable zoning laws, or by the laws, rules or regulations of any governmental body. In the event of any conflict between such laws, rules or regulations and the covenants, restrictions and easements created or imposed by this Declaration, the more restrictive provision shall govern and control.

10.15 Subdivision of Lots. No Lot shall be subdivided or

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its boundary lines changed except with the prior written approval of the Board of Directors of the Association. Declarant, however, hereby expressly reserves the right to replat any Lot or Lots owned by Declarant. Any such division, boundary line change, or replatting shall not be in violation of the applicable subdivision and zoning regulations.

10.16 Tree Removal. No trees with a measure of over six (6") caliper or greater shall be removed, except for safety reasons, unless approved in accordance with Article XI of this Declaration. In the event of an intentional or unintentional violation of this section, the violator may be required, by the committee having jurisdiction, to replace the removed tree with one (1) or more trees of such size and number, and in such locations, as the WPAC may determine in its sole discretion.

10.17 Utility Easements. In addition to all other easements for utilities that may be otherwise addressed within these Covenants the Developer reserves unto itself, and/or any utility entity that may service the area, an easement for purposes of installing and maintaining utilities within any lot in those areas as defined on the plat of Gasque and Associates, Inc., as heretofore set forth.

10.18 Setbacks. No buildings or structures may be located within any setback area. The setback areas are defined on the plat of Gasque and Associates, Inc., as herein set forth.

10.19 Private Docks. Any application for a dock permit by any Lot Owner shall be in accordance with the Master Dock Plan on file with the South Carolina Coastal Council.

10.20 Recreational Improvements. The Developer reserves unto himself, his heirs and assigns, for the common use of all lot owners the right to install and maintain recreational improvements, including but not limited to benches, seating facilities, playground equipment and other related improvements for recreational activities.

10.21 Buffers. Developer reserves unto himself, his heirs and assigns, an easement for the purposes of installing and maintaining a buffer in those areas shown on the plat of Gasque and Associates, Inc. heretofore set forth. Developer, his heirs and assigns shall have the right to plant and maintain trees, shrubs and other buffering vegetation within any buffer area. No lot owner shall remove or disturb any vegetative matter or man-made screening within the buffer area. Developer, his heirs and assigns shall have the right to assign the buffer rights and responsibility of maintaining same to the Wright's Point Homeowners Association, Inc., should he elect to do so.

10.22 Pedestrian Easement. Developer reserves unto himself,

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his heirs and assigns, for the benefit and use of all lot owners the right to use those areas shown as Pedestrian Easement for purpose of ingress and egress to sidewalks and recreational areas as set forth in Section 10.20 above.

ARTICLE XI. Enforcement.

11.01 Enforcement. Each Owner shall comply strictly with the By-Laws and the published rules and regulations of the Association adopted pursuant to this Declaration, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Declaration and in the deed or other instrument of conveyance to his Lot, if any. Failure to comply with any of the same shall be grounds for imposing fines, for suspending voting rights or for instituting an action to recover sums due, for damages and/or for injunctive relief, such actions to be maintainable by Developer, the Board on behalf of the Association, or in a proper case, by an aggrieved Owner. Should Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees shall be paid by the violating Owner. Inasmuch as the enforcement of the provisions of this Declaration, the By-Laws and the rules and regulation of the Association are essential for the effectuation of the general plan of development contemplated hereby and for the protection of present and future Owners, it is hereby declared that any branch thereof may not adequately be compensated by recovery of damages and that Developer, the Association or any aggrieved Owner, in addition to all other remedies, may require and shall be entitled to the remedy of injunction to restrain any such violation or breach or any threatened violation of breach. No delay, failure or any omission on the part of the Developer, the Association or any aggrieved Owner in exercising any right, power or remedy herein provided shall be construed as an acquiescence thereto or shall be deemed a waiver of the right to enforce such right, power or remedy thereafter as to the same violation or breach, or as to a violation of breach occurring prior or subsequent thereto, and shall not bar or affect its enforcement. No right of action shall accrue nor shall any action be brought or maintained by anyone whatsoever against Developer or the Association for or on account of any failure to bring any action on account of any violation or breach, or threatened violation or breach, by any person of the provisions of this Declaration, the By-laws or any rules and regulations of the Association, however long continued.

11.02 Self-Help. In addition to any other remedies provided for herein the Developer and the Association or its duly authorized agents shall have the power to enter upon a Lot to abate or remove, using such force as may be reasonably necessary, any erection, thing or condition which violates this Declaration, the By-laws, the rules and regulations, the use restrictions or the

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Standards. Unless an emergency situation exists, the Board shall give the violating Owner ten (10) days written notice of its intent to exercise self-help. All costs of self-help, including reasonable attorneys' fees, shall be assessed against the violating Owner and shall be collected as provided for herein for the collection of assessments.

ARTICLE XII. General Provisions

12.01 Control by Developer. NOTWITHSTANDING ANY OTHER LANGUAGE OR PROVISION TO THE CONTRARY IN THIS DECLARATION, IN THE ARTICLES OF INCORPORATION OR IN THE BY-LAWS OF THE ASSOCIATION, Developer shall have the right to appoint and remove all members of the Board of the Association as provided by and for the term set forth in Section 7.01 hereof. Every grantee of any interest in the Property, by acceptance of a deed or other conveyance of such interest, agrees that Developer shall have the authority to appoint and remove directors and officers of the Association in accordance with the foregoing provisions of this Section 12.01 and the provisions of Section 7.01. Upon the expiration of Developer's right to appoint and remove directors and officers of the Association pursuant to the provisions of Sections 7.01 and this Section 12.01, such right shall pass to the Owners, including Developer, if Developer then owns one or more Lots, and a special meeting of the Association shall be called within a reasonable time thereafter. At such special meeting the Owners shall elect a new Board which shall undertake the responsibilities of the Board, and Developer shall deliver all books, accounts and records, if any, which Developer has kept on behalf of the Association and any agreements or contracts executed by or on behalf of the Association during such period and which Developer has in its possession.

12.02 Amendments by Developer. During any period in which Developer retains the right to appoint and remove any directors and officers of the Association, Developer may unilaterally amend this Declaration by an instrument in writing filed and recorded in the records of the office of the Register of Deeds for Beaufort County, South Carolina, without the approval of any Owner or Mortgagee; provided, however, that (i) in the event that such amendment materially alters or changes any Owner's right to the use and enjoyment of his Lot as set forth in this Declaration or adversely affects the title to any Lot, such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby, or (ii) in the event that such amendment would materially and adversely affect the security title and interest of any Mortgagee, such amendment shall be valid only upon the written consent thereto of all such Mortgagees so affected. Any amendment made pursuant to this Section 12.02 shall be certified by Developer as having been duly approved by Developer, and by such Owners and Mortgagees if required, and shall be effective only upon recordation or at such later date as shall be specified in the amendment itself. Each Owner, by acceptance of a deed or other conveyance to a lot, agrees to be bound by such

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amendments as are permitted by this Section 12.02 and further agrees that, if request to do so by Developer, such Owner will consent to the amend of this Declaration or any other instruments relating to the Property (A) if such amendment is necessary to bring any provisions of any applicable governmental statute, rule or regulation or any judicial determination which shall be in conflict therewith, (b) if such amendment is necessary to enable any reputable title insurance company to issue title insurance coverage with respect to any Lots subject to this Declaration, (c) if such amendment is required by an institutional or governmental lender or purchaser of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to enable such improvements subject to his Declaration, or (d) if any such amendment is necessary to enable any governmental agency or reputable private insurance company to insure Mortgages on the Lots or other improvements subject to this Declaration.

12.03 Amendments by Association. Amendments to this Declaration, other than those authorized by Section 12.02 hereof, shall be proposed and adopted in the following manner:

(a) Notice of the subject matter of the proposed amendment shall be included in the notice of the meeting of the Association at which such proposed amendment is to be considered and shall be delivered to each member of the Association.

(b) At such meeting, a resolution adopting a proposed amendment may be proposed by either the Board or by members of the Association. Such amendment must be approved by Owners holding at least two-thirds of the total votes in the Association; Provided, however, (i) that any amendment which materially and adversely affects the security title and interest of any Mortgage must be approved by such Mortgagee, and (ii) during any period in which Developer owns a Lot primarily for the purpose of sale, such amendment must be approved by Developer.

(c) The agreement of the required percentage of the Owners and, where required, Developer and any Mortgagee, to any amendment of this Declaration shall be evidenced by their execution of such amendment or, in the alternative, the sworn statement of the President of the Association attached to or incorporated in the amendment or, in the Alternative, the sworn statement of the President of the Association attached to or incorporated in the amendment executed by the Association, which sworn statement shall state unequivocally that the agreement of the required parties was lawfully obtained. Any such amendment of this Declaration shall become effective only when recorded or at such later dates as may be specified in the amendment itself.

12.04 Duration. The provisions of this Declaration shall run with and bind title to the Property, shall be binding upon and insure to the benefit of all Owners and Mortgagees and their respective heirs, executors, legal representatives, successors and

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assigns, and shall be and remain in effect for a period of twenty (20) years from and after the date of the recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. This Declaration may be renewed for an unlimited number of successive ten (10) year periods.

12.05 Perpetuities. 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 provisions shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Ethel Kennedy, widow of the late Robert Kennedy.

12.06 Interpretation. In all cases, the provisions set forth or provided for in this Declaration shall be construed together and given that interpretation or construction which, in the opinion of Developer or the Board will best effect the intent of the general plan of development. The provisions hereof shall be liberally interpreted and, if necessary, they shall so be extended or enlarged by implications to make them fully effective. The provisions of this Declaration shall be given full force and effect notwithstanding the existence of any zoning ordinance or building codes which are less restrictive. The effective date of this Declaration shall be the date of its filing for record in the records of the Register of Mesne Conveyance for Beaufort County, South Carolina. The captions of each Article and Section hereof as to the contents of each Article and Section are inserted only for convenience and are in no way to be construed as defining, limiting, extending or otherwise modifying or adding to the particular Article or Section to which they refer. This Declaration shall be construed under and in accordance with the laws of the State of South Carolina.

12.07 Gender and Grammar. The singular wherever used herein shall be construed to mean the plural when applicable, and be necessary grammatical changes required to make the provisions hereof apply either to corporations or other entities or to individuals, men or women, shall in all cases be assumed as though in each case fully expressed.

12.08 Severability. Whenever possible, each provision of this Declaration shall be interpreted in such manner as to be effective and valid, but if the application of any provisions of this Declaration to any person or to any property shall be prohibited or held invalid, such prohibition or invalidity shall not affect any other provision or the application of any provision which can be given effect without the invalid provision or application, and to this end the provisions of this Declaration are declared to be severable.

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12.09 Rights of Third Parties. This Declaration shall be recorded for the benefit of the Developer, the Owners and their Mortgagees as herein provided, and by such recording, no adjoining property owner or third party shall have any right, title or interest whatsoever in the Property or in the operation or continuation thereof or in the enforcement of any of the provisions hereof, and subject to the rights of Developer and Mortgagees herein provided, the Owners shall have the right to extend, modify, amend or otherwise change the provisions of this Declaration without the consent, permission or approval of any adjoining owner or third party.

12.10 No Trespass. Whenever the Association, Developer, the Wright's Point Architectural Committee, and their respective successors, assigns, agents or employees are permitted by this Declaration to enter upon or correct, repair, clean maintain, preserve or do any other action within any portion of the property, the entering thereon and the taking of such action shall not be deemed a trespass.

12.11 Notices. Notices required hereunder shall be in writing and shall be delivered by hand or sent by United States Mail, postage prepaid. All notices to owners shall be delivered or sent to such addresses as have been designated in writing to the Association, or if no address has been so designated, at the addresses of such Owners' respective Lots. Notices sent by United States Mail shall be deemed effective on the third day after mailing. Notices delivered in person shall be effective on the date of delivery. All notices to the Association shall be delivered or sent in care of Developer at P. O. Box 2424, Beaufort, South Carolina 29901, or to such other address as the Association may from time to time notify the Owners. All notices to Developer shall be delivered or sent to Developer at the above address or to such other address as Developer may from time to time notify the Association. Notices to Mortgagee shall be delivered or sent to such addresses as such Mortgagees specify in writing to the Association.

12.12 No Liability. Developer has, using best efforts and all due diligence, prepared and recorded this Declaration so that each and every Owner shall have the right and the power to enforce the terms and provisions of this Declaration so that each and every owner shall have the right and the power to enforce the terms and provisions of this Declaration against every other Owner. However, in the event that this Declaration is, for any reason whatsoever, unenforceable by an Owner (or any other Person) in a court of law or otherwise, Developer shall have no liability of any kind as a result of such unenforceability, and each and every Owner, by acceptance of a deed conveying a Lot, acknowledges that Developer shall have no such liability.

12.13 Agreements. All agreements and determinations,

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including settlement agreements regarding litigation involving the Association, lawfully authorized by the Board shall be binding upon all Owners, their heirs, legal representatives, successors, assigns, and others having an interest in the Property or the privilege of possession and enjoyment of any part of the Property, except that no such agreements shall be binding as to the Developer without the written consent of the Developer.

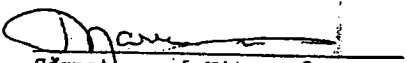
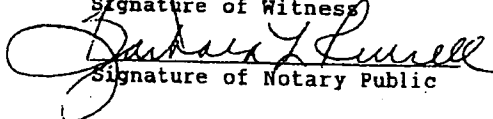
12.14 Variances. Notwithstanding anything to the contrary contained herein the Board, and Developer for so long as Developer has the right to appoint and remove all members of the Board of the Association and any officer or officers of the Association as set forth in Section 7.01 hereof, shall be authorized to grant individual variances from any of the provisions of this Declaration or the By-Laws, except the provisions of Article VIII of the Declaration regarding assessments, if it determines that waiver of application or enforcement of the provision in a particular case would not be inconsistent with the overall scheme of development for the Property.

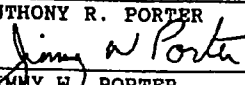
12.15 Security. NOTWITHSTANDING ANY PRIVACY WALL AND/OR FENCE SERVING THE SUBDIVISION, DEVELOPER MAKES NO REPRESENTATIONS OR WARRANTIES WITH REGARDING TO THE EFFECTIVENESS OF SUCH STRUCTURES FROM A SAFETY OR SECURITY STANDPOINT. EACH OWNER, OCCUPANT, GUEST OR INVITEE, AS APPLICABLE, ACKNOWLEDGES AND UNDERSTANDS THAT THE DEVELOPER IS NOT AN INSURER AND THAT EACH OWNER, OCCUPANT, GUEST AND INVITEE ASSUMES ALL RISKS OF PERSONAL INJURY AND PROPERTY DAMAGE.

IN WITNESS WHEREOF, Developer has caused this Declaration to be executed in its name under seal, as of the day and year first above written.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

DEVELOPER


Signature of Witness

Signature of Notary Public

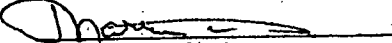

ANTHONY R. PORTER

JIMMY W. PORTER

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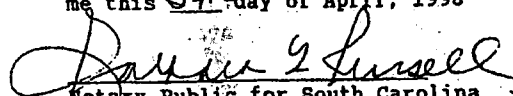
STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

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PERSONALLY appeared before me the undersigned witness, who under oath states that s/he saw the within named Anthony R. Porter and Jimmy W. Porter, Developer, sign, seal and as their act and deed, deliver the within written instrument and that s/he with the other witness, witnessed the execution thereof.


Signature of Witness

SWORN TO and subscribed before
me this 9th day of April, 1998


Notary Public for South Carolina
My Commission Expires: 3-02-2002

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EXHIBIT "A"

ALL that certain piece, parcel, or tract of land, situate, lying and being on Port Royal Island, Beaufort County, South Carolina, formerly referred to as Belleview Bluff Subdivision, and more particularly shown as Parcel "C", containing 10.45 Acres on that certain plat prepared by Gasque and Associates, David E. Gasque, R.L.S., dated the 17th day of December, 1997 and entitled "Boundary Survey of Parcels "A", "B", "C" and "D", Wrights Point", a copy of which is recorded in the Office of the RMC for Beaufort County, South Carolina in Plat Book 64 at Page 98. For a more accurate description of said tract of land, reference is craved to the aforementioned plat of record.

AND ALSO;

ALL that certain piece, parcel or tract of land, situate, lying and being on Port Royal Island, Beaufort County, South Carolina, formerly referred to as Belleview Bluff Subdivision, and more particularly shown as Parcel "D", containing 8.41 Acres on that certain plat prepared by Gasque and Associates, David E. Gasque, R.L.S., dated the 17th day of December, 1997 and entitled "Boundary Survey of Parcels "A", "B", "C" and "D", Wrights Point", a copy of which is recorded in the Office of the RMC for Beaufort County, South Carolina in Plat Book 64 at Page 98. For a more accurate description of said tract of land, reference is craved to the aforementioned plat of record.

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AND ALSO:

ALL that certain piece, parcel or tract of land containing 1.7 acres, more or less, situate, lying and being on Port Royal Island, Beaufort County, South Carolina, said tract being more particularly known as a portion of Belleview Plantation and a portion of Magnolia Bluff Plantation and being more fully shown and described on that certain plat prepared by Mary P. Logan by R. D. Trodgon, Jr., R.L.S. #2712, dated November 9, 1988. The tract herein conveyed is bounded on the North and East by the waters and marshes of Battery Creek, on the South by the remainder of Belleview Plantation, now or formerly of Lewis Wright and on the West by the remainder of Magnolia Bluff Plantation, now or formerly of Edwin B. Mitchell.

AND ALSO:

ALL that certain piece, parcel, or tract of land, situate, lying and being on Port Royal Island, Beaufort County, South Carolina, formerly referred to as Belleview Bluff Subdivision, and more particularly shown as Parcel "B" containing 19.74 Acres on that certain plat prepared by Gasque and Associates, David E. Gasque, R.L.S., dated the 17th day of December, 1997 and entitled "Boundary Survey of Parcels "A", "B", "C" and "D", Wrights Point", a copy of which is recorded in the Office of the RMC for Beaufort County, South Carolina in Plat Book 64 at Page 98. For a more accurate description of said tract of land, reference is craved to the aforementioned plat of record.

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JOHN A. SULLIVAN-RMC
DEAN CRT COUNTY, S.C.

99 MAR 30 AM 10:47

BK 1152 PG 2278
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JOHN A. SULLIVAN-RMC
DEAN CRT COUNTY, S.C.

99 JUN -2 AM 10:34

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FOLDER#

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STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROBERT L. CULLEN, ANDREW)
A. CORRIVEAU, JOHN)
CALDWELL, ANDREA HUCKS,)
JAMIE BELLAMY, MICHAEL)
PEARSON and DAVID)
MANDELL,)

Plaintiffs,)

vs.)

J. BENNETT McNEAL, B.)
McNEAL PARTNERSHIP, L.P.,)
ANTHONY R. PORTER, and)
WRIGHT'S POINT HOME)
OWNERS ASSOCIATION, INC.)

Defendants.)

IN THE COURT OF COMMON PLEAS

C/A # 04-CP-07-633

CLERK OF COURT
BEAUFORT, S.C.
C: JUN 10 PM 6:12

ANSWER AND COUNTERCLAIM OF THE DEFENDANTS
J. BENNETT McNEAL, B. McNEAL PARTNERSHIP, L.P., ANTHONY R. PORTER and
WRIGHT'S POINT HOME OWNERS ASSOCIATION, INC.

Specifically preserving all rights under any defense raised herein or under any motion filed previously or contemporaneously herewith, the Defendants J. BENNETT McNEAL, B. McNEAL PARTNERSHIP, L.P., ANTHONY R. PORTER, and WRIGHT'S POINT HOME OWNERS ASSOCIATION, INC. respectfully answer the Complaint of the Plaintiffs as follows:

FOR A FIRST DEFENSE

1. The said Defendants deny each and every allegation of the Complaint unless such allegations are specifically admitted or explained.

2. The said Defendants admit the material allegations of Paragraphs 2, 3, and 5 of the Complaint.

3. The said Defendants deny the material allegations of Paragraphs 23 and 25 of the Complaint.

4. The said Defendants are informed and believe that the allegations of Paragraph 6 of the Complaint constitute conclusions of law, rather than affirmations of fact, and that no response to such allegations is required of the Defendants. To the extent that a response may be required, the said Defendants assert that proof of such allegations is incumbent upon the Plaintiffs and is a matter to be addressed by the Court. Accordingly, the allegations are denied pending proof of the same by the Plaintiffs.

5. As to Paragraph 1 of the Complaint, the said Defendants are informed and believe that at least some of the Plaintiffs are residents of Beaufort County, South Carolina, but lack information sufficient to form a belief as to the accuracy and veracity of the allegations of such Paragraph as to each person identified as a Plaintiff. Accordingly, the allegations are denied pending proof of the same by the Plaintiffs.

6. The said Defendants admit so much of Paragraph 4 of the Complaint as alleges, or may be construed to allege, that the Defendant Anthony A. Porter was, at all times relevant to this matter, a resident of Beaufort County, South Carolina. The said Defendant continues to own real and personal property in such county, including property in Wright's Point Plantation, but also maintains residences outside Beaufort County and the State of South Carolina.

7. The said Defendants admit so much of Paragraph 7 of the Complaint as alleges, or may be construed to allege, that the Defendant Porter and his father, as Developers of

Wright's Point Plantation, have made conveyances of real estate included in such development. Such conveyances are duly documented by deeds, plats and other written instruments, some of which have been recorded with the Register of Mesne Conveyances for Beaufort County. These Defendants affirmatively assert that such written documentation speaks for itself; they specifically crave reference to the same in response to the allegations of Paragraph 7, and deny any allegation or insinuation of the Plaintiffs which is contrary to and inconsistent with any terms of art or the plain meaning of such writings or documentation.

8. The said Defendants admit so much of Paragraphs 8 and 9 of the Complaint as alleges, or may be construed to allege, that the Defendant Porter and his father, as Developers of Wright's Point Plantation, have caused to be prepared and executed a document entitled, "Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point," and that such document, on more than one occasion, was subsequently recorded, along with documents describing or depicting real estate covered thereby, with the Register of Mesne Conveyances for Beaufort County. These Defendants affirmatively assert that such documents speak for themselves; they specifically crave reference to such documents, and deny any allegation or insinuation of the Plaintiffs which is contrary to and inconsistent with any terms of art or the plain meaning of such documents. Specifically, these Defendants deny that the Defendant Porter is the only individual identified in the restrictive covenants as "Developer," or that the terms "Lot" or "Lots," as used in the restrictive covenants are limited to the 44 lots shown as "Phase I" on the plat recorded in the Office of the Register of Mesne Conveyances in Plat Book 64 at page 150.

9. The said Defendants admit so much of Paragraph 10 of the Complaint as alleges, or may be construed to allege, that the Plaintiffs own lots in Wright's Point Plantation. With

respect to the remaining allegations of such paragraph relating to the restrictive covenants, these Defendants affirmatively assert that such covenants speak for themselves; they specifically crave reference to such documents, and deny any allegation or insinuation of the Plaintiffs which is contrary to and inconsistent with any terms of art or the plain meaning of such documents

10. The said Defendants admit so much of Paragraph 11 of the Complaint as alleges, or may be construed to allege, that the Defendant Porter, as Developer of Wright's Point Plantation, has the authority under § 7.01 of the Plantation's restrictive covenants, to appoint and remove officers or members of the Board of Directors of the Defendant Wright's Point Home Owners Association, Inc. The restrictive covenants specifically provide for the manner in which this authority may be extinguished or transferred, and these Defendants crave reference to the language of such documents, and deny any allegation or insinuation of the Plaintiffs which is contrary to and inconsistent with any terms of art or the plain meaning of such documents. Specifically, these Defendants deny that the Developer of Wright's Point Plantation has conveyed all the lots in the subdivision to a person other than the Developer or Builder, or that the Developer has relinquished the right to appoint or remove officers and/or directors of the Defendant home owners association. These Defendants also specifically deny the validity of any "special meeting" or election of directors or officers instituted by the Plaintiffs. To the contrary, these Defendants affirmatively assert that there was no legal justification or support for any such action taken by or on behalf of the Plaintiffs, and specifically refute any action purportedly taken by the Plaintiffs for or on behalf of the Defendant home owners association.

11. The said Defendants admit so much of Paragraph 12 of the Complaint as alleges, or may be construed to allege, that the Plaintiffs held a meeting wherein they purported to

install themselves as directors and/or officers of the Defendant home owners association. These Defendants specifically deny, however, the validity of any action taken at the said meeting, including any attempt to elect directors or officers other than those appointed by the Developer. To the contrary, these Defendants affirmatively assert that there was no legal justification or support for any such action taken by or on behalf of the Plaintiffs, and specifically refute any action purportedly taken by the Plaintiffs for or on behalf of the Defendant home owners association.

12. The Defendants admit so much of Paragraph 13 of the Complaint which alleges, or may be construed to allege, that the Defendant Porter claims a continuing right to control the appointment and removal of officers and directors of the Defendant home owners association under § 7.01 of the said restrictive covenants, and that he has appointed the Defendant J. Bennett McNeal as president of the association. These Defendants further admit that the Defendants Porter and McNeal have not delivered to the Plaintiffs "all books, accounts and records of the Association" because the Plaintiffs are not legally entitled to such documents. These Defendants further admit that the property owners in Wright's Point Plantation subdivision have been assessed dues by the Defendant Wright's Point Home Owners Association, Inc., which has continued to conduct business with the management company which it retained to manage the affairs of the Association. These Defendants deny any allegation or insinuation in the said paragraph which contends or purports that the Defendants' conduct has been improper or unauthorized; to the contrary, they affirmatively assert that the conduct of the Plaintiffs in this matter has been improper, illegal and unauthorized.

13. With respect to the allegations of Paragraph 14 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that the Defendant J. Bennett McNeal and/or the Defendant B. McNeal Partnership, L.P. own property

located between S.C. Highway 802 and the present entrance to Phase I of the Wright's Point Plantation subdivision, and that documents evidencing such ownership are recorded with the Register of Mesne Conveyances for Beaufort County.

14. With respect to the allegations of Paragraph 15 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that the Defendant J. Bennett McNeal and/or the Defendant B. McNeal Partnership, L.P. have the right to develop real estate owned in Wright's Point Plantation subdivision, and that any owners of property in such subdivision will have equal rights to common properties and amenities of the development, regardless of whether their property is located in Phase I or any additional phase of the development.

15. With respect to the allegations of Paragraph 16 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that persons who do not own property in Wright's Point Plantation subdivision are given neither rights nor obligations under the subdivision's restrictive covenants. These Defendants specifically deny, however, any allegation or insinuation in such paragraph which contends that only property located in Phase I of the subdivision is to be covered by the said restrictive covenants, or that property owners in Phase II or other phases of the subdivision are not part of Wright's Point Plantation or governed by the said restrictive covenants. Additionally, these Defendants affirmatively assert that such documents speak for themselves; they specifically crave reference to such documents, and deny any allegation or insinuation of the Plaintiffs which is contrary to and inconsistent with any terms of art or the plain meaning of such documents.

16. With respect to the allegations of Paragraph 17 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that neither

the Defendant J. Bennett McNeal nor the Defendant B. McNeal Partnership, L.P. was the Developer of Wright's Point Plantation subdivision, and that no conveyance has expressly designated them as Developer. These Defendants specifically deny any allegation or insinuation in such paragraph which contends that the Defendant J. Bennett McNeal has not been given any authority or position by the Developer in accordance with the aforesaid restrictive covenants.

17. With respect to the allegations of Paragraph 18 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that the Defendants Porter and McNeal continue to have the right to control the development, including appointment of the officers and directors of the Defendant home owners association, and to conduct business with the management company which handles the administrative affairs of the Defendant home owners association. The contention that Plaintiffs' claims are derivative in nature is a conclusion of law, rather than an affirmation of fact, and these Defendants are informed and believe that they are not required to respond to the same. To the extent that a response may be required, these Defendants deny the allegation pending proof thereof by the Plaintiffs. These Defendants specifically deny any allegation or insinuation in such paragraph which contends that the conduct of the Plaintiffs is supported by the majority of the members of the Defendant home owners association, or that such members have an interest in Plaintiffs' pursuit of their claims in this action.

18. With respect to the allegations of Paragraph 19 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that the right to govern and control the Defendant home owners association may be determined by the Court in this case. These Defendants deny any allegation or insinuation in the paragraph which contends that the Plaintiffs' motivation in bringing this action was to benefit all members of the Defendant home owners association.

19. With respect to the allegations of Paragraph 20 of the Complaint, the Defendants are informed and believe that no response to such allegations is necessary or required of them. To the extent that a response may be required, the said Defendants adopt their responses to Paragraphs 1 through 19 of the Complaint and incorporate the same as their response to Paragraph 20 of the Complaint.

20. With respect to the allegations of Paragraph 21 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that this Court is empowered to grant relief by declaring the rights and responsibilities of the parties in this matter. The said Defendants specifically deny, however, that the Plaintiffs are entitled to, or that this Court should grant, the relief sought in sub-paragraphs "a" through "f" of such Paragraph 21.

21. With respect to the allegations of Paragraph 22 of the Complaint, the said Defendants are informed and believe that no response to such allegations is necessary or required. To the extent that a response may be required, the said Defendants adopt their responses to Paragraphs 1 through 21 of the Complaint and incorporate the same as their response to Paragraph 22 of the Complaint.

22. With respect to the allegations of Paragraph 24 of the Complaint, the said Defendants are informed and believe that no response to such allegations is necessary or required. To the extent that a response may be required, the said Defendants adopt their responses to Paragraphs 1 through 23 of the Complaint and incorporate the same as their response to Paragraph 24 of the Complaint.

23. With respect to the allegations of Paragraph 26 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that some

owners of properties in Wright's Point Plantation subdivision are now unsure as to who has the right to set the budget and approve expenditures of the Defendant home owners association, and have been exposed to loss of peace and tranquility and potential loss of value with respect to their property. The Defendants specifically deny, however, that such uncertainty and loss has resulted from acts or conduct on their part; to the contrary, the Defendants affirmatively assert that such has resulted from the acts or conduct of the Plaintiffs in wrongfully seeking to establish themselves as officers and/or directors of the Defendant home owners association.

24. With respect to the allegations of Paragraph 27 of the Complaint, the said Defendants admit so much of such Paragraph as alleges, or may be construed to allege, that this Court is empowered to grant injunctive relief concerning the rights and responsibilities of the parties in this matter. The said Defendants specifically deny, however, that the Plaintiffs are entitled to, or that this Court should grant, any such relief against the Defendants, including the relief sought in sub-paragraphs "a" and "b" of Paragraph 27. Conversely, the Defendants affirmatively assert that the Plaintiffs, not the Defendants, should be enjoined from taking any acts on behalf of the Defendant home owners association.

FOR A SECOND AND AFFIRMATIVE DEFENSE

25. The said Defendants further and affirmatively assert that, in order to be enforceable, any agreements or contracts upon which the Plaintiffs rely in support of their claims in this matter are required to be in writing and signed by these Defendants, and the said Defendants accordingly assert that the Plaintiffs' claims which are based upon such agreements or contracts are barred by the Statute of Frauds.

FOR A THIRD AND AFFIRMATIVE DEFENSE

26. The said Defendants further and affirmatively assert that the Plaintiffs have failed to state facts sufficient to constitute a cause of action, and their Complaint should be dismissed in whole or in part pursuant to SCRPC 12(b)(6).

FOR A FOURTH AND AFFIRMATIVE DEFENSE

27. The said Defendants further and affirmatively assert that the Plaintiffs lack the prerequisite legal capacity and standing to bring this action under the statutory and case law of the State of South Carolina, as they are not the legitimate officers and/or directors of the Defendant home owners association, and are not the real parties in interest in accordance with Rule 17 of the South Carolina Rules of Civil Procedure.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

28. The said Defendants further and affirmatively assert that the Plaintiffs' claims in this matter are frivolous, and have required the Defendants to incur substantial expenses in order to defend themselves against such claims, thereby entitling the Defendants to such relief as may be proper under the statutes and case law of the State of South Carolina for the institution and/or maintenance of frivolous litigation, including, *inter alia*, recovery of their legal fees and costs.

FOR A SIXTH DEFENSE AND BY WAY OF COUNTERCLAIM

29. The Defendants, by way of Counterclaim against the Plaintiffs, further assert as follows:

GENERAL ALLEGATIONS

(a) The Defendants, at all times relevant to this matter, were all residents and citizens of Beaufort County, South Carolina.

(b) The Defendant J. Bennett McNeal is engaged in the business of purchasing, developing, marketing, and selling real estate, primarily in Beaufort County, South Carolina.

(c) The Defendant B. McNeal Partnership, L.P., is a limited partnership organized and existing under the laws of the State of South Carolina, having its principal place of business in Beaufort County, South Carolina.

(d) The Defendant Anthony R. Porter is a resident and citizen of Beaufort County, South Carolina, but maintains one or more residences outside of such County and State. Mr. Porter is engaged in the real estate development business and is one of the Developers of Wright's Point Plantation in Beaufort County, South Carolina. Mr. Porter also has an ownership interest in one or more lots located in Phase I of Wright's Point Plantation.

(e) The Defendant Wright's Point Home Owners Association, Inc. is a non-profit corporation organized and existing under the laws of the State of South Carolina, having its principal place of business in Beaufort County, South Carolina. It is composed of persons or entities owning property in Wright's Point Plantation.

(f) The Plaintiffs, upon information and belief, are residents and citizens of Beaufort County, and are all owners of real property located in Phase I of Wright's Point Plantation.

(g) The Defendants are informed and believe that they are entitled to monetary damages from the Plaintiffs for the acts or omissions hereinafter set forth. The Defendants' claims for monetary damages are delineated in the First, Second, Third, Fourth, Fifth and Sixth Causes of Action under this Counterclaim. As to such causes of action, the Defendants are informed and believe that they are entitled to have the issues tried by a jury and hereby invoke a demand for trial by jury of the issues under the said First through Sixth Causes of Action.

(h) The Defendants are further informed and believe that monetary damages will be insufficient to provide full relief and justice in this matter, and that they are further entitled to equitable relief as hereinafter set forth. As to such claims for equitable relief, the Defendants are informed and believe that such claims are not properly for determination by a jury, and hereby invoke a demand that such claims be determined non-jury by a Circuit Court Judge, Master-in-Equity or other appropriate judicial officer.

(i) The parties and subject matter of this Counterclaim are within the jurisdiction of this Court.

SPECIFIC ALLEGATIONS

(j) On April 24, 1998, the Defendant Anthony R. Porter, together with his father, Jimmy W. Porter, executed a document entitled, "Declarations of Covenants, Conditions, Restrictions And Easements For Wright's Point," a mixed use real estate development located in the Town of Port Royal, in Beaufort County, South Carolina. This document, commonly known as the restrictive covenants for Wright's Point Plantation, were duly filed and recorded in the Office of the Register of Mesne Conveyances for Beaufort County on or about the 30th day of March, 1999.

(k) The real estate covered by the said restrictive covenants is commonly known as Wright's Point Plantation, and the said Defendant Anthony R. Porter, together with his father, Jimmy W. Porter, are the Developers of such property.

(l) The said Defendant Anthony R. Porter, as the Developer, formulated plans for the development of the property, and retained the services of surveyors, architects, builders, real estate professionals and others to carry out the plans. A prospectus was prepared which

demonstrated the overall development scheme and was shown to each prospective purchaser of property within the development.

(m) Wright's Point Plantation was established as a multi-phase development. Phase I consisted of single family residential lots, together with common areas and amenities for the use and enjoyment of all Wright's Point property owners. Phase II included a mix of commercial and residential properties. These phases are delineated on a plat of the property prepared by David E. Gasque of Gasque & Associates, Inc. of Beaufort, South Carolina, on or about March 3, 1998. The plat was approved by the Town of Port Royal Planning Board on or about March 6, 1998, and recorded on or about April 14, 1998 in the Office of the Register of Mesne Conveyances for Beaufort County in Plat Book 64 at page 150. This plat, together with any amendments, was designated as the plat referenced in the said restrictive covenants.

(n) The said Defendant Anthony R. Porter, as Developer, then retained the Defendant J. Bennett McNeal and his real estate company to market the development and sell lots and tracts within the development to members of the general public. Each sale of property in Wright's Point Plantation included an agreement between the seller and the purchaser that these parties would be bound by the terms and conditions of the said restrictive covenants, which were to run with the land and be binding upon each successive owner of these properties.

(o) The properties sold in Phase I of Wright's Point development were purchased by various persons and entities for various purposes. Some of the lots were purchased by persons who have constructed residences and reside in the development on a permanent basis. Other lots have been purchased by persons or entities who do not intend to permanently reside in the development. Some of these properties are being held by their owners as investments. Several of

the lots have been purchased by professional builders in order to build homes on them for resale purposes. Regardless of the type of owner or use intended for the property, however, each lot sold in Wright's Point Plantation is bound by the aforesaid restrictive covenants.

(p) The Defendants J. Bennett McNeal and/or B. McNeal Partnership, LP, own the property designated as Phase II on the aforesaid plat, and intend to construct structures on such property as may be consistent with the overall plan of development for Wright's Point Plantation. Such construction may involve both single family and multi-family residences, as well as commercial structures, as provided in the said restrictive covenants.

(q) The said Defendant Anthony R. Porter has retained an ownership interest in properties in Wright's Point Plantation, including one or more lots in Phase I. The said Defendant has also engaged, and continues to engage, in various functions and activities as Developer of the said property, including, *inter alia*:

1. In accordance with the express provisions of the said restrictive covenants, he has incorporated under the laws of South Carolina a non-profit corporation, *i.e.*, the Defendant Wright's Point Home Owners Association, Inc., for the purpose of maintaining and administering Wright's Point Plantation. Prior to the incorporation of this entity, he was responsible for the maintenance and administration of the development;
2. He has appointed persons to serve as officers and members of the Board of Directors of the said home owners association, including the Defendant, J. Bennett McNeal, who was appointed by the Developer as President and Secretary of the said association;
3. He has created the Wright's Point Architectural Committee to insure the preservation and enhancement of the property located in Wright's Point Plantation. Prior to his creation of this committee, he formulated the guidelines for construction within the development, and he reviewed, approved and/or rejected construction proposals submitted by or on behalf of owners of such property;

4. He has appointed the Defendant J. Bennett McNeal, together with a licensed real estate broker, Mr. Wayne Webb, and a licensed architect, Mr. Wayne Ramsey, as members of the said architectural committee;
5. He has loaned money to the said association in order that it could meet its financial obligations regarding the maintenance and administration of the development;
6. He has conveyed properties consisting of common elements and amenities to the said association; and
7. He has retained the services of Bundy Appraisal & Management, Inc., a professional property management firm, to perform certain critical administrative functions for the said association and development.

(r) At the present time, all of the lots and properties in Wright's Point Plantation have not been fully developed, and the Defendant Porter, as Developer, maintains the sole authority to appoint and remove officers and members of the Board of Directors of the Defendant home owners association, as well as the sole authority to appoint and remove members of the Wright's Point Architectural Committee.

CLAIMS TO BE DETERMINED BY JURY

FOR A FIRST CAUSE OF ACTION V/A COUNTERCLAIM **(CIVIL CONSPIRACY)**

(1) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(2) The Defendants further allege that, in or about 2003, the Plaintiffs, intentionally and maliciously, combined with one another, and/or with other persons whose identities are presently unknown to these Defendants, and conspired and agreed to inflict damage and harm upon the Defendants.

(3) The primary purpose of the Plaintiffs' conspiracy was to harm the Defendants, and the Plaintiffs engaged in overt acts in furtherance of the conspiracy, including, *inter alia*:

- a. Deliberately withholding their assessments due to the Defendant Wright's Point Home Owners Association, Inc.;
- b. Usurping the authority provided to the Defendant Anthony R. Porter as Developer and the Defendant home owners association under the said restrictive covenants;
- c. Purporting to appoint themselves as officers, directors or spokesmen for the Defendant home owners association when they had no legal authority to do so;
- d. Contacting and communicating with other Wright's Point Plantation property owners in an attempt to undermine the legitimacy of the Defendants with respect to the development;
- e. Contacting and communicating with persons and/or entities with whom the Defendants maintained contractual and business relationships in an attempt to undermine the legitimacy of the Defendants with respect to the development;
- f. Purporting to appoint themselves as members of the Wright's Point Architectural Committee when they had no legal authority to do so;
- g. Changing the guidelines of the Wright's Point Architectural Committee in order to approve construction methods and materials for themselves when they had no legal authority to do so; and
- h. Initiating frivolous litigation against the Defendants to restrict or remove their authority with respect to Wright's Point Plantation.

(4) As a result of the illegal conspiracy agreement and conduct of the Plaintiffs, the Defendants have sustained special damage and harm, including, *inter alia*, expenditure of monies in the form of investigative costs, attorney's fees and court costs in order to defend against the frivolous claims of the Plaintiffs; loss of time and income in order to defend against the frivolous claims of the Plaintiffs; loss of professional reputation and standing in the community; and mental anguish and emotional distress occasioned by the Defendants' conduct.

FOR A SECOND CAUSE OF ACTION VIA COUNTERCLAIM
(BREACH OF CONTRACT)

(5) The said Defendants reiterate each and every allegation set forth above as fully and completely as if set forth herein verbatim.

(6) The said restrictive covenants constitute a contractual agreement between the purchasers of properties in Wright's Point Plantation, including the Defendant Porter, as Developer.

(7) The Plaintiffs and Defendants, as owners of properties in Wright's Point Plantation, are bound to honor the terms and conditions of the said contractual agreement.

(8) Notwithstanding their duty to honor and abide by the terms and conditions of the said restrictive covenants, the Plaintiffs have breached their duties and have failed and refused to honor their obligations under the said restrictive covenants by, *inter alia*:

- a. Unlawfully attempting to usurp the authority of the Defendant Porter as Developer to control the appointment and/or removal of officers and members of the Board of Directors of the Defendant Wright's Point Home Owners Association, Inc.;
- b. Unlawfully attempting to usurp the authority of the Defendant Porter as Developer to control the appointment and/or removal of members of the Wright's Point Architectural Committee;
- c. Unlawfully attempting to usurp the authority of the Defendant Porter as Developer, the Defendant J. Bennett McNeal as President and the Defendant Wright's Point Home Owners Association, Inc. to assess, collect and utilize assessments from property owners in Wright's Point Plantation;
- d. Unlawfully attempting to usurp the authority of the Defendant Porter as Developer and the duly appointed members of the Wright's Point Architectural Committee to establish guidelines, policies and procedures concerning construction in Wright's Point Plantation;

- e. Unlawfully collecting assessments belonging to the Defendant Porter as Developer and the Defendant Wright's Point Home Owners Association, Inc. and converting the same to their own use;
- f. Unlawfully interfering with contractual and business relationships of the Defendants between themselves and others;
- g. Unlawfully withholding assessments, dues and monies from the Defendants Porter and Wright's Point Home Owners Association, Inc. without valid authority or permission to do so;
- h. Unlawfully constructing and approving for construction in Wright's Point Plantation building sites, structures and materials which are not permitted by the Developer or the legitimate members of the Wright's Point Architectural Committee.

(9) As a direct and proximate result of the Plaintiffs' breach of the said restrictive covenants, the Defendants have been injured and damaged as hereinafter set forth.

FOR A THIRD CAUSE OF ACTION VIA COUNTERCLAIM
(BREACH OF IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING)

(10) The said Defendants reiterate each and every allegation set forth in the other causes of action of their Counterclaim as fully and completely as if set forth herein verbatim.

(11) The said Defendants further allege that, included in each contract in the State of South Carolina, is the implied obligation of the parties to deal fairly with each other and to act in good faith.

(12) The conduct of the Plaintiffs as set forth herein constitutes a violation of their duty to deal fairly and to act in good faith with respect to their contractual obligations under the said restrictive covenants.

(13) As a direct and proximate result of the Plaintiffs' breach of their obligations of good faith and fair dealing with respect to the said restrictive covenants, the Defendants have been injured and damaged as hereinafter set forth.

FOR A FOURTH CAUSE OF ACTION VIA COUNTERCLAIM
(CONVERSION)

(14) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(15) The Defendants further allege that, during the course of their conduct as set forth above, the Plaintiffs have unlawfully collected monies in the form of assessments and dues from members of the Defendant Wright's Point Home Owners Association, and have illegally and unlawfully appropriated the same to their own use, exercising dominion and control over such monies to the exclusion of the rightful owners, to-wit, the Defendants Porter and Wright's Point Home Owners Association, Inc., thereby denying possession and control of the monies to the lawful owners, such conduct being willful and intentional, and with a conscious and reckless disregard for the rights of these Defendants.

(16) As a direct and proximate result of the Plaintiffs' illegal and unlawful conversion of the property of the said Defendants, such Defendants have been injured and damaged as hereinafter set forth.

FOR A FIFTH CAUSE OF ACTION VIA COUNTERCLAIM
(TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS)

(17) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(18) The Defendants Anthony R. Porter, J. Bennett McNeal and Wright's Point Home Owners Association, Inc., as a result of their association with and involvement in and on behalf of Wright's Point Plantation, have entered into contractual relationships with one or more parties, including, *inter alia*, a contractual relationship with property owners in Wright's Point Plantation

through the restrictive covenants governing such property, and a contractual relationship with Bundy Appraisal & Management, Inc. relating to accounting and management functions.

(19) The Plaintiffs were aware of such contractual relationships, having both actual and constructive knowledge of the same.

(20) Notwithstanding their knowledge and awareness of the said contractual relationships, the Plaintiffs nevertheless sought to interfere with such relationships when they had no legitimate right or authority to do so.

(21) The Plaintiffs' interference with these contractual relationships has included, *inter alia*:

- a. The illegal and improper attempt to substitute themselves as officers and/or members of the Board of Directors of the Defendant Wright's Point Home Owners Association, Inc.;
- b. The illegal and improper solicitation and collection of assessments and dues from property owners in Wright's Point Plantation;
- c. The illegal and improper alteration of the guidelines and regulations of the Wright's Point Architectural Committee;
- d. The initiation and/or continuation of frivolous litigation, including the case *sub judice*;
- e. The attempt to direct and control the activities of Bundy Appraisal & Management, Inc.

(22) The Plaintiffs' interference with the Defendants' contractual relationships has been willful, intentional, without just or legal authority, and has been perpetrated with a reckless and conscious disregard for the rights of these Defendants.

(23) The interference on the part of the Defendants has caused the breach of the said contractual relationships, as property owners in Wright's Point Plantation have not paid their dues

in a timely manner to the Defendant Wright's Point Home Owners Association, Inc., and Bundy Appraisal & Management has not been able to properly perform its management functions on behalf of such Defendant.

(24) As a direct and proximate result of the Plaintiffs' illegal and unlawful interference with the said contracts of the said Defendants, such Defendants have been injured and damaged as hereinafter set forth.

FOR A SIXTH CAUSE OF ACTION V/A COUNTERCLAIM
(DEFAMATION)

(25) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(26) The Plaintiffs, by virtue of their conduct as set forth herein and otherwise, have expressed to owners of property in Wright's Point Plantation and others that the Defendants have abandoned their roles and responsibilities with respect to Wright's Point Plantation, and are no longer acting on behalf of such property owners, and have no rights with respect to the said Wright's Point Plantation development.

(27) The said conduct and declarations of the Plaintiffs directly and adversely reflects upon the Defendants' professional competence and integrity, has impugned and continues to impugn the Defendants' professional integrity and reputation, and falsely and unfairly portrays the Defendants to the said property owners and to the general public.

(28) The Plaintiffs' portrayal of the Defendants as stated above was and is false and unfair, and has been published by the Plaintiffs to members of the Beaufort business community, the said property owners and others with actual or constructive knowledge of its falsity and unfairness,

and the Plaintiffs' said portrayal of the Defendants has been committed with such recklessness as to evidence a conscious indifference toward the rights of the Defendants.

DAMAGES

(29) As a direct and proximate result of the acts and/or omissions on the part of the Plaintiffs as set forth above, the Defendants have been injured and damaged in one or more of the following particulars:

- a. The Defendants have sustained special damages as set forth in the First Cause of Action, and are entitled to compensation for the same;
- b. The Defendants have been denied the benefit of their bargain under the contractual relationship existing between the parties under the restrictive covenants governing Wright's Point Plantation, and are entitled under the Second and Third Causes of Action to compensation for the same, including, *inter alia*, damages for all costs incurred in this action, including attorney's fees;
- c. The Defendants have been deprived of the use, enjoyment and value of their property and are entitled to recover the full value of the same under the Fourth Cause of Action, together with such other and further damages as may be provided by law;
- d. The Defendants' rights under contractual agreements with third parties have been damaged and undermined as a result of the Plaintiffs' conduct, and the said Defendants are informed and believe that the Plaintiffs are responsible under the Fifth Cause of Action for all damages flowing from such conduct;
- e. The Defendants have been damaged and injured in their reputations as a result of the defamatory conduct and representations of the Plaintiffs, have experienced mental anguish as a further result of such conduct, have been injured in their ability to conduct business in a normal manner, and are informed and believe that they are entitled to be compensated under the Sixth Cause of Action for such damage and injury to their reputations, mental well being and business losses.

(30) The Defendants are informed and believe that they are entitled under the laws of this State to be fully and fairly compensated for all actual damages sustained as a result of the foregoing conduct on the part of the Plaintiffs; to special damages under the First Cause of Action; to punitive or exemplary damages as a result of the willful, reckless and/or intentional conduct of the Plaintiffs; and for such other and further relief as may be provided by law.

CLAIMS TO BE DETERMINED NON- JURY

FOR A SEVENTH CAUSE OF ACTION V/A COUNTERCLAIM **(DECLARATORY RELIEF)**

(31) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(32) The Defendants are informed and believe that the conduct of the Plaintiffs as set forth herein has caused and will continue to cause turmoil, confusion and damage to the present and potential property owners in Wright's Point Plantation, and that it is necessary for this Court, pursuant to the South Carolina Uniform Declaratory Judgments Act, to declare the rights, status and other legal relations of the parties hereto in order to terminate the uncertainty and controversy giving rise to this proceeding.

FOR AN EIGHTH CAUSE OF ACTION V/A COUNTERCLAIM **(INJUNCTIVE RELIEF)**

(33) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(34) The Defendants are further informed and believe that they are entitled to immediate relief in the form of an injunction, to be imposed both permanently and *pendente lite*, including, *inter alia*, the following particulars:

- a. Prohibiting the Plaintiffs from taking any action reserved to the Developer under the Declarations of Covenants, Conditions, Restrictions and Easements governing present or future property owners in Wright's Point Plantation subdivision;
- b. Prohibiting the Plaintiffs from taking any action in the name of the Wright's Point Architectural Committee including, but not limited to, (a) convening of meetings of the Committee, (b) solicitation, receipt or usage of fees or monies from property owners, or (c) approval of plans, locations, designs, construction methods, or materials for new or existing residences or other buildings in Wright's Point Plantation;
- c. Prohibiting the Plaintiffs from taking any action in the name of Wright's Point Home Owners Association, Inc., or any other entity purporting to be legally entitled to act on behalf of the members of such association, including, but not limited to, (a) convening of meetings of the Association, or (b) solicitation, receipt or usage of fees or monies from property owners; and
- d. Requiring the Plaintiffs to account for and return all monies collected from Wrights Point Plantation property owners or others in the name of the Defendant Wright's Point Home Owners Association, Inc., the Wright's Point Architectural Committee or any other person or entity purporting to have an official status with the Wright's Point Plantation development.

FOR A NINTH CAUSE OF ACTION V/A COUNTERCLAIM
(SPECIFIC PERFORMANCE)

(35) The Defendants reiterate each and every allegation above as fully and completely as if set forth in this Cause of Action verbatim.

(36) The Defendants further allege that the Plaintiffs, as property owners in Wright's Point Plantation, are obligated to abide by the terms and conditions of the restrictive covenants, By-Laws, and rules and regulations of such development, including, *inter alia*:

- a. Recognizing and adhering to the right of the Defendant Porter as Developer to govern the Wright's Point Architectural Committee, including the appointment and/or removal of its members;

- b. Recognizing and adhering to the right of the Defendant Porter as Developer to incorporate and govern the Defendant Wright's Point Home Owners Association, Inc., including the right to appoint and/or remove officers and members of the Board of Directors of such Defendant;
- c. Recognizing and adhering to the right of the Defendant Porter as Developer to provide for the appearance, development, preservation and enhancement of Wright's Point Plantation by designing, developing and implementing the plans and specifications of the development for those purposes; and
- d. Recognizing and adhering to the right of the Defendant Porter as Developer and the Defendant Wright's Point Home Owners Association, Inc. to contract with third parties in order to provide for goods and services for or on behalf of Wright's Point Plantation.

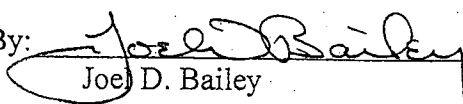
WHEREFORE, the Defendants request that this Court inquire into the matters set forth herein, and that it issue its Order granting relief to the Defendants by (a) dismissing the Complaint against the Defendants; (b) awarding to the Defendants judgment against the Plaintiffs under their Counterclaim as stated herein; (c) awarding the Defendants such costs as may be permitted by law; including a reasonable attorney's fee, and (d) awarding the Defendants such other and further relief as may be appropriate under the laws of this State.

RESPECTFULLY SUBMITTED,

THE BAILEY LAW FIRM, P.A.
PO Box 1437, 1001 Bay Street
Beaufort, South Carolina 29901

ATTORNEYS FOR THE DEFENDANTS
J. BENNETT McNEAL, B. McNEAL
PARTNERSHIP, L.P., ANTHONY R. PORTER,
and WRIGHT'S POINT HOME OWNERS
ASSOCIATION, INC

By:


Joe D. Bailey

Beaufort, South Carolina
June 10, 2004

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 04-CP-07-633

ROBERT L. CULLEN,
ANDREW A. CORRIVEAU,
JOHN CALDWELL, ANDREA
HUCKS, JAMIE BELLAMY,
AND MICHAEL PEARSON,
Plaintiffs,

v.

J. BENNET McNEAL, B.
McNEAL PARTNERSHIP, L.P.,
ANTHONY R. PORTER, and
WRIGHT'S POINT HOME
OWNERS ASSOCIATION,
INC.,

Defendants.

REPLY TO COUNTERCLAIM

CLERK OF COURT
BEAUFORT, S.C.

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Come now the Plaintiffs, and for their reply to the Counterclaim of the
Defendants, state and allege as follows:

1. Plaintiffs admit the allegations contained within paragraphs 29 b, c, e, f, i,
and k of the general and specific allegations of the Complaint.
2. Plaintiffs are without sufficient knowledge to either admit or deny the
allegations of paragraphs 29 j, l, m, n, o, and p of the general and specific
allegations of the Complaint.
3. Paragraphs 6 and 11 of the Complaint set forth legal conclusions to which
no response is required.

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4. Paragraphs 7, 18, 19, 26, 27, and 28 assume facts that are disputed by the Plaintiffs and, therefore the allegations of these paragraphs are denied.

5. The remaining allegations of the Complaint are denied except such allegations as may constitute admissions against the interest of the Defendants.

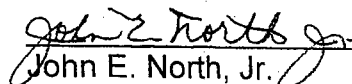
6. Defendants lack the legal capacity and standing to bring any action in the name of Wright's Point Home Owners Association, Inc., in that none of them are the legitimate officers, directors, or representatives of said Defendants and are not the real parties in interest in accordance with Rule 17 of the South Carolina Rules of Civil Procedure.

Wherefore, having fully replied, Plaintiffs pray that the Counterclaim of the Defendants be dismissed with prejudice at Defendants' cost.

Dated this 15th day of July, 2004.

ROBERT L. CULLEN et. al., Plaintiffs,

By:


John E. North, Jr.
S.C. Bar Number 6570
1103 BAY STREET
BEAUFORT, S.C. 29902
(843) 575-0800 (phone)
(843) 575-0900 (fax)
Attorney for Plaintiffs

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Certificate of Service

The undersigned hereby certifies that on the 15th day of July, 2004, a true and correct copy of the foregoing was served upon the attorney for the Defendants, Joel D. Bailey, P.O. Box 1437, Beaufort, S.C. 29901-1437 by United States Mail, postage prepaid.

John E. Smith Jr.

CLERK OF COURT
BEAUFORT, S.C.
04 JUL 12 PM 4:20

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROBERT L. CULLEN, ANDREW A.
CORRIVEAU, JOHN CALDWELL,
ANDREA HUCKS, JAMIE
BELLAMY, MICHAEL PEARSON,
and DAVID MANDELL,

Plaintiffs,

v.

J. BENNET McNEAL, B. McNEAL
PARTNERSHIP, L.P., ANTHONY
R. PORTER, and WRIGHT'S
POINT HOME OWNERS
ASSOCIATION, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 04-CP-07-633

MOTION TO ALTER OR AMEND

Come now the Plaintiffs and move the Court for an Order pursuant to Rules 52(b) and 59(e), SCRCP, altering or amending the Court's Order, dated October 26, 2007, ("Order") notice of which was received by Plaintiffs on October 31, 2007, for the following reasons:

I.

The Court Erred in Determining the
Definition of Developer under the Covenants.

Because the definition of "Developer" is crucial to the resolution of the issues in the case, the Court had to determine if the definition of "Developer" is ambiguous and, if so, the proper construction of the term under the Covenants.

The Court found that the omission of Jimmy Porter's name as a defined Developer was not intentional, was a clerical error, and that the Covenants would

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be effectively rewritten by the Court and be interpreted as if "Jimmy W. Porter, together with the Defendant Anthony R. Porter, was the official Developer of Wright's Point."

This finding violates multiple legal principals and is inconsistent with the evidence adduced at trial. If the Covenants at issue are not ambiguous, their proper interpretation is a question of law for the Court and no extrinsic or parole evidence is admissible. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E. 2d 866, 868 (Ct. App. 1992).¹

Ambiguity is created if the Covenants are:

...capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Hawkins v. Greenwood Development Corporation, 328 S.C. 585; 592, 493 S.E. 2d 878 (Ct. App. 1997) *reh denied; cert. denied*.

If the Court finds the Covenants ambiguous, they must be construed most strictly against Jimmy Porter and Anthony Porter, who imposed them upon the land, and most liberally in favor of the Plaintiffs and the other Members of the Association ("Homeowners"), and all doubts as to their meaning must be resolved in favor of the Homeowners. *Stanton v. Gulf Oil Corp.*, 232 S.C. 148,

¹ Unambiguous covenants must be interpreted reasonably in the context of the covenants as a whole and applied in accordance with their clear meaning. *Koontz v. Thomas*, 333 S.C. 702, 708, 511 S.E. 2d 407, 410 (Ct. App. 1999); *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E. 2d 299, 302-303 (2001). *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, S. E. 2d 411 (Ct. App. 1987).

101 S.E.2d 250 (1957); *Sea Pines Plantation Company v. Wells, III*, 294 S.C. 266, 270, 363 S.E. 2d 891, 894 (1987).

There is no ambiguity with regard to the wording of the definition of "Developer" under the Covenants. The word Developer was a defined term that stated that Developer "shall mean and refer to (a) Anthony R. Porter. . .". The definition made no mention of Jimmy Porter. The Court relied upon the recitals on page 1 of the Declaration of Covenants in support of the ruling. The Preamble sets out that the Declaration of Covenants² "was made by Anthony R. Porter and Jimmy W. Porter, (hereinafter referred to as "Developer")". However, that recital is inconsistent with the specific definition of Developer as a defined term at ¶ 1.12.

As a matter of law in South Carolina, such recitals and captions cannot be used to create an ambiguity and an explicit operative part of a contract cannot be trumped by such recitals. *Kingman v. Nationwide Mutual Insurance Company*, 243 S.C. 405, 134 S.E. 2d 217, 221 (1964). Even if both the recitals and the operative provision of the contract are clear, the operative part is controlling. Am. Jur 2nd, *Contracts*, §383.

Because the basis of the alleged ambiguity is a recital, and not within the operative part of the Covenants, and because the term "Developer" is a specifically defined term in a definitional section of the Covenants, it was error for the Court to find any ambiguity with regard to the clear language of ¶1.12.

² Jimmy Porter owned part of the land that was subjected to the Covenants and, thus, his execution of the Covenants was required. The testimony showed that Jimmy Porter took title to Parcel D to secure repayment of a loan and that, once that need was satisfied, he relinquished the title to Parcel D to J. Bennett McNeal ("McNeal") for no consideration since that was the agreement between Anthony Porter and McNeal.

Shortly before trial, the Defendants cause to be filed the Supplemental Declaration, which purported to "acknowledge" that Jimmy Porter, as well as Anthony Porter, is to be considered a "Developer" under the Covenants. It was also error to consider the extrinsic evidence of the Supplemental Declaration and testimony of witnesses to vary or contradict the clear wording of ¶1.12. Pursuant to the operative language of the Covenants, the term "Developer" should have been found to mean Anthony Porter, which is the clearly worded definition in the Covenants.

Even if the Court were to consider the recital as creating an ambiguity, it was error for the Court to not construe any ambiguity against Anthony Porter, as one of the drafters of the Covenants, and in favor of the Homeowners. In addition, the opinion of lay witnesses as to their proper interpretation is inadmissible. Rather than consider extrinsic evidence, the Court should have interpreted the Covenants in the manner advocated by the Homeowners as required by the applicable rules for construing Covenants.

Even if the Court did consider extrinsic evidence, there was no evidence adduced at trial that demonstrated any actual involvement of Jimmy Porter in the development of Wright's Point. In fact, Anthony Porter testified that Jimmy Porter, his father, was only a lender, took title to parcel D as collateral for a loan, and conveyed the parcel to McNeal when that collateral was released. Anthony Porter also testified that Jimmy Porter had no financial interest in the development and that all of the profits were reported on Anthony Porter's tax return. It was undisputed that, after 2002, Jimmy Porter did not have any

ownership in any part of the four parcels of land that could have been made part of the Development. The Court's Order finds that Jimmy Porter is a Developer of Phase II based on these facts, which is error. Whether the Court finds the term "Developer" unambiguous or ambiguous, the result is the same. The Court should have found that only Anthony Porter is the Developer.

Finally, since the recital refers to Anthony Porter and Jimmy Porter in the conjunctive and not in the disjunctive, and since the Court found that "Jimmy W Porter, together with the Defendant Anthony R. Porter, was the official Developer", it was error to additionally treat the definition of Developer to allow each right and responsibility accorded to the Developer under the Covenants to be exercised by and performed by Jimmy Porter, individually, by Anthony Porter, individually, or by them jointly and not individually. There was no evidence that Jimmy Porter and Anthony Porter, jointly, took any action, assumed any responsibility, or exercised any rights accorded to the Developer pursuant to the Covenants in developing Wright's Point. There is no language in the Covenants that would support a finding that either Anthony Porter or Jimmy Porter, acting alone, can be deemed the Developer. The definition of Developer must be consistently applied, and the definition cannot be varied in its application depending upon the convenience of the Defendants or what may suit their purposes best for a particular act.

II.

The Court Should Have Ruled that the Ability to Develop and Submit Additional Phases to the Development Terminated When the Land was Sold.

The Court found that the Wright's Point Development ("Development") included, in addition to the initial Phase I, a Phase II and "Future Development" (jointly, "Undeveloped Land") as shown on the Defendant's master plan and that the marketing materials of Defendants show that the Development "will" (emphasis added) entail multiple phases. This finding conflicts with the language of the Covenants and ignores the legal consequences of the sale and transfer of all land outside of Phase I by Jimmy Porter and Anthony Porter.

The Covenants at ¶ 2.03 reserve only to "Developer" the "right" to "develop and submit additional phases" to Wright's Point, as originally created, if several conditions are met, which are discussed below.

South Carolina, like other jurisdictions, considers the rights of a developer reserved in the applicable covenants to be personal to the developer, enforceable only by him, and extinguished upon disposition of the developer's interest in the land. See: *Peoples Federal Savings and Loan Association of South Carolina v. Resources Planning Corporation*, 358 S. C. 460, 479, 596 S.E. 2d 51, 61 (2004), *reh denied*, citing *Board of Managers of Medinah on the Lake Homeowners Association v. Bank of Ravenswood*, 295 Ill App. 3d 131, 692 N.E. 2d 402 (1998).

The personal nature of the Developer's right to add subsequent phases to the Development is consistent with the provisions of the Covenants. Paragraph 2.03 of the Covenants provides that Developer "*reserves unto himself . . . the*

right to develop and submit additional phases to this Declaration of Covenants,

Conditions, Restrictions and Easements, Wright's Point Homeowners Association, Inc., and related documents (emphasis supplied)." In accordance with the language of the Covenants, the ability to add additional phases to the Development is a "right" reserved only to the Developer.

It is undisputed that in April, 1999, Anthony Porter divested himself any ownership in the Undeveloped Land when he conveyed the part of it that he owned to McNeal. It is further undisputed that in July, 2002, Jimmy Porter divested himself of any ownership in the Undeveloped Land when he conveyed the portion of the Undeveloped Land that he owned to McNeal. It is further undisputed that the land intended as Phase II of the Development was conveyed by McNeal to a corporation owned by Richard Ratcliff ("Ratcliff") in February, 2007, and consisted of part of the Undeveloped Land that McNeal acquired from Anthony Porter and part of the Undeveloped Land McNeal acquired from Jimmy Porter.

Accordingly, the personal right of the Developer to annex the Undeveloped Land into the existing subdivision was lost when it was conveyed to McNeal.

The precise situation presented here was decided against the developer in *Fairways of Country Lakes Townhouse Association v. Shenandoah Development Corporation*, 113 Ill. App. 3d 932, 447 N. E. 2d 1367 (Ill. App. 1983). In that case, the original developer conveyed undeveloped property to an unrelated entity, which in turn conveyed it to the party to the litigation. Similar to the

Covenants here, the restrictive covenants at issue allowed the developer to annex additional property into the development by filing a "Supplemental Declaration".

The *Fairways* court determined that the power to annex additional property into the development was personal to the original developer and that that right was extinguished when the subject property was sold to another.

This Court has considered analogous provisions which provided for the unilateral modification or revocation of restrictive covenants already imposed upon land by a developer. In those situations, we held that such reserved powers to modify or revoke restrictive covenants contained in a deed are personal covenants which can be exercised only by the one who imposed the restrictions, particularly where the power can be exercised without the consent of the property owners. (internal citations omitted) *In these cases it was determined that once the title to the property passed from the hands of the one holding such a reservation of rights, the power can no longer be exercised by him or any other person notwithstanding that the declaration provided that all covenants were to run with the land.* (internal citations omitted) (emphasis supplied).

We see no basis for interpreting the provisions of the Fairway Declarations differently and consider that the disputed provisions established a personal right to be exercised only by the original developer.

* * * * *

Defendants' argument, taken to its logical conclusion would permit any number of persons who may have acquired portions of the Greens property, instead of the one corporation here, to separately chose to exercise the rights of the developer and annex his property on a piecemeal basis. (emphasis supplied) Such an intention cannot be found with the Fairway Declarations and we may not supply it.

Fairways at 936, 937, 1370, 1371. See, also: *Orange Beach Marina, Inc. v. Warner*, 500 So. 2d 1068 (Ala. 1986) [purported amendment to covenants by developer ineffective where developer had no continuing interest in the land].

This Court's ruling allowing the Developer to submit Phase II to the Development after the Developer had conveyed his interest in the land violates these legal principals.

In this case, the *Fairways* scenario has come true, all to the detriment of the Homeowners and the other owners of the 44 Lots. The original Developer has left, the title has been conveyed to two successive owners, each of whom now claim the right to develop and submit their land on a piecemeal basis and to have that land become a phase of the Development.

In its analysis, the *Fairways* Court relied upon the rationale of cases holding that the right of a developer to amend restrictive covenants was personal to him and terminated upon the cessation of his financial interest in the land.

South Carolina has recently acknowledged the rule relied upon in *Fairways* in *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 SC 342, 362-363, 628 SE 2d 902, 914 (Ct. App. 2006) ["when a subdivision developer is divested of all interest in the subdivision, a reserved right to amend restrictive covenants is extinguished."]³

Pursuant to the language of the Covenants themselves, and the rationale of *Fairways* and *Queen's Grant*, any right to annex the Undeveloped Land was personal to Developer and that right was extinguished when the Undeveloped Land was sold to McNeal.

³ In *Queens Grant*, the Court allowed the amendment because it found a continuing financial interest.

III.

The Court Erred in Finding that, Despite the Disposition of the Undeveloped Land, the "Developer" was able to Meet the Conditions Imposed by the Covenants for the Submission of an Additional Phase to the Development.

The issue presented by this case was not whether the Covenants applied to all four parcels of land owned by either Anthony Porter or Jimmy Porter. Even the Defendants agreed that, least up to the point in time shortly before trial when the Developer purported to add Phase II to the Development, the Association had as Members only the Owners of the 44 Lots in Phase I and the only Lots that made up the Development were the 44 Lots in Phase I. The issue is whether the Undeveloped Land can be added as additional phases of the Development after the Developer has sold the land to another and whether a successor-in-interest of the land can subdivide the land into lots and have that land added to the Development. The issue is also under what circumstances can the owners of the land outside of Phase I become Members of the Association and entitled to use the amenities owned by the Association. The Court incorrectly applied the Covenants with regard to both issues. Pursuant to the Covenants, the development and submission of an additional phase to the Development can be accomplished only when specific conditions are met:

1. The relevant action must be taken by the "Developer".
2. The additional phases must be "developed and submitted" by the Developer.
3. The land eligible to be an additional phase must have been acquired "by the Developer".
4. The land eligible to be an additional phase is limited to land formerly owned by "Lewis H. Wright, et al and/or Mary P. Logan" or be contiguous to such land.
5. The "Developer" must file a plat "signed by the Developer showing such additional phases".

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Pursuant to the Covenants, all activities effectuating the submission of an additional phase must be taken by the "Developer" and not by some other person or entity. Only land "developed and submitted" by the Developer can be added into the existing development. Because of this specific requirement, due to the conveyance of the Undeveloped Land to McNeal and Ratcliff prior to any of it being developed and submitted to the Development, the land could not thereafter be added to the Development. Without ownership of the land, the Developer could not amend the plat to subdivide the land into Lots or to add such Lots to the Development. The Court's Order allowing such a result is in error.

The document that purports to submit Phase II to the Development ("Supplemental Declaration") was executed by Ratcliff since he owned the land. Jimmy Porter and Anthony Porter signed this document as the Developer. However, as noted previously, such acts by them after they have conveyed the land are a nullity. One cannot develop land that one does not own. Once the land was conveyed by the Developer, the conditions imposed by the Covenants precluded any such land being an additional Phase of the Development.

Furthermore, Anthony Porter was unable to identify one activity in which he engaged which is related to "development" of the Undeveloped Land and he has paid no expenses related to that development. The sum and substance of his involvement with the development of the Undeveloped Land is his "consultation" with McNeal for which he has no written agreement or legal right to any remuneration but for which, at some point in time, he may receive some compensation if McNeal determines that it would be fair. There was no evidence

that Jimmy Porter had any interest in any aspect the McNeal land or its

development, either individually or jointly with Anthony Porter. The evidence was clear that neither Jimmy Porter nor Anthony Porter had any interest in the land or business of Ratcliff, which was the land that included all of the proposed Phase II of the Development. There is not one document related to the development of the Undeveloped Land that bears the signature of either Porter or one invoice that has been paid by either Porter.

An additional phase of the Development must be submitted by the "Developer" by "filing a plat signed by the Developer". On March 7, 2007, a plat ("Ratcliff Plat") was filed of record, signed by Ratcliff, and not signed by the Developer, which subdivided the portion of the Ratcliff property that comprised Phase II. The Ratcliff Plat, which the Supplemental Declaration purports to incorporate into the existing Development, was not signed by Anthony Porter, or Jimmy Porter, or Anthony Porter and Jimmy Porter, jointly. The Ratcliff Plat purported to amend the Master Plan for the Development as shown on the official Plat. Obviously, the Porters did not sign the Ratcliff Plat because they cannot subdivide and plat property they do not own. Both Jimmy Porter and Anthony Porter had divested themselves of any ownership in the property described in the Ratcliff Plat more than five years before. Ratcliff is not the Developer and Ratcliff cannot create new Lots as defined in the Covenants and amend the Master Plan of the Development. This condition to adding a phase to the Development has not been met and cannot be met.

The Covenants also required that the Developer subject the additional phase to the Covenants. Although by the Supplemental Declaration, the Defendants purport to do so, it is axiomatic that a person can impose restrictive covenants only upon land which that person owns. Neither Anthony Porter nor Jimmy Porter owned the land upon which they purport to impose the Covenants. Therefore, their execution of the "Supplemental Declaration" has no legal effect and is a nullity. While Ratcliff may have been able to subject his own land to covenants, Ratcliff is not the Developer and, therefore, he cannot submit his land as an additional phase of the Development. The Court's ruling erroneously allows Ratcliff, with the cooperation of the Developer, to avoid the limitations of the Covenants and thereby purport to have the owner of the lots that Ratcliff created become additional Members of the Association entitled to use Association property.

Since the Covenants give only the "Developer", and not third parties, the right to amend or revise the Plat or to "develop and submit" additional phases, and since the Developer's personal right to do so was extinguished when the Developer was divested of any interest in the real estate, it is a legal impossibility for additional Lots, as defined in the Covenants, to be created and submitted to the Development or for additional Members of the Association to be created.

Finally, the Covenants at ¶ 2.03 provide that only land acquired by the "Developer" from certain named individuals is subject to being added as a phase of the Development. It is undisputed that part of the purported Phase II was never owned by the defined "Developer", Anthony Porter, but was, in fact, owned

by his father, Jimmy Porter, who, as previously pointed out, should not have been found to be the Developer. As such, none of the land conveyed from Jimmy Porter to McNeal can, under the Covenants, be submitted as an additional phase of the Development. In addition, none of the Undeveloped Land was held by the Porters, jointly. Accordingly, the Court's finding that the Developer is Jimmy Porter together with Anthony Porter is inconsistent with the finding that only one of them need own the Undeveloped Land that may be added as a Phase of the Development.

Thus, unless the Court finds that the definition of "Developer" means *either* Anthony Porter *or* Jimmy Porter, a part of the Undeveloped Land ultimately acquired by Ratcliff was land that was never able to be added to the Development in accordance with the limitations of the Covenants. There is no proper construction of the Covenants that permits "Developer" to be *either* Anthony Porter *or* Jimmy Porter.

The Court erred in finding that the land that was subdivided into lots by Ratcliff, who was not the Developer, could be developed and submitted as an additional phase of the Development. Because the conditions of the Covenants for submitting an additional phase to the Development cannot be met, the purported addition of Phase II and any future purported additions of phases to the Development should have been found to be null and void.

Finally, no reasonable interpretation of the Covenants permits either Anthony Porter or Jimmy Porter to proclaim himself "Developer" of land that he does not own and for which he is neither doing the work of development nor

paying the expenses of development in order to bestow upon McNeal and Ratcliff rights that only the Developer could exercise. The finding of the Court that either Anthony Porter or Jimmy Porter had any right or power to exercise the powers of the Developer after they had conveyed their interest in the land was in error.

IV.

The Court Erred in Finding that B. McNeal Partnership, L.P. was a Successor Developer.

The Court erred in finding that B. McNeal Partnership, L.P. ("McNeal LP") was properly appointed as a successor Developer. Pursuant to the Covenants, "Developer" is defined as:

- (a) *Anthony R. Porter, or (ii) (sic) any successor-in-title or any successor in interest to Anthony R. Porter, to all of the Property then subject to this Declaration and provided in the instrument of conveyance to any such successor-in-title or interest is expressly (sic) designated as the "Developer" hereunder by the grantor of such conveyance, which grantor shall be the "Developer" hereunder at the time of such conveyance. (Emphasis supplied)*

(Covenants, ¶1.12)

Under ¶1.12, the term "Developer" may include a "successor-in-title", but only if the successor:

- a. Succeeds to "all of the Property then subject to this Declaration".
- b. But only if the instrument of conveyance of all of the Property designates any such successor as the "Developer".
- c. And only if the grantor of such conveyance shall be the "Developer" at the time of such conveyance.

The Court's Order erroneously made its finding despite the fact that none of the three conditions were met. At the time of trial, neither McNeal, McNeal LP,

nor Ratcliff claimed to be a successor Developer. At no point in time did any conveyance of land to any of them ever provide any such designation. No conveyance of land to any of them ever was from both Anthony Porter and Jimmy Porter, whom "together" have been found by the Court to be the Developer. Neither of the Porters, McNeal, McNeal LP, nor Ratcliff has ever succeeded to "all of the Property then subject to the Declaration", either individually or jointly. At the time of the alleged transfer of the Developer's rights, McNeal had already conveyed a portion of the land to Radcliff's company, which precluded McNeal or McNeal LP from succeeding to all of the land then subject to the Declaration.

The "instrument of conveyance" referenced in ¶1.12 refers to the conveyance of "*all of the Property then subject to this Declaration*", and not to the purported conveyance of Developer rights five years after the sale of the land. None of the deeds conveying the various parts of the Undeveloped Land contained any designation that the grantee was the successor Developer. The Court erred in interpreting the applicable conveyance to be the purported grant of the Developer's rights and not the conveyance of all of the property then subject to the Covenants, which is what was required.

In addition, the document by which McNeal LP purports to obtain the rights of the Developer was executed at a point in time when the original Developer no longer had that status since Anthony Porter and Jimmy Porter had previously conveyed all of their right, title, and interest in the land.

Finally, the Court erred in finding or inferring that McNeal LP "has received all powers and duties of Defendant Porter and his father with respect to their role as Developer". The document purporting to grant rights to McNeal disclaimed any obligation of the Developer to the Association or its Members arising prior to that date. No valid designation as the successor Developer can contain such a limitation on assuming the obligations of the Developer. The Members of the Association cannot and should not be subjected to a situation where one person claims the rights of the Developer but disclaims the corresponding obligations. By doing so, for instance, McNeal LP could assert the right to use the waterfront land of the Association and, at the same time, disclaim the obligation of the Developer to build a dock on that land, to account to the Association for the failure of the Developer to protect the right to build a dock on that land, or to perform any of the other obligations of the Developer during the first six years of the Development.

Pursuant to the Covenants, a successor developer must assume the obligations as well as the rights of the original developer and can succeed the original developer only under the specific conditions set forth in the Covenants. If those conditions are not met, there can be no successor developer and a purported assignment of rights gives the purported assignee no development rights. In addition, the rights of the Developer are personal rights that cannot be assigned and which expire upon a conveyance of the land to a third person. The Court's Order to the contrary was in error.

The Court Erred by finding that Developer had a Continuing Right to Control the Association.

The Court's Order and its interpretation of the Covenants failed to take into account the principal of law that the right of a developer to control a development terminates when developer no longer has a financial interest in the development.

(2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

Restatement (Third) of Property: Servitudes, § 6.19 (2005).

Accordingly, a developer's right to control the development must cease when his financial interests are no longer at stake and a developer cannot sidestep this principle by granting himself continuing rights of control long after the reasonable basis for control has passed. The Court's interpretation of the Covenants erroneously allows this result.

Throughout this litigation, Defendants have treated Anthony Porter as the Developer. Now, the Court has found that Anthony Porter together with Jimmy Porter is the "Developer". That position hinders and not helps the Defendants' claim to the right to control the Association.

It is undisputed that neither Anthony Porter nor Jimmy Porter, individually, nor Jimmy Porter and Anthony Porter, jointly, have any ownership of any of the land at issue in this case. It is also undisputed that Anthony Porter and Jimmy

Porter did not at any time own any of the Undeveloped Land jointly. Thus, under the definition of "Developer" now found by the Court, the issue of control must be resolved as a matter of undisputed fact.

The Court also erroneously found that, because Anthony Porter is the beneficiary of the Trust which owns two of the 44 Lots, Lots 14 and 15, the "Developer" continues to have a "financial interest" in the development. There is no evidence that Jimmy Porter has any interest in the Trust. In addition, the unambiguous language of the Covenants distinguishes among the various legal entities considered "persons" and recognizes in ¶1.17 a trust as a separate legal person. Anthony Porter⁴ testified that his continued right to control the Association rested on his ownership of Lots 14 and 15. Porter's personal residence was built on Lot 15.⁵ However, it is undisputed that Lots 14 and 15 were conveyed by Anthony Porter to an irrevocable trust in 2001. The Trust is not the Developer and an interest in the Trust is not an interest in a real estate development.

Anthony Porter testified that the Trust was not liable for his personal obligations, thereby acknowledging its separate existence. In South Carolina, a trust is a separate legal entity. Since the Trust is not the Developer, title in the Trust does not mean that the Developer has title. The Trust document distinguishes itself from Porter, personally, by stating that it is not liable for the

⁴ Even if the Court were to consider Jimmy Porter within the definition of Developer, there was no evidence at trial that Jimmy Porter now or ever owned any that is the subject of this case other than parcel D, which he conveyed to McNeal in 2002.

⁵ The evidence established that Porter had not been a resident of South Carolina since 2003, had delegated the affairs of the Association to McNeal, and that Lots 14 and 15 were subject to an executory contract of sale. Further, ownership of a residence is not equivalent to a financial interest in the development and should give Porter no greater rights than any other Lot Owner.

obligations of Anthony Porter. Pursuant to the clear and unambiguous language of the Covenants, when Anthony Porter conveyed Lots 14 and 15 to the Trust, he conveyed to a "Person other than Developer".⁶

The evidence established that Anthony Porter, himself, did not consider Lots 14 and 15, to be owned in his capacity as Developer. Article VIII, ¶ 8.02 imposes upon all Owners of Lots "other than Developer or a Builder" the obligation to pay annual, special, and individual assessments. The Affidavit of Katherine D. Bundy, offered into evidence by the Defendants, unequivocally shows that Anthony Porter was paying assessments with respect to the Lots owned by the Trust even though they were clearly exempt if they had been "Developer" lots.

The Court also failed to distinguish between a financial interest in a real estate development and an interest in a personal residence. A developer cannot avoid the duty to turn over control by building a personal residence on a portion of the land and thereafter retain control indefinitely even though the developer has sold all other lots in the development. The Court cannot interpret the Covenants to allow a result that is not allowed by law.

Defendants also contended that because two individuals, Lloyd Denny and Richard Ratcliff, each own one of the 44 Lots, they should be considered "Builders" and that on that basis the Developer is entitled to maintain control of

⁶ The evidence further established that Lots 14 and 15, owned by the Trust, were the subject of multiple mortgage foreclosure actions. The evidence also unequivocally established that Anthony Porter, personally, no longer has any possible financial interest in Wright's Point since there was on file in Beaufort County's Register of Deeds a judgment against any interest of Porter, personally, in excess of \$13 million, and a Federal Tax Lien in excess of \$4,600,000.00.

the Association. Ratcliff and Denny had owned their lots, but had not built on them, since March, 1998, and February, 2003, respectively.

The Covenants at ¶ 1.05 define "Builder" as: "any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more of the Lots".

At trial, it was undisputed that, while Mr. Ratcliff and Mr. Denny personally hold contractor's licenses as required under South Carolina law, the construction activities in which they engage are conducted only through the corporations of which they are principals, Structural Images, Inc.,⁷ and Denny's Construction, Inc., respectively. Both Ratcliff and Denny testified that their businesses involved the construction of "spec" homes, and occasionally custom homes, but all such activities were taken by their corporations and not by them personally. The evidence showed that the Developer had no financial interest in the business of Ratcliff or Denny or in the Lot owned by either of them.

Further, just as with Anthony Porter, pursuant to ¶ 8.02, Ratcliff and Denny would have been exempt from assessments if they had owned their Lots in their capacity as "Builders" and not as individuals. Pursuant to the Bundy Affidavit, however, both Ratcliff and Denny were paying the assessments attributable to the Lot each owned personally.

The interpretation of the Covenants found by the Court would allow the Developer to control the Association, potentially forever, merely because an individual who owns a construction company acquired one of the 44 Lots. The Court should have found that the definition of "Builder" cannot be interpreted to

⁷ Mr. Ratcliff has changed the name of his corporation to RHH.

include persons having no financial relationship to the Developer. The Court's interpretation is not a reasonable construction of the Covenants nor is it consistent with the legal duty of a developer to turn over control of the development when the developer no longer has a financial interest in it. The Covenants cannot be interpreted to allow a breach of that duty.

Based upon the evidence adduced at trial and the unambiguous language of the Covenants, the Court should have found that the Developer no longer had the right to control the Association and that the Members of the Association are entitled to conduct their own affairs. The rights of a developer reserved in the applicable covenants to control the Association are personal to the Developer, do not run with the land, are enforceable only by him, and are extinguished upon disposition of the developer's interest in the land.

Because the Developer had no remaining financial interests at stake in the Development, the only reasonable construction of the Covenants that is consistent with the Covenants as a whole and consistent with the applicable legal principles is that the Members of the Association, whose financial interests are at stake, are entitled to control the Association. The Court's Order to the contrary was in error.

VI.

The Court Erred in Finding that the Developer had the Right to Control the WPAC

The Wright's Point Architectural Committee ("WPAC") is created by Article IX, ¶ 9.01, of the Covenants and is given architectural control over structures to be built. Article I is the definitional section of the Covenants and provides in the

first sentence of ¶ 1.01 that the WPAC "shall mean and refer to" "Porter and Jimmy Porter or such other individual(s) as Developer may appoint, or such entity to which the Wright's Point Architectural Committee may assign its duties, until all improvements constructed thereon and sold to permanent residents." The Court should have found that this sentence addressed the time that the WPAC continues to exist, which is to be until all improvements are constructed on the Lots and are sold to permanent residents.

The duty to turn over control of the WPAC, as opposed to its tenure, is addressed in subsequent sentences of ¶ 1.01, which set forth that Developer's "rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate" when "all of the Lots in the Subdivision have been fully developed". At that time, the Board of the Association is authorized to elect a "successor" WPAC to be composed of not less than two Owners of Lots. The Developer may "at any time prior to completion and sale of all Lots in the Subdivision" voluntarily relinquish control of the WPAC.

The Court found that the phrase "fully developed" means that the Developer was entitled to maintain control of the WPAC until all the Lots have been sold and improvements constructed on them. The Court should have found that "fully developed" should be interpreted to mean upon the "completion and sale of all Lots in the Subdivision" in accordance with the remainder of the language of the paragraph. It is undisputed that all Lots in the subdivision had been conveyed when this action was filed.

In interpreting the Covenants as a whole, the Court should have

concluded that the reasonable interpretation of the phrase "fully developed" means when all of the Lots have been sold by the Developer. This interpretation is consistent with authority which holds that a Developer's right to architectural control is personal to the Developer and ceases when he sells all of his interest in the subdivision. *Smith v. First Savings of Louisiana, FAS*, 575 So. 2d 1033 (Ala., 1991) [after developer has no pecuniary interest in subdivision, covenant provision granting him sole control of ARB for twenty five years invalid]. As noted previously, the rights of a developer reserved in the applicable covenants are personal to the developer and do not run with the land. *Smith v. First Savings of Louisiana, FSA*, 575 So.2d 1033 (Ala., 1991) [covenant making developer in control of architectural committee was personal covenant that did not run with the land]. Personal covenants are enforceable only by the Developer and are extinguished upon disposition of the developer's interest in the land.

The Court's interpretation ignores the totality of ¶ 1.01 as well as ¶ 7.01 and ¶ 11.01 of the Covenants and allows the Developer to control the WPAC, potentially forever, even though all the Lots were sold and the Developer no longer had any financial interest in the development.⁸ It makes no sense to say that the Owners have the right to control the WPAC until all improvements were constructed since, at that point, by definition, the WPAC ceases to exist.

⁸ It is certainly conceivable that one of the 44 Lots could remain unbuilt upon for many years, long after the Developer had moved on to different projects and with only the residents of the subdivision having any interest in what was built in the neighborhood. That is not a reasonable construction of the Covenants and is inconsistent with the duty of the Developer to relinquish control when he no longer has a financial interest in the development.

Read as a whole, the Court should have found that ¶ 1.01 establishes a procedure for the Developer to remain in control of the WPAC so long he is developing the subdivision and has lots for sale and his own financial interests are at stake. This interpretation of "fully developed" is bolstered by the remainder of ¶ 1.01 which allows the Developer to turn over control "at any time prior to the completion and sale of all Lots". It is also consistent with ¶ 7.01 and ¶ 12.01, both of which terminate the Developer's rights of control when he no longer has a financial interest at stake in the development.

Accordingly, the Court should have found that the reasonable interpretation of the phrase "full developed" is that time when the Developer has sold the Lots. Since the evidence was undisputed that the Developer had sold all of the Lots as of 2003, as well as conveyed the Undeveloped Land, the Court should have found that the Developer is no longer entitled to control the WPAC and that its Members should be appointed by the Board of the Association.

VII.

The Court Further Erred with Respect to the Following Findings

The Court erred in making the following findings for the reason that such findings are contrary to the weight of the evidence and/or contrary to law:

1. That the Wright's Point Development was not limited to 44 Lots, that it was a planned community created by combining four parcels of land, that the Development included all four parcels prior to the development and submission of such land as an additional phase of the Development, and that the land outside of Phase I is already part of the Development.

2. That the amenities of the Association are not restricted to the use of the Owners of the 44 Lots in Phase I who are the Members of the Association.
3. That there was a development agreement or any other type of agreement between Jimmy Porter and McNeal.
4. That the Developer or his assigns have the right or ability to submit additional properties or phases to the Development.
5. That Anthony Porter and/or Jimmy Porter has the continuing right under the Covenants, even after the conveyance of the Undeveloped Land to McNeal, to annex the Undeveloped Land into the existing Development of 44 Lots and that the ultimate owners and users of lots created on the Undeveloped Land will be entitled to access to the common areas and amenities owned by the Association, including waterfront access.
6. That, even though Anthony Porter and Jimmy Porter no longer own the Undeveloped Land, that they are still the "Developer" and are thus entitled to, by the Supplemental Declaration, incorporate land owned by Ratcliff's corporation into the Development. Even if legally possible, the evidence at trial did not support the finding that they are "Developers" of the McNeal and Ratcliff land.⁹ Although asserting that he was the "Developer", Anthony Porter was unaware of the terms of the sale of land from McNeal to Ratcliff, was unable to describe what kind of development was contemplated for the McNeal and Ratcliff land, and left all decisions up to them.¹⁰ The Sale Agreement entered into between McNeal and

⁹ The Covenants make no provision for multiple developers or co-developers.

¹⁰ The sole contribution of Porter appears to be his contention that his own "vision" for development is being accomplished through the activities of McNeal and Ratcliff. However, his level of involvement is shown by his testimony that he did not read every word of the

Ratcliff allocated the responsibility and expense of development activities between them, with no participation of Anthony Porter or Jimmy Porter. Although McNeal testified that he had a "moral agreement" to give Anthony Porter something, Ratcliff, whose company owns the majority of the land now being developed, testified that Anthony Porter had no interest in the development that he was undertaking and would receive nothing from it. The evidence does not support the Defendants' contention that Anthony Porter and Jimmy Porter are "developers" of the land owned by McNeal and Ratcliff.¹¹

7. That the land which could be added to the Development included land formerly owned by Jimmy Porter or land which, at the time that the phase was to be added, could be owned by McNeal or Ratcliff or their assigns.

8. That the Developer may proceed with the development of additional phases of the Development.

9. That the last Lot in the Subdivision had not been conveyed to a Person other than Developer or Builder as defined in the Covenants.

10. That Anthony Porter possessed an ownership interest in Lots in Phase I of the Development.

11. That the transfer of legal title from Porter to Porter's Trust did not divest Porter of an interest in the Development or of control of the Development.

Supplemental Declaration before signing and that he trusted in whatever McNeal and Ratcliff decided to do with the land.

¹¹ If the Court were to hold otherwise, there would be no unity of rights and responsibilities with respect to the subdivision since neither Ratcliff nor McNeal purported at trial to be the Developer of Phase I and Porter has no financial responsibility with respect to the remainder of the land now being developed.

12. That the transfer of legal title from Porter's Trust to a third-party in connection with a tax sale was only a temporary change that did not divest Porter of control, and that there was no evidence that the transfer was not nullified even though the deeds reflecting the transfers and the repurchase of the land were admitted into evidence.

13. That the Plaintiffs continued to bill Porter for the land owned by the Trust when such billings originated with Porter or his agents.

14. That ownership of a residence titled to a Trust is a sufficient interest to maintain Anthony Porter's position as Developer and to maintain control of the Association.

15. That Ratcliff and Denny, personally, are Builders as defined in the Covenants.

16. That Plaintiff Cullen formed a separate entity called the Wright's Point Property Owners Association.

17. That the ARB had acted on requests for the use of Hardi-plank by Plaintiffs Cullen and Corriveau as of May 6, 2003.

18. That the Defendants evidence of damages be admitted into evidence despite the failure to provide discovery of such evidence prior to trial or in accordance with the Orders of the Master in Equity compelling such discovery.

19. That judgment should be awarded to the Defendants as set forth in the Order.

20. That injunctive relief be awarded in favor of Defendants against the Plaintiffs as set forth in the Order and in denying the injunctive and declaratory relief prayed for by Plaintiffs.

VIII.

The Court Erred in Failing to
Make the Following Findings.

The Court erred by failing to find the following facts based upon the weight of the evidence and the applicable law:

1. That the Homeowners are entitled to pursue their derivative claims and that the Homeowners fairly and adequately represent the interests of the Association members with respect to rights of control, the right to add phases to the Development, the use of Association property, and the matters prayed for in Plaintiffs' Complaint.
2. That, as of the end of 2002, Anthony Porter's principal residence was in North Carolina and, as of 2003, all of the 44 Lots that made up the Development had been conveyed to persons or entities other than Anthony Porter, individually, the Developer.
3. That, pursuant to Article IV of the Covenants, the Members of the Association are limited to the Owners of Lots depicted on the Subdivision Plat; that ownership of a Lot was the "sole qualification for membership" in the Association; that the Subdivision Plat as defined showed only the 44 Lots in Phase I of the Development; that the Covenants, at paragraph 2.03, allow the "Developer" to "modify, amend, revise and add to" the Subdivision Plat, but that was never undertaken prior to the transfer of the Undeveloped Land to McNeal,

which terminated any right of the Developer to revise the Plat of the property to add additional Lots to the Development; that pursuant to the definitional of terms in the Covenants, at ¶ 1.13 and ¶ 1.16, respectively, a "Lot" was one of the 44 lots on the Subdivision Plat, and an "Owner" was the holder in fee simple of a Lot; and that accordingly, the only members ("Members") of the Association entitled to use the amenities of the Association are the 44 Owners of the only Lots depicted on the Plat.

4. That the Plaintiffs have successfully pursued derivative claims on behalf of the Association, that they are the elected officers and directors of the Association, and that they are awarded their attorney fees and expenses.

5. That the injunctive and declaratory relief prayed for by the Plaintiffs be granted.

IX.

The Court Erred in Characterizing the Action as one at Law rather than in Equity.

In an action which involves the interpretation of restrictive covenants, the nature of the relief sought determines whether the case is one at law or in equity. If the Plaintiff seeks damages, the claim is one at law. If the relief sought is merely a declaration of rights and injunctive relief, the claims are in equity.

In this case, the Plaintiffs sought only injunctive relief and did not seek damages.

The character of an action as legal or equitable depends on the relief sought. *Compare O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E. 2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law because relief sought was general damages for loss of view and invasion of privacy) and *Kneale v. Bonds*, 317

S. C. 262, 265, 452 S. E. 2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunctions is in equity.") see also *S. C. Dep't of Natural Res. v. Town of McClellanville*, 345 S. C. 617, 622, 550 S. E. 2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action).

Cedar Cove Homeowners Ass'n, Inc. v. Di Pietro, 368 S. C. 254, 258, 628 S. E., 2d 284, 286 (2006), *reh. denied; cert. denied*.

Although the action involved the interpretation of restrictive covenants, the essence of the action was for equitable relief and the trial court erred when it determined that it was legal rather than equitable in nature.

WHEREFORE, for all of the foregoing reasons, Plaintiffs pray that the Court make and enter an Order altering or amending the Order of this Court, dated October 26, 2007, by correcting the errors referred to herein, by amending the Order to incorporate the legal principals set forth herein, and by finding that the relevant Covenants at issue in this case are clear and unambiguous, that the only reasonable interpretation of them, based upon the established facts and the law, is that, at the conclusion of the development of Wright's Point, Phase I, when Anthony Porter and Jimmy Porter had divested themselves of all of the remaining Undeveloped Land, their ability or the ability of any other person, to submit any of the Undeveloped Land as an additional phase of the Wright's Point Development became factually and legally impossible, and that, when the personal financial interest of the Developer in the Development ended, the Developer no longer had any right or power, at law or pursuant to the Covenants, to control the Association.

S. C. 262, 265, 452 S. E. 2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunctions is in equity.") see also *S. C. Dep't of Natural Res. v. Town of McClellanville*, 345 S. C. 617, 622, 550 S. E. 2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action).

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S. C. 262, 265, 452 S. E. 2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunctions is in equity.") see also *S. C. Dep't of Natural Res. v. Town of McClellanville*, 345 S. C. 617, 622, 550 S. E. 2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action).

Cedar Cove Homeowners Ass'n, Inc. v. Di Pietro, 368 S. C. 254, 258, 628 S. E. 2d 284, 286 (2006), *reh. denied; cert. denied*.

Although the action involved the interpretation of restrictive covenants, the essence of the action was for equitable relief and the trial court erred when it determined that it was legal rather than equitable in nature.

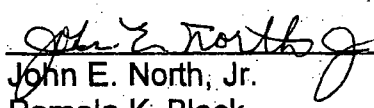
WHEREFORE, for all of the foregoing reasons, Plaintiffs pray that the Court make and enter an Order altering or amending the Order of this Court, dated October 26, 2007, by correcting the errors referred to herein, by amending the Order to incorporate the legal principals set forth herein, and by finding that the relevant Covenants at issue in this case are clear and unambiguous, that the only reasonable interpretation of them, based upon the established facts and the law, is that, at the conclusion of the development of Wright's Point, Phase I, when Anthony Porter and Jimmy Porter had divested themselves of all of the remaining Undeveloped Land, their ability or the ability of any other person, to submit any of the Undeveloped Land as an additional phase of the Wright's Point Development became factually and legally impossible, and that, when the personal financial interest of the Developer in the Development ended, the Developer no longer had any right or power, at law or pursuant to the Covenants, to control the Association.

Plaintiffs further pray that the Court amend its Order and declare that, pursuant to the Covenants, the owners of the 44 Lots are the only Members of the Association, that they, and not the Developer, are entitled to control the Association, that the neither the Developer nor McNeal, Ratcliff, or their assigns have the legal ability to annex the Undeveloped Land or any part of it into the existing Development, that the Plaintiffs be awarded their attorney fees, and for such other relief is appropriate under the circumstances.

Dated this 13th day of November, 2007.

ROBERT L. CULLEN et. al. Plaintiffs,

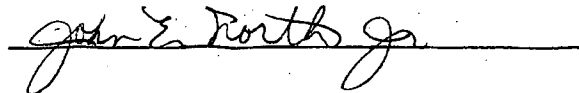
By:


John E. North, Jr.
Pamela K. Black
North & Black, PC
1103 BAY STREET
BEAUFORT, S.C. 29902
(843) 379-0800 (phone)
(843) 379-0900 (fax)
Attorney for Plaintiffs

2007 NOV 13 PM 2:31
ELIZABETH H. HARRIS
BEAUFORT, S.C.
CLERK OF COURT

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the attorney for the Plaintiffs, Joel D. Bailey, PO Box 1437, 510 Ribaut, Beaufort, SC 29901, by U.S. Mail on the 13th day of November, 2007.



0127

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

ROBERT L. CULLEN, ANDREW A.
CORRIVEAU, JOHN CALDWELL,
ANDREA HUCKS, JAMIE
BELLAMY, MICHAEL PEARSON,
and DAVID MANDELL,

CIVIL ACTION NO.: 04-CP-07-633

Plaintiffs,

v.

J. BENNET McNEAL, B. McNEAL
PARTNERSHIP, L.P., ANTHONY
R. PORTER, and WRIGHT'S
POINT HOME OWNERS
ASSOCIATION, INC.,

Defendants.

MOTION

CLERK OF COURT
BEAUFORT COUNTY
S.C.
JUL 19 AM 10:56

Come now the Plaintiffs and hereby move the Court for an Order reopening the trial of this matter for the presentation of evidence on newly discovered and highly relevant matters that were not and, with reasonable diligence, could not have been discovered prior to the conclusion of the trial of this matter on April 1, 2007.

The newly discovered evidence, which the Plaintiffs will adduce upon the reopening of the trial, will demonstrate that Defendant Porter and Jimmie Porter have now purportedly assigned "their development rights" to B. McNeal Partnership as set out in the communication to the Plaintiffs and other home owners within Wright's Point, a true and correct copy of which is marked Exhibit A, attached hereto.

This evidence is critically important and relevant to the legal ability of Porter to continue to act as Developer in controlling the Wright's Point Homeowner's Association or to develop and submit additional phases to the development. Throughout the case and at trial the Defendants consistently contended that Defendant Porter remained the Developer of the land that had been conveyed to McNeal years before. Defendants maintained this position even though the evidence showed that Porter had no financial obligations for the development and did not handle any of the business of the development. Now that the apparent assignment of rights has taken place, it would be a miscarriage of justice if the Court were to declare that Porter continues to have the rights of the Developer after those rights had been "assigned" to another.

Further, the Court should not affirm the existence of any such rights in Defendant Porter or any purported successor without hearing evidence on the nature of the assignment and considering the facts in the context of the specific conditions imposed by the Covenants upon the qualification of a "successor developer". Pursuant to the Covenants, a successor developer must assume the obligations as well as the rights of the original developer and can succeed the original developer only under the specific conditions set forth therein. If those conditions are not met, there can be no successor developer and a purported assignment of rights gives the purported assignee no development rights.

The Court's ruling should also address the legal consequences of Porter's purported assignment of development rights granted in the Covenants since these rights are typically considered personal to the Developer and are

extinguished when the developer no longer has a financial interest in the land burdened by the Covenants.

Although the issue of Defendant McNeal's ability to act as a "successor developer" was, in fact, raised in the Complaint of the Plaintiffs, at ¶ 17 thereof, and the Complaint sought a declaratory judgment on the rights of McNeal to act as Developer, the Defendants steadfastly maintained during the litigation and at trial that only Defendant Porter and his father Jimmy Porter was the defined "developer" of Wright's Point and that there had not been any assignment or transfer of those rights despite the fact that the undeveloped land had been sold.

As the evidence will clearly demonstrate, the Defendants have now completely changed their position with respect to who actually is the developer of Wright's Point and the purported "assignment" of the developer's rights is a critical matter in fully resolving this dispute. As the Court well knows, this litigation has consumed a great deal of time and expense, both of the parties and of the Court. In order to fully adjudicate the issues presented by the Complaint, to preclude further litigation, and in the interests of fairness and judicial economy, the Court should reopen the trial for the presentation of evidence on the issues identified herein so that the record will accurately reflect the facts that exist at the time that the Court rules on the merits in this proceeding.

The newly discovered evidence, which the Plaintiffs will adduce upon the reopening of the trial, will further demonstrate that, subsequent to the date of the actions of the Plaintiffs which Defendant Porter testified undermined his borrowing capacity, thereby resulting in millions of dollars of damage to him,

Defendant Porter's business entities borrowed \$16,700,000, guaranteed by Defendant Porter and his wife. The evidence will further demonstrate that this obligation ultimately resulted in a \$13,060,014.63 judgment against Defendant Porter and his wife, registered in this state on May 3, 2007. A true and correct copy of the Complaint filed against Defendant Porter and the Judgment are attached hereto as Exhibits B and C, respectively.

The evidence will further demonstrate that, since the conclusion of the trial of this matter, Defendant Porter has been the subject of proceedings concerning his allegedly fraudulent conduct in the development of real estate in North Carolina, resulting in the North Carolina Attorney General obtaining injunctive relief against Porter in connection with the alleged \$100 million dollar real estate scheme. A true and correct copy of the public announcement of the North Carolina Department of Justice concerning the matter is attached hereto as Exhibit D.¹

This evidence bears upon the credibility of Defendant Porter's testimony at trial, the proximal relationship between the actions of the Plaintiffs and the damages allegedly suffered by Defendant Porter, and Defendant Porter's financial ability to act as "developer" of the undeveloped real estate here at issue.

WHEREFORE, Plaintiffs respectfully move the Court to reopen the trial of this matter for the presentation of evidence on the matters identified herein. Plaintiffs further pray that the Court include in its ruling on the merits of this action a declaration as to the right of McNeal to act as the Developer, as requested in paragraph 21 (c) of the Complaint, and a declaration as to the rights of McNeal to

¹ This information will be presented at trial in admissible form.

develop and annex additional phases to the development as requested in

paragraphs 21(d) and (f) of the Complaint.

Dated this 16th day of July, 2007.

ROBERT L. CULLEN et. al., Plaintiffs,

By:

J. North

John E. North, Jr.

Pamela K. Black

North & Black, PC

Regions Bank Building

916 Bay Street, Suite 100

(843) 379-0800 (phone)

(843) 379-0900 (fax)

Attorney for Plaintiffs

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the attorney for the Plaintiffs, Joel D. Bailey, PO Box 1437, Beaufort, SC 29901, by depositing same in the United States mail, first class, postage prepaid this 16th day of July, 2007.

J. North

CLERK OF COURT
BEAUFORT, S.C.

07 JUL 19 AM 10:56

SENTRY

management INC.

COMMUNITY ASSOCIATION MANAGEMENT

MAIN OFFICE
2180 West SR 434
Suite 5000
Longwood FL
32779-5044
PH 407-788-6700
FAX 407-788-7488

BREVARD COUNTY
597 Haverty Ct #110
Rockledge FL
32955-3813
PH 321-638-8880
FAX 321-638-9801

CLERMONT
1645 E Hwy 50 #201
Clermont FL
34711-5124
PH 352-243-4585
FAX 352-243-4597

FT MYERS
12573 New Brittany Blvd #23
Ft Myers FL
33907-3525
PH 239-277-0112
FAX 239-277-0114

GEORGIA
270 Carpenter Dr #320
Atlanta GA
30328-4912
PH 404-458-8851
FAX 404-459-8862

JACKSONVILLE
2980 Hartley Rd W #4
Jacksonville FL
32257-8202
PH 904-880-4055
FAX 904-880-3550

KISSIMMEE
3377 W Vine St #305
Kissimmee FL
34741-4655
PH 407-840-6323
FAX 407-846-0301

LEESBURG
10392 US Hwy 441 #102
Leesburg FL
34788-7222
PH 352-343-5708
FAX 352-343-5123

PONTE VEDRA
10036 Sawgrass Dr #3
Ponte Vedra Beach FL
32082-3555
PH 904-285-1526
FAX 904-285-1280

SARASOTA
5500 Bee Ridge Rd #202
Sarasota FL
34233-1502
PH 941-343-0505
FAX 941-343-9874

SOUTH CAROLINA
1130 Folly Rd
Charleston SC
29412-4104
PH 843-795-0190
FAX 843-795-0191

TAMPA BAY AREA
25400 US 19 North #164
Clearwater FL
33763-2148
PH 727-799-8882
FAX 727-799-8884

VOLUSIA COUNTY
4188 S Atlantic Ave
New Smyrna Beach FL
32159-3711
PH 386-423-7798
FAX 386-423-1278



June 22, 2007

Dear Wrights Point Homeowners:

The following is a brief update for all owners in the development plans relating to the future phases of Wright's Point Plantation. Richard Ratcliff Homes, Inc. will be starting construction on twenty (20) beautiful homes in the next few weeks. Seamon, Whiteside & Associates, Inc. is finalizing the master plan for the town center and T.S. Adams' Architect Firm has finalized the design of the first Live/Work units, which will be started shortly after the homes. Also, Allison Ramsey, Architect is finalizing the plans for an incredible amenity center overlooking Battery Creek.

These are exciting times for Wright's Point. With the move forward towards completion of the future phases, Anthony R. Porter and Jimmy W. Porter have assigned their Developer rights for Wright's Point Plantation to B. McNeal Partnership pursuant to the Declarations of Covenants, Conditions, Restrictions and Easements for the plantation.

I am on-site once a week and look forward to meeting each of you personally. If you have any questions, please contact me at 843-795-0190 ext 101 or via email to mparades@sentrymgt.com.

Yours truly,

Michael R. Parades, PCAM
Management Agent

Mailing Address: P.O. Box 12710 • Charleston, SC 29422-2710

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Wick
472*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RECEIVED
USDC CLERK, CHARLESTON, SC

2007 MAY -3 P 3 27

ALESCO FINANCIAL INC., a Maryland
corporation, f/k/a Sunset Financial Resources,
Inc.,

BEAUFORT COUNTY SC- ROD
BK 00032 PG 0177

DATE: 05/22/2007 02:25:32 PM

INST # 2007039703 RCPT# 490246

Plaintiff,

-vs-

Case No. 3:07-cv-32-J-12MMH

ANTHONY R. PORTER, DOROTHY M.
PORTER, FRANK AMELUNG, EUGENIA
AMELUNG, and RICHARD AMELUNG,,

9:07mc42

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, entered on March 28, 2007, Judgment is hereby entered on the Award of Arbitrators in favor of the Plaintiff and against the Defendants in the amount of \$13,060,614.63, together with prejudgment interest from December 27, 2006, calculated at the rate of nine percent (9%) per annum, in accordance with the "Award" section, Paragraphs 1-4 on unnumbered pages 7- 8 of the Award of Arbitrators, with costs to be assessed according to law.

Date: March 29, 2007

SHERYL L. LOESCH, CLERK

/s/ Patrick DiVito

By: Deputy Clerk-

Copy to:

A TRUE COPY

CERTIFIED A TRUE COPY

Counsel of Record

Attest: Larry W. Propp, Clerk

SHERYL L. LOESCH, CLERK
U. S. DISTRICT COURT

Unrepresented Parties

By: *Melissa Deuman*
Deputy Clerk

By: *Patrick DiVito*
Deputy Clerk



FILED

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

2007 JAN 12 A 11:36

ALESCO FINANCIAL INC.
f/k/a SUNSET FINANCIAL
RESOURCES, INC., a Maryland corporation,

CASE NO. 3:07-cv-32-J-12mmH

Movant,

v.

ANTHONY R. PORTER, an individual, DOROTHY M.
PORTER, an individual, FRANK AMELUNG, an
individual, EUGENIA AMELUNG, an individual,
and RICHARD AMELUNG, an individual,

Respondents.

MOTION TO CONFIRM ARBITRATION AWARD

COMES NOW Plaintiff Alesco Financial Inc. f/k/a Sunset Financial Resources, Inc. (hereinafter referred to as "Alesco"), by and through its undersigned counsel, and hereby files this its Motion to Confirm Arbitration Award against Respondents Anthony R. Porter, Dorothy M. Porter, Frank Amelung, Eugenia Amelung, and Richard Amelung, jointly and severally.

As grounds for this Motion, Alesco alleges as follows:

GENERAL AND JURISDICTIONAL BACKGROUND

1. This is an action to confirm an arbitration award which awarded Alesco \$13,060,614.63 pursuant to 9 U.S.C. § 9.
2. Alesco is a Maryland corporation with its principal place of business located in Philadelphia, Pennsylvania. Prior to changing its name following a merger which was made effective on October 6, 2006, Alesco Financial Inc. was known as Sunset Financial Resources, Inc.

0135



3. Respondent Anthony R. Porter is an individual and, upon information and belief, is a resident of the State of North Carolina.

4. Respondent Dorothy M. Porter is an individual and, upon information and belief, is a resident of the State of North Carolina.

5. Respondent Frank Amelung is an individual and, upon information and belief, is a resident of the State of Florida.

6. Respondent Eugenia Amelung is an individual and, upon information and belief, is a resident of the State of Florida.

7. Respondent Richard Amelung is an individual and, upon information and belief, is a resident of the State of Florida.

8. Venue is proper in this Court pursuant to 9 U.S.C. § 9 which provides that “[i]f no court is specified in the agreement of the parties [as the court with jurisdiction to hear a motion to confirm an arbitration award], then such application may be made to the United States court in and for the district within which such award was made.” See 9 U.S.C. § 9 (alteration in original).

9. Complete diversity exists between Alesco and Respondents. Accordingly, subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(a)(1).

FACTUAL BACKGROUND

10. Prior to June 8, 2005 Alesco purchased a loan in the principal amount of \$16,700,000.00 which had been originated by an unrelated third party in the United States Virgin Islands (hereinafter referred to as the “Loan”). The borrowers of the Loan consisted of COP Preservation Partners, LLC, Triad Apartment Group, LLC, Communities of Penland, LLC, The Penland Reserve Tract, LLC, Beech Thicket Spring, Inc., and F.W., Inc. (hereinafter

referred to as the "Borrowers"), each of whom are, upon information and belief, business entities organized under the laws of the State of North Carolina.

11. The Loan was originally obtained by the Borrowers and was later refinanced by Alesco for purposes of funding the development of real property located in the vicinity of Spruce Pines, North Carolina. The Loan was secured by real estate pledged as collateral which is located in the State of North Carolina and personal property collateral located in the State of Georgia.

12. In connection with the refinancing of the Loan by the Borrowers, Respondent Dorothy M. Porter executed that certain Continuing Guaranty Agreement in favor of Alesco, which was then known as Sunset Financial Resources, Inc. A true and correct copy of the Continuing Guaranty Agreement executed by Dorothy M. Porter is attached hereto as **EXHIBIT A**.

13. In connection with the refinancing of the Loan by the Borrowers, Respondent Anthony R. Porter executed that certain Continuing Guaranty Agreement in favor of Alesco, which was then known as Sunset Financial Resources, Inc. A true and correct copy of the Continuing Guaranty Agreement executed by Anthony R. Porter is attached hereto as **EXHIBIT B**.

14. In connection with the refinancing of the Loan by the Borrowers, Respondent Frank Amelung executed that certain Continuing Guaranty Agreement in favor of Alesco, which was then known as Sunset Financial Resources, Inc. A true and correct copy of the Continuing Guaranty Agreement executed by Frank Amelung is attached hereto as **EXHIBIT C**.

15. In connection with the refinancing of the Loan by the Borrowers, Respondent Eugenia Amelung executed that certain Continuing Guaranty Agreement in favor of Alesco,

which was then known as Sunset Financial Resources, Inc. A true and correct copy of the Continuing Guaranty Agreement executed by Eugenia Amelung is attached hereto as **EXHIBIT D**.

16. In connection with the refinancing of the Loan by the Borrowers, Respondent Richard Amelung executed that certain Continuing Guaranty Agreement in favor of Alesco, which was then known as Sunset Financial Resources, Inc. A true and correct copy of the Continuing Guaranty Agreement executed by Richard Amelung is attached hereto as **EXHIBIT E**.

17. The Continuing Guaranty Agreements referred to in Paragraphs 11 through 16 above are hereinafter referred to collectively and generically as the "Continuing Guaranty Agreements".

18. Section 18 of the Continuing Guaranty Agreements provides for arbitration of any disputes arising between the applicable Guarantor thereunder and Alesco Financial Inc. in pertinent part as follows:

18. Guarantor hereby agrees, upon demand by any party, to submit any Dispute to binding arbitration in accordance with the terms of this Arbitration Program. A "**Dispute**" shall include any dispute, claim or controversy of any kind, whether in contract or in tort, legal or equitable, now existing or hereafter arising, relating in any way to this Guaranty, the Loan Documents, or any past, present or future loans, transactions, contracts, agreements, relations, incidents or injuries of any kind whatsoever relating to or involving or any group or department of Lender. **DISPUTES SUBMITTED TO ARBITRATION ARE NOT RESOLVED IN COURT BY A JUDGE OR JURY.**

(a) Governing Rules. Any arbitration proceeding will (i) be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any conflicting choice of law provision in any of the documents between the parties; and (ii) be conducted by the AAA (American Arbitration Association), or such other administrator as the parties shall mutually agree upon, in accordance with the AAA's commercial dispute resolution procedures (the

commercial dispute resolution procedures are hereinafter referred to as the "Rules").

...
(c) Arbitrator Qualification and Powers. ... Any Dispute in which the amount in controversy exceeds \$5,000,000 shall be decided by majority vote of a panel of three arbitrators; provided however, that all three arbitrators must actively participate in all hearings and deliberations. ... Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

...
(emphasis in original)

19. On June 8, 2006 the Loan matured without payment from the Borrowers.

COUNT I

(CONFIRMATION OF ARBITRATION AWARD)

20. Alesco realleges and incorporates by reference the allegations of Paragraphs 1 through 18 above as if realleged and restated herein in their entirety.

21. On June 26, 2006 Alesco demanded arbitration of the dispute for recovery of the Loan indebtedness from each of Respondents Anthony R. Porter, Dorothy M. Porter, Frank Amelung, Eugenia Amelung and Richard Amelung, jointly and severally, by delivery of a Demand for Arbitration delivered to the American Arbitration Association. A copy of the June 26, 2006 Demand for Arbitration is attached hereto as **EXHIBIT F**.

22. On August 30, 2006 an arbitration panel consisting of three arbitrators, Robert Cowles, Esq., R.A. Green, Esq. and Charles P. Pillans, III, Esq., was appointed by notice from the American Arbitration Association (hereinafter referred to as the "Arbitration Panel").

23. Following the service of notice to Respondents, on December 13, 2006 a final arbitration hearing was held before the Arbitration Panel in Jacksonville, Duval County, Florida.

at which Alesco presented evidence of default and the amounts due under the Continuing Guaranty Agreements. Respondents failed to appear at or otherwise attend the December 13, 2006, arbitration hearing.

24. On December 27, 2006, the Arbitration Panel issued its Arbitration Award in favor of Alesco on the evidence presented at the December 13, 2006, arbitration hearing in which the Arbitration Panel awarded Alesco (i) the principal amount of Eleven Million, Seven Hundred Forty-five Thousand, Five Hundred Eighty-nine and 50/100 Dollars (\$11,745,589.50), (ii) interest of One Million, Two Hundred Eighty-nine Thousand, Six Hundred Fifty-Three and 62/100 Dollars (\$1,289,653.62), (iii) costs and administrative fees of Eighteen Thousand Thirty and 01/100 Dollars (\$18,030.01), and (iv) Arbitrator's fees and expenses of Seven Thousand Three Hundred Forty-one and 50/100 Dollars (\$7,341.50) for a total of Fourteen Million, Sixty Thousand, Six Hundred Fourteen and 63/100 Dollars (\$13,060,614.63). A copy of the Arbitration Award is attached hereto as **EXHIBIT G**.

25. Since the delivery of the Arbitration Award, Respondents have refused and continue to refuse, to comply with the terms of the Arbitration Award by failing to pay the sums due and owing to Alesco provided for thereunder.

26. There are no impediments to the entry of an Order confirming the Arbitration Award and the Arbitration Award should be confirmed in accordance with 9 U.S.C. § 9.

WHEREFORE, Alesco respectfully requests the entry of an Order confirming the Arbitration Award and entering judgment thereon in favor of Alesco in the amount of Thirteen Million, Sixty Thousand, Six Hundred Fourteen and 63/100 Dollars (\$13,060,614.63) together with post-award, prejudgment interest at a rate of nine percent (9%) per annum as specified in

Paragraph (4) of the Arbitration Award, together with such other and further relief as this Court deems just and equitable.

MEMORANDUM OF LAW

A. Subject Matter Jurisdiction and Venue

Subject matter jurisdiction in this matter is predicated on 28 U.S.C. § 1332(a) (1)¹. Alesco is a Maryland corporation with its principal place of business located in Philadelphia, Pennsylvania. *See supra* at ¶ 2. Each of the Respondents is a resident of either the State of North Carolina or the State of Florida. *See supra* at ¶¶ 3 through 7. The amount in controversy in this matter exceeds \$75,000.00. *See supra* at ¶ 1. Accordingly, all requirements for the exercise of diversity jurisdiction in this matter are satisfied. *See Tuscano v. Evening Journal Ass'n*, 179 Fed. Appx. 621 (11th Cir. 2006)(finding the requirements of diversity jurisdiction met in an action to enforce an arbitration award where the diversity of the parties was undisputed and the amount in controversy as reflected on the face of the Complaint exceeded the jurisdictional threshold); *see also Rowland v. Patterson*, 882 F. 2d 97 (4th Cir. 1989)(finding that the relevant time for determining the diversity of the parties was at the filing of the federal action and not the earlier initiating of the arbitration proceeding).

As the arbitration agreement contained in each of the Continuing Guaranty Agreements does not specify the venue of the proceeding for the confirmation of the Arbitration Award, venue is proper in this Court, as the Court sitting in the District in which the December 13, 2006, arbitration hearing was held. *See* 9 U.S.C. § 9.

¹ Recognizing that the Federal Arbitration Act does not itself serve as an independent basis for Federal Court subject matter jurisdiction, *see, e.g. Quick & Reilly, Inc. v. Saglio*, 717 F. Supp. 822 (S.D. Fla. 1989), Alesco brings this action in diversity.

B. Governing Law

The Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*, is the governing law in this matter².

The parties stipulated to the application of the Federal Arbitration Act in the arbitration clause contained in each of the Continuing Guaranty Agreements. *See* Continuing Guaranty Agreements at ¶18 (a) (quoted *supra*). Moreover, the Federal Arbitration Act applies to any written provision in “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.” 9 U.S.C. § 2. “Federal courts have consistently ruled that even in a diversity case federal substantive law developed under the Act is to be applied to decide arbitration issues if the underlying agreement affects interstate commerce.” RPJ Energy Fund Management, Inc. v. Collins, 552 F. Supp. 946 (D. Minn. 1982); Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc., 625 F. 2d 22, 25 (5th Cir. 1980)(“ Although state law is usually adopted in diversity cases, it is not followed in an action to enforce the arbitration provision of a contract in interstate commerce. The parties to these contracts are from different states, and if, as appears likely, performance necessarily entailed interstate commerce, ... enforcement of the arbitration clause in federal court is controlled by the United States Arbitration Act.”). “The FAA provisions concerning the validity of arbitration clauses reach to the edge of Congress’s power under the Commerce Clause.” Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054, 1060 (11th Cir. 1998) *citing* Allied-Bruce Terminix Cos. V. Dobson, 513 U.S. 265, 270, 115 S. Ct. 834, 838, 130 L.Ed.2d 753 (1995).

² While Alesco maintains that the applicable provisions of the Federal Arbitration Act are controlling in this matter, Movant notes that at least insofar as this Motion is concerned, that the relevant provisions of the Florida Arbitration Act are substantively the same as the relevant provision of the Federal Arbitration Act providing for confirmation of an arbitration award. *Compare* 9 U.S.C. § 9 with Fla. Stat. § 682.12 (2006).

The contracts of guaranty which were the subject of the Arbitration Proceeding were made in connection with the refinancing of a loan which involved interstate commerce. The decision to refinance the Loan was made from Alesco's principal place of business, which was then located in the State of Florida. See Mullins Affidavit at ¶ 6. The refinancing of the Loan was approved by Alesco for purposes of refinancing a loan made to fund development costs of real property located in the State of North Carolina. See Mullins Affidavit at ¶ 4. At all times material hereto, the Loan was administered from its principal place of business which was then located in the State of Florida. See Mullins Affidavit at ¶ 7. Each of the Borrowers are, upon information and belief, business entities organized under the laws of the State of Florida. See Mullins Affidavit at § 3. Three of the Respondents were residents of the State of Florida and two of the Respondents were residents of the State of North Carolina at the time of the refinancing of the Loan. See Mullins Affidavit at ¶ 9; *see also, supra* at ¶¶ 3 through 7. Accordingly, the Loan and the subject guaranty agreements were ones affecting interstate commerce for purposes of the Federal Arbitration Act. See, e.g. Jenkins v. First American Cash Advance of Georgia, 400 F. 3d 868 (11th Cir. 2005)(finding that a "payday loan" transaction between a Georgia resident and a South Dakota bank to be a transaction involving commerce for purposes of the Federal Arbitration Act). Because this transaction is one affecting commerce, this proceeding is governed by the Federal Arbitration Act (9 U.S.C. § 1, *et. seq.*).

B. Standard for Confirmation of Arbitration Award

9 U.S.C. § 9 provides in pertinent part as follows:

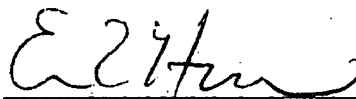
If the parties in their agreement have agreed that judgment of the court shall be entered upon the award made pursuant to the arbitration ... then at any time within one year after the award is made any party to the arbitration may apply to the court ... for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the

agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

“[A] confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the United States Arbitration Act.” Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F. 2d 851 (11th Cir. 1989)(citing Taylor v. Nelson, 788 F. 2d 220 (4th Cir. 1986)).

To the best of Alesco's knowledge, no action is now pending to vacate or modify the Arbitration Award. Accordingly, Alesco respectfully requests the entry of an order confirming the subject Arbitration Award and entering judgment thereon in the amount of \$13,060,614.63 together with post-award, prejudgment interest thereon from December 27, 2006 through the date of the entry of the Order confirming the Arbitration Award at a rate of nine percent (9%) per annum. Alesco further respectfully reserves the right to respond to any motion which may be brought by any one or more the Respondents for purposes of having the Arbitration Award vacated or modified.

Respectfully submitted,



Eric L. Hearn
Florida Bar No. 0094269
Moseley, Prichard, Parrish, Knight & Jones, P.A.
501 W. Bay Street
Jacksonville, Florida 32202
(904) 356-1306
(904) 354-0194 (facsimile)

Attorneys for the Movant

EXHIBIT G

DECEMBER 27, 2006 ARBITRATION AWARD

0145

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal**

In the Matter of the Arbitration between:

Case No.: 33 148 Y 00248 06

ALESCO FINANCIAL INC., f/k/a
SUNSET FINANCIAL RESOURCES, INC.,

Claimant,

vs.

ANTHONY R. PORTER, DOROTHY M. PORTER,
EUGENIA AMELUNG, FRANK AMELUNG and
RICHARD L. AMELUNG

Respondents.

AWARD OF ARBITRATORS

We, the undersigned Arbitrators, having been designated in accordance with the Arbitration Agreements entered into by the above-named parties, having been sworn, and having heard the proofs and allegations of the parties, ALESCO FINANCIAL INC., f/k/a SUNSET FINANCIAL RESOURCES, INC., Claimant, and ANTHONY R. PORTER, DOROTHY M. PORTER, EUGENIA AMELUNG, FRANK AMELUNG and RICHARD L. AMELUNG, Respondents, in accordance with the Commercial Rules of the American Arbitration Association, hereby enter the award hereinafter.

The Arbitration Hearing was held before R. A. Green, Robert L. Cowles and Charles P. Pillans, III, Arbitrators for the American Arbitration Association on December 13, 2006, in Jacksonville, Florida. Claimant was present at the

Arbitration Hearing; however, the Respondents, having been sent proper notice, were not present.

This case arises out of the guaranty of certain indebtedness by the Respondents. Each Respondent executed a Guaranty of indebtedness owed to Claimant. Having heard the evidence of Claimant at the Arbitration Hearing and considering the Affidavit of Robert W. Mullins, as previously presented and provided to Respondents, the Arbitrators make the following Award.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

1. Sunset Financial Resources, Inc., filed this Arbitration against five individuals who have guaranteed certain indebtedness to Sunset Financial Resources, Inc. The Guarantors are:

Guarantors

Richard Amelung
Frank Amelung
Eugenia Amelung
Anthony Porter
Dorothy Porter

All Guarantors (Respondents) were served notice of this Arbitration as provided in the applicable Guaranty and the Rules of the American Arbitration Association.

2. Sunset Financial Resources, Inc., consummated a merger transaction effective October 6, 2006, in which Sunset Financial Resources, Inc., was the surviving entity with its name changed to Alesco Financial Inc. Alesco Financial Inc. a/k/a Sunset Financial Resources, Inc., will be referred to as Alesco for actions after October 6, 2006, and Sunset for actions on or prior to October 6, 2006.

3. The following is a procedure background.

June 26, 2006	Sunset delivered the Demand for Arbitration to the American Arbitration Association.
June 29, 2006	American Arbitration Association sent letter to all parties outlining the arbitration process and setting initial deadlines.
July 19, 2006	Sunset sent a notice letter to Guarantors at all known addresses.
July 20, 2006	Letter summarizing conference call held on July 19, 2006 received from American Arbitration Association.
July 27, 2006	Sunset filed Checklist for Conflicts.
August 1, 2006	American Arbitration Association provided list of arbitrators to all parties.
August 7, 2006	Sunset forwarded List for Selection of Arbitrators to American Arbitration Association.
August 30, 2006	Notice of Appointment of Arbitrators from American Arbitration Association.
Sept. 12, 2006	Notice of Preliminary Hearing from American Arbitration Association.
October 2, 2006	Preliminary Hearing held via conference call. Two Respondents, Richard Amelung and Anthony Porter, attended the Preliminary Hearing stating that, singularly or together, they acted for all Respondents.
October 5, 2006	Scheduling Order from American Arbitration Association.
October 23, 2006	Alesco filed a Request to Expedite Hearing, which was granted by Order dated November 7, 2006.
November 17, 2006	A telephonic hearing was held November 17, 2006, at which time a person purporting to be Jimmy Porter, the father of Anthony Porter, allegedly acting on behalf of all Respondents, participated.

December 6, 2006 Letter from Jimmy Porter purporting to act for all Respondents admitting that the matter involved a matured note and there were no defenses.

Except as stated above, Respondents have not appeared in this Arbitration or provided any response to the claim.

4. The following Borrowers executed a Promissory Note dated June 8, 2005, in the original principal amount of \$16,700,000.

Borrowers

COP Preservation Partners, LLC
Triad Apartment Group, LLC
Communities of Penland, LLC
The Penland Reserve Tract, LLC
Beech Thicket Spring, Inc.
F. W., Inc.

5. In connection with the execution of the Promissory Note by the named Borrowers, the Respondents, as Guarantors, executed separate, joint and several Guaranties of the Promissory Note and other guaranteed Indebtedness as set forth in the Guaranties.

6. Each Guaranty contractually provides for this Arbitration Proceeding in Florida.

7. Each Guaranty contains the same provision defining the Guaranteed Indebtedness in Paragraph 2, as follows:

The term "Guaranteed Indebtedness" as used herein shall mean:
(a) all indebtedness of every kind and character whether now existing or hereafter arising, by, through and under, that certain Promissory Note of even date herewith, executed by Borrowers, payable to the order of Lender and in the original principal amount of \$16,700,000 ("Loan") and the full, complete, and timely performance of any obligations arising under any and all

documents executed in connection with the Loan and securing the payment thereof (the "Loan Documents"), including, but not limited to, that certain Loan Agreement by and between Lender and Borrowers and dated of even date herewith and all documents, agreements or instruments executed or delivered pursuant to the terms of the Loan Agreement; (b) accrued, but unpaid, interest on the Guaranteed Indebtedness; (c) any and all reasonable costs, attorneys' fees, and expenses incurred by Lender by reason of any Borrower's and/or Guarantor's default in payment of any indebtedness or incurred by Lender by reason of any Borrower's default in any obligations of Borrowers; and (d) any renewal or extension of any indebtedness, interest, costs or expenses described herein, or any part thereof; and (e) any and all other debts, claims, or obligations or indebtedness of Borrowers to Lender.

8. The Promissory Note contains a provision for a default interest rate of 21% per annum. The Promissory Note also provides as follows in Paragraph 5:

Borrower, any endorser, or guarantor hereof or any other party hereto (collectively "Obligors") and each of them jointly and severally: . . . (c) agree to pay, on demand, all costs and expenses of collection of this Note or of any endorsement or guaranty hereof and/or the enforcement of Lender's rights with respect to, or the administration, supervision, preservation, protection of, or realization upon, any property securing payment hereof, including, without limitation, reasonable attorney's fees, including fees related to any trial, arbitration, bankruptcy, appeal or other proceeding, in the amount of 10% of the principal amount of this Note, or such greater amount as may be determined reasonable by any court.

9. The Loan Agreement contains the following provisions:

"Obligation" means all present and future indebtedness, obligations, and Liabilities and all renewals and extensions thereof, or any part thereof, now or hereafter owed to Lender by Borrowers, whether arising pursuant to any of the Loan Documents, or otherwise, and all renewals and extensions thereof, together with all interest accruing thereon and costs, expenses, and attorneys' fees incurred in the enforcement or collection thereof.

"Liabilities" means, with respect to any Person, all indebtedness, obligations and liabilities of such Person, including without limitation (a) all "liabilities" which would be reflected on a balance sheet of such Person, (b) all obligations of such Person in respect of any Guaranty, letter of credit, or banker's acceptance, (c) all obligations of such Person in respect of any Capital Lease, (d) all obligations, indebtedness, and liabilities secured by any Lien on any property or assets of such Person, and (e) any obligation to redeem or repurchase any of such Person's capital stock, warrants, or stock equivalents.

3.3 *Guaranties.* Payment of the Obligation shall be unconditionally guaranteed by Guarantors.

10. The Promissory Note matured on June 8, 2006, without payment.

11. The Guarantors were provided notices and demand concerning the maturity of the Promissory Note and payment by letters with the following dates: May 11, 2006, June 1, 2006, June 6, 2006, June 8, 2006, and June 15, 2006.

12. The current principal balance outstanding under the Promissory Note is \$11,745,589.50. (There were payments made under the Promissory Note due to the sale of collateral for the Loan.)

13. The amount of interest accrued under the Promissory note is \$1,289,653.62.

14. Claimant has withdrawn its claim before this Panel for attorney fees and other costs due under the Promissory Note and Loan Agreement, and the Guaranties, without prejudice to request attorney fees in another proceeding. There is no amount for attorney fees and other costs included in the amount of the Award, except costs related to the AAA as set out below.

15. Under their respective Guaranties, each Guarantor is jointly and severally liable for all Guaranteed Indebtedness, including without limitation, principal [paragraph 2(a)] and interest [paragraph 2(b)].

16. No Guarantor (Respondent) has made payment under their respective Guaranties despite the demand to do so.

17. This Award may be signed by the individual Arbitrators in counterparts, all of which taken together shall constitute one and the same document, and any of the Arbitrators may execute this Award by signing any such counterpart.

AWARD

(1) We unanimously AWARD Claimant, ALESCO FINANCIAL INC., f/k/a SUNSET FINANCIAL RESOURCES, INC., against each Guarantor, namely Respondents, Richard Amelung, Frank Amelung, Eugenia Amelung, Anthony Porter, and Dorothy Porter jointly and severally, a total of **\$13,035,243.12**, plus interest at the rate of 9.00% per annum until paid.

(2) The costs and administrative fees incurred by Claimant to the American Arbitration Association for administrative fees totaling EIGHTEEN THOUSAND SEVEN HUNDRED THIRTY DOLLARS AND ONE CENT (\$18,730.01) shall be paid and are hereby awarded against Respondents, jointly and severally.

(3) Arbitrators' fees and expenses of SEVEN THOUSAND THREE HUNDRED FORTY-ONE DOLLARS AND FIFTY CENTS (\$7,341.50) shall be paid by and are hereby AWARDED against Respondents, jointly and severally.

Therefore, Respondents jointly and severally shall reimburse Claimant the sum of TWENTY-SDX THOUSAND SEVENTY-ONE DOLLARS AND FIFTY-ONE CENTS (\$26,071.51), representing that portion of the said fess and expenses previously incurred by Claimant.

(4) Amounts awarded in paragraphs two (2) and three (3) above shall also incur interest until paid at the rate of 9% per annum.

(5) This Award is in satisfaction of all claims presented to this panel.

12/27/06
Date


R.A. Green

Date

Charles Pillans, III

Date

Robert Cowles

We, R. A. Green, Robert L. Cowles, and Charles P. Pillians, do affirm upon our oaths as Arbitrator(s) that we are the individuals described in and who did execute this instrument, which is our AWARD.


R. A. Green

Robert L. Cowles

Charles P. Pillians

Therefore, Respondents jointly and severally shall reimburse Claimant the sum of TWENTY-SIX THOUSAND SEVENTY-ONE DOLLARS AND FIFTY-ONE CENTS (\$26,071.51), representing that portion of the said fees and expenses previously incurred by Claimant.

(4) Amounts awarded in paragraphs two (2) and three (3) above shall also incur interest until paid at the rate of 9% per annum.

(5) This Award is in satisfaction of all claims presented to this panel.

Date

12/21/06

Date

R.A. Green



Charles Pillans, III

Date

Robert Cowles

We, R. A. Green, Robert L. Cowles, and Charles P. Pillans, do affirm upon our oaths as Arbitrator(s) that we are the individuals described in and who did execute this Instrument, which is our AWARD.

R. A. Green

Robert L. Cowles



Charles P. Pillans

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Date

R.A. Green

Date

Charles Pillans, III

12-27-06
Date

Robert L. Cowles
Robert Cowles

We, R. A. Green, Robert L. Cowles, and Charles P. Pillans, do affirm upon our oaths as Arbitrator(s) that we are the individuals described in and who did execute this Instrument, which is our AWARD.

R. A. Green

Robert L. Cowles
Robert L. Cowles

Charles P. Pillans



Roy Cooper North Carolina Attorney General

For immediate release
Date: June 7, 2007

Contact: Noelle Talley
Phone: 919/716-6413

AG Cooper stops \$100 million mountain real estate scheme

Developers convinced dozens of consumers to invest in overvalued lots in Mitchell County

Raleigh: Attorney General Roy Cooper won a court order this week to stop a real estate venture that sold overpriced lots in the North Carolina mountains by promising consumers they could make a profit without having to invest any of their own money.

The defendants' complicated investment scheme used inflated appraisals and phony second mortgages as down payments to entice consumers to borrow millions of dollars to purchase property in the Village of Penland development in Mitchell County.

"These developers squandered more than \$100 million in financing, leaving consumers stuck with property that isn't worth what they owe on it," said Cooper. "We're putting a stop to this scheme before any more consumers get caught up in it."

Wake County Superior Court Judge Michael Morgan on Wednesday ordered a group of developers behind the Village of Penland project in Mitchell County to stop using misrepresentations to encourage consumers to take out loans to purchase lots. Cooper is also asking the court to permanently stop the developers' deceptive practices and to order them to pay refunds to consumers to satisfy consumers' loans on properties sold by the developers.

Developers involved in the Village of Penland project and named in Cooper's complaint include Peerless Real Estate Services, Village of Penland, MFSL Landholdings, Communities of Penland, COP Land Holdings, PG Capital Holdings, and West Side Development, all of Spruce Pine. Also named as defendants are the following individuals connected with these companies: Frank Amelung, Richard Amelung and Michael Yeomans of Florida; J. Kevin Foster of Georgia; and Anthony Porter and Neil O'Rourke of North Carolina. A. Greg Anderson, a licensed appraiser in North Carolina, is also named as a defendant.

Cooper asked the court to appoint a receiver to take control of these companies. On Wednesday, Judge Morgan appointed Joseph W. Grier III of Grier, Furr & Crisp in Charlotte as receiver.

According to Cooper's complaint, around 2002 the defendants purchased at least 1,200 acres of land in Mitchell County and subdivided it into more than 2,000 lots to create the Village of Penland development. The developers set up the companies listed above and have since received more than \$100 million in loan proceeds by marketing the lots to consumer investors. The developers have failed to complete any part of the project and instead used the money to fund other failed projects in South Carolina and St. Thomas and to pay for trips such as a cruise of the Greek isles and a ski trip to Switzerland.

As alleged in the complaint, the defendants sold most lots in the development for \$125,000 based on inflated appraisals by Anderson even though the lots had tax values of \$20,000 or less. Many of the lots could not

realistically be used to build homes because none of the lots included water and sewer systems, and many were too small to support a septic tank or a well.

Cooper alleges that the defendants promised consumers that they would profit from the Village of Penland without ever having to invest any of their own money. The developers used several different schemes to entice consumers to use their credit to purchase lots. In one scenario cited in Cooper's complaint, the developers told consumers to apply for credit to buy ten lots for a total of \$1.25 million and promised to buy back the lots at the same price within three years. Consumers were told that these ten lots would then be developed and that they would receive \$100,000 when each home sold. In other cases, developers asked consumers to buy 20 lots for \$2.5 million. The developers promised to buy the lots back in two years and deed consumers an additional 20 lots plus a house, which the companies said they would then rent from the consumer for \$280,000 a year as a model home.

Cooper alleges that consumers who agreed to invest in the Village of Penland were told by the developers to fill out four or five loan applications. Without most consumers' knowledge, the defendants sent all of the loan applications to different lenders at the same time so that the lenders were unaware that the consumers were taking out multiple loans. The developers provided illusory second mortgages to cover the down payments on these loans through a company related to one of the defendants. These second mortgages were not shown on required closing statements that instead showed deposits of earnest money which the consumers did not make.

On May 30, 2007, defendant Anthony Porter notified some of these consumers that the developers would not be able to make the monthly mortgage payments as promised, leaving consumers stuck with large debts and no way to sell their lots for enough money to cover the loans.

According to Cooper's complaint, the defendants also failed to register the project with the US Department of Housing and Urban Development, which requires developers to provide a disclosure statement outlining how housing developments will be completed and how services such as water and sewer systems will be provided. This same law, the Interstate Land Sales Full Disclosure Act, also provides protections for consumers by giving them a period of time to cancel their purchase in the development.

"Do your homework carefully when investing in real estate," Cooper cautioned consumers. "Watch out for offers that promise high profits with little or no investment."

###

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROBERT L. CULLEN, ANDREW A.
CORRIVEAU, JOHN CALDWELL,
ANDREA HUCKS, JAMIE
BELLAMY, MICHAEL PEARSON,
and DAVID MANDELL,

Plaintiffs,

v.

J. BENNETT McNEAL, B. McNEAL
PARTNERSHIP, L.P., ANTHONY
R. PORTER, and WRIGHT'S
POINT HOME OWNERS
ASSOCIATION, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 04-CP-07-623

07 AUG -6 AM 11:14
CLERK OF COURT
BEAUFORT, S.C.

AFFIDAVIT IN SUPPORT OF
MOTION TO REOPEN EVIDENCE

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

)
) ss
)

JOHN E. NORTH, JR., being of lawful age and first duly sworn upon oath,
deposes and says as follows:

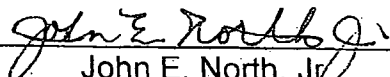
1. He is one of the attorneys for the Plaintiffs herein.
2. This Affidavit is given in support of Plaintiffs' Motion to reopen the evidence in this case.
3. Attached hereto as Exhibit A is a true and correct copy of a document entitled Assignment of Developer's Rights ("Assignment") dated June 12, 2007, and recorded July 27, 2007, in office of the Register of Deeds, Beaufort County, South Carolina.

4. The Assignment purports to assign to B. McNeal Partnership, LP "all rights of Developer" afforded under the Declaration of Covenants, Conditions, Restrictions and Easements for Wright's Point, dated April 2, 1998 ("Covenants").
5. The Assignment further purports to indemnify B. McNeal Partnership, LP for any claims against Developer arising prior to the date of the Assignment, July 12, 2007.
6. Pursuant to the Covenants, ¶ 1.12, any successor to Developer must have received all property then subject to the Covenants from Anthony R. Porter pursuant to a conveyance which expressly designates that the grantee as "Developer".
7. In April, 1999, J. Bennett McNeal DBA McNeal Land Company acquired Lots 1, 2, 3 and 4 as depicted in the Wright's Point Subdivision Plat and the entirety of undeveloped Parcel B as shown on the Boundary Survey from Anthony R. Porter.
8. That conveyance did not designate J. Bennett McNeal DBA McNeal Land Company as "Developer" nor did it convey all land then subject to the Covenants.
9. On July 16, 2002, B. McNeal Partnership, L.L. P. acquired undeveloped Parcel D from Jimmy W. Porter by Warranty Deed.
10. The Jimmy Porter/McNeal Partnership Deed did not designate B. McNeal Partnership, L.L.P. as Developer nor was Parcel D all of the property subject to the Covenants.

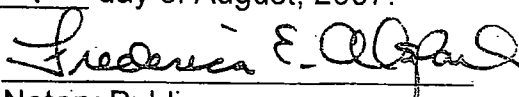
0159

11. At the time of the purported assignment of Developer's rights, neither Jimmy W. Porter nor Anthony R. Porter owned any property subject to the Covenants.
12. The Assignment of the Developer's rights purports to grant the rights and benefits of the Developer while avoiding the corresponding obligations of the Developer by disclaiming any liabilities for the actions of the Developer which occurred prior to June 12, 2007.
13. Paragraph 7.01 of the Covenants provides that control of the Board of the Association by Developer ends with the "surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer". Plaintiffs contend that the purported Assignment of the Developer's rights to one not qualified under the Covenants to act as successor "Developer" is a surrender of the authority of Anthony R. Porter to control the Board of the Association and vests those rights in the members of the Association pursuant to paragraph 12.01 of the Covenants.

FURTHER, Affiant says not.


John E. North, Jr.

Subscribed and sworn to before me this 2 day of August, 2007.


Notary Public

My Commission Expires: ~~My Commission Expires 8-25-2008~~

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served by United States Mail, postage prepaid, upon the attorney for the Defendants, Joel D. Bailey, PO Box 1437, Beaufort, SC 29901 this 2nd day of August, 2007.

John E. North Jr.

07 AUG -6 AM 11:14
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

0161

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ASSIGNMENT OF DEVELOPER'S RIGHTS

WHEREAS, Anthony R. Porter and Jimmy W. Porter (collectively, as "Developer", filed that certain Declaration of Covenants, Conditions, Restrictions and Easements for Wright's Point, as dated April 24, 1998 and recorded in Book 1049, Page 2283 and as rerecorded in Book 1152, Page 2278 in the ROD Office for Beaufort County, as amended and supplemented from time to time (the "Declaration"); and

WHEREAS, Developer wishes to assign its Developer's rights to B. McNeal Partnership, L.P..

NOW, THEREFORE, in consideration of the premises herein and other good and valuable consideration, the parties hereto agree as follows:

1. Anthony R. Porter and Jimmy W. Porter, do hereby assign any and all Developer rights, as set forth in the Declaration, as amended and supplemented, to B. McNeal Partnership, L.P.

2. B. McNeal Partnership, L.P., as successor Developer, shall have the rights, duties and responsibilities as Developer, as set forth in the Declaration, except that B. McNeal Partnership, L.P., shall not have any liabilities for actions of Developer, which occurred prior to the date of the within Assignment.

3. The intent of the within Assignment is that B. McNeal Partnership, L.P. shall have all rights as Developer under the Declaration, including, but limited to:

(a) All Development Rights under Article II - Development.

BEAUFORT COUNTY SC- ROD

BK 02603 PGS 2537-2539

DATE: 07/27/2007 03:20:51 PM

INST # 2007057041 RCPT# 501849

0162

EXHIBIT

A

- (b) All Administrative Rights under Article VII - Administration.
- (c) All rights of Developer, as set forth in Article XII, - General Provisions
- (d) All other rights of Developer, as specifically enumerated herein and as set forth in the Declaration.

4. Anthony R. Porter and Jimmy W. Porter shall save and hold harmless B. McNeal Partnership, L.P. from any claim against Developer, arising prior to the date hereof.

5. B. McNeal Partnership, L.P. shall save and hold harmless Anthony R. Porter and Jimmy W. Porter from any and all claims from its actions as Developer, subsequent to the date hereof.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this 12TH day of JUNE, 2007.

WITNESSES:

Scottie Parr
Larry Harvett
Scottie Parr
Larry Harvett
Diane Verhel

Anthony R. Porter
Anthony R. Porter

Jimmy W. Porter
Jimmy W. Porter

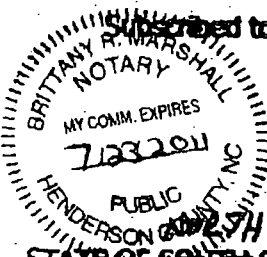
B. McNeal Partnership, L.P.

By: B. McNeal
Its: B. McNeal Partnership, L.P.

NORTH
STATE OF ~~SOUTH~~ CAROLINA

COUNTY OF ~~BEAUFORT~~ HENDERSON

I, Brittany B. Marshall, Notary Public for the State of ~~South~~ NORTH Carolina, do hereby certify that Anthony R. Porter, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.



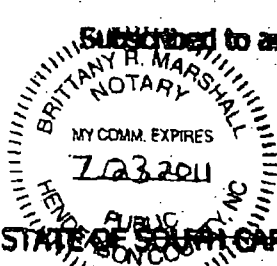
Subscribed to and sworn before me this 12 day of JUNE, 2007.

Brittany B. Marshall
Notary Public, State of ~~South~~ North Carolina
My commission expires: 7/23/2011

STATE OF ~~SOUTH~~ CAROLINA

COUNTY OF ~~BEAUFORT~~ HENDERSON

I, Brittany B. Marshall, Notary Public for the State of ~~South~~ NORTH Carolina, do hereby certify that Jimmy W. Porter, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.



Subscribed to and sworn before me this 12 day of JUNE, 2007.

Brittany B. Marshall
Notary Public, State of ~~South~~ NORTH CAROLINA
My commission expires: 7/23/2011

STATE OF ~~SOUTH~~ CAROLINA New York

COUNTY OF ~~BEAUFORT~~ Nassau

I, Diane Korb, Notary Public for the State of ~~South~~ New York Carolina, do hereby certify that B. McNeal Partnership, L.P. by J. Bennett McNeal its General Partner, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Subscribed to and sworn before me this 15 day of JUNE, 2007.

Diane Korb
Notary Public, State of South Carolina
My commission expires: 6-15-2011

DIANE KORB
Notary Public, State of New York
No. 403840
Qualified in Nassau County
Commission Expires June 21, 2010

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 04-CP-07-633

ROBERT L. CULLEN,
ANDREW A. CORRIVEAU,
JOHN CALDWELL, ANDREA
HUCKS, JAMIE BELLAMY,
AND MICHAEL PEARSON,
Plaintiffs,

v.

J. BENNET McNEAL, B.
McNEAL PARTNERSHIP, L.P.,
ANTHONY R. PORTER, and
WRIGHT'S POINT HOME
OWNERS ASSOCIATION,
INC.,

Defendants.

AMENDED REPLY TO COUNTERCLAIM

07 APR 13 PM 2:31
CLERK OF COURT
BEAUFORT, S.C.

Come now the Plaintiffs, and for their amended reply to the Counterclaim of the Defendants, state and allege as follows:

1. Plaintiffs admit the allegations contained within paragraphs 29 b, c, e, f, and i of the general and specific allegations of the Complaint.
2. Plaintiffs are without sufficient knowledge to either admit or deny the allegations of paragraphs 29 j, l, m, n, o, and p of the general and specific allegations of the Complaint.
3. Paragraphs 6 and 11 of the Complaint set forth legal conclusions to which no response is required.

0165

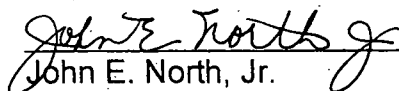
4. Paragraphs 7, 18, 19, 26, 27, and 28 assume facts that are disputed by the Plaintiffs and, therefore the allegations of these paragraphs are denied.
5. The remaining allegations of the Complaint are denied except such allegations as may constitute admissions against the interest of the Defendants.
6. Defendants lack the legal capacity and standing to bring any action in the name of Wright's Point Home Owners Association, Inc., in that none of them are the legitimate officers, directors, or representatives of said Defendants and are not the real parties in interest in accordance with Rule 17 of the South Carolina Rules of Civil Procedure.

Wherefore, having fully replied, Plaintiffs pray that the Counterclaim of the Defendants be dismissed with prejudice at Defendants' cost.

Dated this 11th day of April, 2007.

ROBERT L. CULLEN et. al., Plaintiffs,

By:


John E. North, Jr.
S.C. Bar Number 6570
916 BAY STREET, Suite 100
BEAUFORT, S.C. 29902
(843) 379-0800 (phone)
(843) 379-0900 (fax)
Attorney for Plaintiffs

Certificate of Service

The undersigned hereby certifies that on the 11th day of April, 2007, a true and correct copy of the foregoing was served upon the attorney for the Defendants, Joel D. Bailey, P.O. Box 1437, Beaufort, S.C. 29901-1437 by United States Mail, postage prepaid.

John E. North Jr.

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BEAUFORT COUNTY
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BEAUFORT, S.C.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 04-CP-07-633

Robert L. Cullen, Andrew A. Corriveau,
John Caldwell, Andrea Hucks, Jamie Bellamy,
Michael Pearson, and David Mandell, of whom
Robert L. Cullen, Andrew A. Corriveau, and
Andrea Hucks are Appellants,

v.

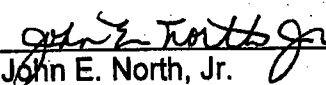
J. Bennet McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc.....Respondents.

NOTICE OF APPEAL

Robert L. Cullen, Andrew A. Corriveau, and Andrea Hucks appeal the
Judgment of the Honorable Carmen Tevis Mullen, dated October 26, 2007, and
the denial of Appellants' Motion to Alter or Amend by an Order, dated January
22, 2008, which Order was received by Appellants on January 23, 2008.

True and correct copies of the Judgment and Order subject to this appeal
are enclosed herewith.

Dated this 19th day of February, 2008.



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**THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

Carmen Tevis Mullen, Circuit Court Judge

Case No: 2004-CP-07-633

**Robert L. Cullen, Andrew A. Corriveau, John
Caldwell, Andrea Hucks, Jamie Bellamy, Michael
Pearson and David Mandell, of whom Robert L.
Cullen, Andrew A. Corriveau and Andrea
Hucks are.....Appellants-Respondents**

vs.

**J. Bennett McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc.....Respondents-Appellants**

NOTICE OF CROSS APPEAL

J. Bennett McNeal, B. McNeal Partnership, L.P., Anthony R. Porter, and Wright's Point Home Owners Association, Inc. appeal the order of the Honorable Carmen Tevis Mullen dated October 26, 2007. Respondents-Appellants received written notice of entry of this order on January 23, 2008, and received Appellants-Respondents' Notice of Appeal on February 20, 2008..

February 22, 2008


Joel D. Bailey
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Attorneys for Appellants-Respondents

1 ROBERT L. CULLEN,
2 Having Been First Duly Sworn,
3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MR. NORTH:

6 Q. Can you state your name and address, please.

7 A. Robert Cullen,
8 Beaufort, South Carolina.

9 Q. How long have you lived at that location?

10 A. We moved in in December 23rd, 2002.

11 Q. And do you still reside there today?

12 A. Yes.

13 Q. Is that real estate on a lot within what is
14 referred to as phase one of the Wright's Point
15 Plantation?

16 A. Yes.

17 Q. Did you build a house at that location?

18 A. Yes.

19 Q. And when you built your house, did you request
20 that you be allowed to use Hardiplank materials?

21 A. Yes.

22 Q. And was that request denied?

23 A. It was denied.

24 Q. Okay. And did you comply with that denial?

25 A. Yes.

1 Q. Okay. Do you recall, at the point in time you
2 moved into your house, that Mr. Porter was a resident of
3 that neighborhood?

4 A. Yes.

5 Q. When did he quit being a resident?

6 A. I think in the spring of 2003. I can't
7 remember the exact date.

8 Q. Did you notice at that point in time that his
9 house was for sale?

10 A. I don't think -- I don't know at that point in
11 time whether there was a for sale sign on it, at that
12 point in time, or not.

13 Q. Okay.

14 A. But there subsequently -- there was a for sale
15 sign on it in 2003, I think.

16 Q. Okay. After you moved into your house, did you
17 have discussions with anybody concerning the condition of
18 the neighborhood?

19 A. Yes.

20 Q. Who did you discuss that with?

21 A. Bennett McNeal.

22 Q. And what was his role, or what was your
23 understanding of his role, with regard to the
24 neighborhood?

25 A. Well, we knew we couldn't get ahold of Tony

1 cutting the grass. And he said, well, how can we -- you
2 know, the lots here aren't selling real fast; you know,
3 what do you think the problem is. And I said, well, I
4 think the problem is is the place looks a little shabby.
5 And he says, well, what do you mean. And I said, well,
6 you know, the edges -- the edges aren't, you know, well-
7 defined on the lawn; you know, there's a lot of crabgrass
8 around; there's weeds growing every place. I believe at
9 that point in time the fountain had died. And -- the
10 fountain in the pond had died. And, generally, it was
11 in -- it needed some upkeep.

12 Subsequent to that, Bennett said, well, why
13 don't we get together and talk about your issues. So I
14 met with Bennett McNeal and Wayne Webb at Callahan's. I
15 think now it's a pizza place. But it was right at
16 Midtown Bi-Lo. And in that meeting, Bennett told me
17 that -- you know, he says all the lots are sold, or maybe
18 except one; I think it's time that you guys started your
19 own homeowners association. And I said, well, what do
20 you mean a homeowners association; I've never lived in a
21 place where there was a homeowners association. I said,
22 what's that all about. And he said, well, what it is,
23 it's a ruling body of people that basically govern the
24 affairs of the association. And I said, well, how do you
25 do that. And he said, well, what you need to do to start

1 one is that you need to go over to Bundy, get a list of
2 all the names of all the homeowners, and then send them
3 out notices that you're having an annual meeting, and
4 then elect yourself some officers, and then create some
5 bylaws, and you're off and running. So he encouraged me
6 to do that.

7 Q. When you built your house, did you understand
8 that he was on the architectural review committee?

9 A. Yes, he was. I'm almost positive that I
10 submitted, you know, wood samples with paint to Bennett,
11 as well as landscaping plans and so forth.

12 Q. Did you later learn that he was, in fact,
13 designated as the president of the homeowners
14 association?

15 A. Yes. We got a letter from Tony on that.

16 Q. When Mr. McNeal described to you the various
17 steps that would be required to get a homeowners
18 organization running, what did you say to him?

19 A. I said -- I said, gee, that seems like a lot of
20 work. And he says, well, that's what you got to do to --
21 you know, to get this thing going.

22 Q. Did he provide any assistance to you thereafter
23 in terms of getting it going?

24 A. Not really, other than saying to go over to
25 Bundy, and get a list of the names and send out notices

1 to everybody, and get a meeting of everybody that you can
2 get ahold of.

3 Q. Do you remember him providing bylaws to you?

4 A. Yes. He provided bylaws from Polowana Island
5 to me.

6 Q. And is Polowana one of the developers that he
7 was involved with?

8 A. Yes. He and Tony apparently were developers at
9 the Polowana.

10 Q. Did you follow his suggestion and contact Bundy
11 Management?

12 A. I did.

13 Q. And describe that discussion for me.

14 A. I went over to Bundy Management and told them
15 that Bennett had talked to me and that we were going to
16 start our own homeowners association, and could she give
17 me the names and address of all the people, and I started
18 writing them and calling them.

19 Q. And she fully cooperated and gave you the
20 information you requested?

21 A. Absolutely.

22 Q. And when you wrote and called them, what did
23 you call them about or did you ask them to do?

24 A. I'm not sure I understand your question.

25 Q. Well, when you made contact with the

1 homeowners, what did you say to them?

2 A. I said that I had had a -- I had had a meeting
3 with Bennett and that they wanted us to start our
4 homeowner -- our own homeowners association because
5 basically all the lots were sold.

6 [Whereupon, Plaintiffs' Exhibit Number 22 is
7 pre-marked by Mr. North]

8 MR. NORTH: Your Honor, can I approach the
9 witness?

10 THE COURT: Sure.

11 Q. [Mr. North] I'm handing you what has been
12 marked as Exhibit 22. Can you tell me whether that's a
13 true and correct copy of a memo or letter that you sent
14 to Mr. McNeal on April 29th of 2003?

15 A. That is -- yeah. That's obviously mine.

16 Q. And does that exhibit set forth the various
17 items that you discussed with Mr. McNeal at your meeting
18 at Callahan's?

19 A. Yes.

20 Q. And does that exhibit also reference your
21 suggestion that some of those various issues should be
22 worked out prior to actually having the homeowners
23 meeting?

24 A. I can't remember -- I can't remember the answer
25 to --

1 Q. Well, could you take a look at it in the third
2 -- or the second paragraph?

3 A. Am I looking at the same document?

4 Q. Yes. Are you looking at Exhibit 22?

5 A. Yes. Repeat your question again.

6 Q. Read the second sentence to me.

7 A. We should probably meet to specifically nail
8 down them prior to our homeowners association meeting.

9 Q. And then referring to the list of items that
10 you had discussed?

11 A. Yes.

12 Q. Okay.

13 [Whereupon, Plaintiffs' Exhibit Number 23 is
14 pre-marked by Mr. North]

15 Q. [Mr. North] I'm handing you what has been
16 marked as Exhibit 23. Tell me what that is.

17 A. Exhibit 23 is a letter which I either e-mailed
18 or hand-delivered to everyone that we could get ahold of,
19 that was on Bundy's list, announcing that we were having
20 a homeowners meeting.

21 Q. And does that letter that was sent to the
22 various neighbors reference your discussions with Mr.
23 McNeal about the homeowners assuming management?

24 A. Yes.

25 Q. Read the portion of the letter that references

1 THE COURT: All right.

2 Q. [Mr. North] Mr. Cullen, in paragraph 2 of
3 this letter to the homeowners, do you reference your
4 discussion with Mr. McNeal concerning his suggestion to
5 assume management decision-making for the neighborhood?

6 A. Yes.

7 Q. And this was sent to all of your neighbors?

8 A. Yes.

9 [Whereupon, Plaintiffs' Exhibit Number 3,
10 minutes of 5/6/03 meeting, is marked by the court
11 reporter]

12 Q. [Mr. North] Mr. Cullen, do you have Exhibit
13 Number 3?

14 A. Yes, I do. That's defendants' exhibit 12.

15 Q. Correct. Do you recognize that as minutes of
16 the meeting of May 6, 2003?

17 A. That's correct.

18 Q. And do those minutes refer -- or reflect the
19 various homeowners that attended that meeting?

20 A. Yes.

21 Q. And at that time did the homeowners agree to go
22 ahead and form a homeowners association?

23 A. Yes.

24 Q. At that time were you elected president?

25 A. Yes, I was.

1 he acted as a president of this meeting. He was
2 elected, is that correct, and he went on to conduct
3 this meeting? Am I correct in that?

4 MR. NORTH: Yes.

5 MR. BAILEY: That's their --

6 THE COURT: And I'm assuming -- and that's what
7 they're saying.

8 I'm looking at the meeting minutes. I don't
9 know if it's reflected in the meeting minutes in
10 regards to the discussion of Hardiplank. I think he
11 can tell me what the group, in total, decided as to
12 whether or not they wanted to use Hardiplank. So he
13 can go ahead and he can testify to that.

14 Q. [Mr. North] Does Exhibit 3 reflect the
15 discussions that took place during that meeting?

16 A. Yes.

17 Q. Was Bennett McNeal at that time elected by the
18 homeowners as one of the board members?

19 A. Yes, he was.

20 Q. Was he present at that meeting?

21 A. No, he was not. However, I did give him -- you
22 know, I did let him know that he was elected to the board
23 of directors.

24 Q. Okay. After that meeting did you have any
25 additional meetings with Mr. McNeal at Callahan's?

1 A. Yeah. I think there was one additional meeting
2 where we ran into Sherwood Fender.

3 Q. Were you introduced to Mr. Fender?

4 A. Sherwood just happened to be there at that time
5 having lunch. And we were talking about changing the
6 covenants, and he introduced me to Sherwood as the
7 individual who actually originally created the covenants
8 that were -- that were now -- that we now have; and that
9 Sherwood would be the one that would be responsible for
10 changing them; and there was some tweaking that he wanted
11 to have done in the covenants for our new association;
12 and that Sherwood would be the one that would do it,
13 since he wrote the original ones.

14 Q. And what was the tweaking that you discussed
15 with Mr. McNeal?

16 A. I didn't really get into the details of it.

17 Q. Okay.

18 [Whereupon, Plaintiffs' Exhibit Number 4, memo
19 dated 10/1/03, is marked by the court reporter]

20 Q. [Mr. North] Do you have before you Exhibit
21 Number 4?

22 A. That is correct.

23 Q. What is Exhibit Number 5?

24 A. Basically, it appears to be a summary of my
25 discussion with the homeowners that related to a meeting

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1 that I had with Bennett and Wayne Webb. And this was at
2 the Country Store, where Richard Radcliff happened to be
3 dropping in and out of the -- I think he was fixing the
4 light bulbs or something.

5 Q. Does Exhibit 4 describe your discussion at that
6 time with Mr. McNeal?

7 A. Yes, it does.

8 Q. And did you send Exhibit 4 to the homeowners --

9 A. Yes.

10 Q. -- of phase one at Wright's Point?

11 A. Yes, I did.

12 Q. Describe for me the discussion you had with Mr.
13 McNeal concerning the exchange of use of amenities.

14 A. Well, early on Bennett had asked me whether or
15 not we would be willing -- whether our homeowners
16 association, as it was created in May, whether or not we
17 would have wanted to trade out use of our common areas
18 and docks for the proposed use of a future swimming pool
19 and tennis court which he was going to build in the
20 outside areas.

21 Q. And did you respond to him on that topic?

22 A. Well, based upon the feedback that I had gotten
23 from the homeowners, none of them were interested in it.

24 Q. I notice in paragraph 3 a notation about a
25 written legal separation of the two areas. Describe for

1 me your discussion, concerning that topic, with Mr.
2 McNeal.

3 A. Well, this relates back to using Sherwood
4 Fender. As a matter of fact, in the meeting that I had
5 with Bennett and Wayne Webb, I had asked how is Sherwood
6 doing with the revision of the covenants to reflect that
7 we were now a separate area. And Bennett responded that
8 Sherwood Fender was no longer working on it, and that he
9 had actually look -- you know, looking for a new lawyer
10 to do that, to separate the two areas.

11 Q. Okay.

12 [Whereupon, Plaintiffs' Exhibit Number 5, memo
13 dated 11/2/03, is marked by the court reporter]

14 Q. [Mr. North] Do you have before you Exhibit
15 Number 5?

16 A. Yes.

17 Q. Is that a true and correct copy of a letter or
18 a memo that you sent to Mr. McNeal on or about November 2
19 of --

20 A. Yeah. Basically --

21 Q. -- of 2003?

22 A. -- what this was was my notes that I was using
23 in the meeting.

24 Q. In a meeting that you had with Mr. McNeal?

25 A. Yes. This is -- these were my notes. I may

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1 have given a copy to him. I don't know. But it was my
2 notes of what I wanted to specifically discuss with
3 Bennett.

4 Q. And do these notes reflect the position taken
5 by the new homeowners group --

6 A. Yes.

7 Q. -- in response to the issues that you had
8 discussed with Mr. McNeal previously?

9 A. Yes.

10 Q. Did that meeting end on a sour note?

11 A. Yes, it did.

12 Q. Does Exhibit 5 set forth the various topics
13 that were discussed in that meeting?

14 A. Yes. Yes, it does.

15 [Whereupon, Plaintiffs' Exhibit Number 6,
16 letter dated 12/8/03, is marked by the court reporter]

17 Q. [Mr. North] Do you have before you Exhibit 6?

18 A. Yes.

19 Q. Is that a true and correct copy of a letter
20 that you received from Tony Porter on or about December
21 8th of 2003?

22 A. Yes.

23 Q. Is it fair to say that that letter objected to
24 the existence of the new homeowners group?

25 A. That is correct. And I think at this point in

1 time Bennett was appointed by Porter as the president of
2 the board of directors.

3 Q. Was it your belief at this point in time that
4 the homeowners had the right to go ahead and organize and
5 represent the association?

6 A. Yes. We were encouraged to do so.

7 Q. Are you talking about by Mr. McNeal?

8 A. Yes.

9 Q. Did you also believe that the homeowners had
10 that right, since all of the lots in the development had
11 been sold?

12 A. Yes.

13 Q. Did you conduct an annual meeting, at or about
14 that point in time, of all the homeowners?

15 A. Yes. I think it was a little later than the
16 8th.

17 Q. Okay. Was that annual meeting in January?

18 A. Yes.

19 Q. Was a notice of that annual meeting sent out to
20 the various homeowners?

21 A. Yes.

22 Q. Where was the meeting held?

23 A. At my home.

24 Q. How many of the lots were represented at that
25 meeting?

1 A. I can't recall. It was approximately twenty-
2 two, twenty-three, something like that.

3 Q. Do you recall that Mr. Porter showed up at the
4 beginning of the meeting?

5 A. Yes, I do. With Tom Mikell.

6 Q. Okay. Is it fair to say that if Mr. Porter's
7 presence was counted, that you had a quorum for the
8 meeting?

9 A. We didn't really know how to count that because
10 even though Tony showed up and wanted -- and to -- wanted
11 to drop off a note saying that he was, in fact, the head
12 of the homeowners -- or the head of the -- still a
13 developer, and so forth and so on, and that we were
14 basically having an illegal meeting. When we asked
15 him to address the homeowners association, he refused
16 to do so.

17 [Whereupon, Plaintiffs' Exhibit Number 7,
18 minutes of 1/21/04 meeting, is marked by the court
19 reporter]

20 Q. [Mr. North] Do you have before you what's been
21 marked as Exhibit 7?

22 A. Say that again, John.

23 Q. Do you have before you Exhibit 7?

24 A. Yes.

25 Q. Is that a true and correct copy of minutes of

1 the annual meeting of the homeowners group on January 21
2 of 2004?

3 A. Yes.

4 Q. Does that set of minutes describe the persons
5 present and the matters dealt with during that meeting?

6 A. Yes.

7 Q. In that meeting, were the plaintiffs in this
8 case elected as officers and directors of the homeowners
9 association?

10 A. Yes.

11 Q. And did you as a plaintiff believe that you had
12 the right to act as president and as a director, at that
13 point in time, on behalf of the homeowners association?

14 A. Yes.

15 [Whereupon, Plaintiffs' Exhibit Number 8, memo
16 dated 1/21/04, is marked by the court reporter]

17 Q. [Mr. North] I'm handing you what has been
18 marked as Exhibit 8. Do you recognize that document?

19 A. Yes. That's the one that Tony showed up with
20 at my house on the 21st, the same night that we were
21 having the meeting.

22 Q. So you're saying that Exhibit 8 was delivered
23 to your house on January 24th?

24 A. No. I'm saying that --

25 Q. Oh. I'm sorry. January 21. I'm sorry. I had

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MIA PERRON, CCR, CVR-CM

1 clear.

2 [Whereupon, Plaintiffs' Exhibit Number 9,
3 letter to neighborhood, is marked by the court
4 reporter]

5 [Whereupon, Plaintiffs' Exhibit Number 10,
6 notice of annual meeting, is marked by the court
7 reporter]

8 Q. [Mr. North] Do you have before you Exhibits 9
9 and 10?

10 A. Yes.

11 Q. What is Exhibit 9?

12 A. It appears to be a letter that I sent to the
13 neighborhood to all the members of our association.

14 Q. And did this letter enclose Exhibit 10, which
15 is the notice of the annual meeting?

16 A. Yes.

17 Q. Who handled the sending out of the notice to
18 all of the various homeowners?

19 A. Andy did. Andy Corriveau.

20 Q. And were you present at that meeting in March
21 of 2004?

22 A. Yes.

23 Q. Okay. Describe for me your activities with
24 regard to determining the number of lots represented at
25 that meeting.

1 A. Well, we had proxy values -- we had proxy votes
2 from all the people that responded. We had them sign in,
3 and we counted them up to make sure that we had a valid
4 quorum of members.

5 Q. And did you have twenty-eight lots represented?

6 A. We had twenty-eight lots represented.

7 Q. Were you -- was your election in January, and
8 that of the other officers and directors of the
9 association, ratified at that time by the twenty-eight
10 lot owners?

11 A. Yes, it was.

12 Q. And did you ask the twenty-eight lot owners to
13 ratify the filing of this declaratory judgment action
14 seeking the relief that your complaint seeks?

15 A. Yes.

16 Q. And did all twenty-eight of the lot owners
17 ratify that action?

18 A. They voted on it unanimously.

19 Q. After your election, did you ask Bundy
20 Management to turn over the books to you?

21 A. No, I didn't ask them to turn over the books.
22 I asked to see the financials.

23 Q. Okay. Did they give those to you?

24 A. Yes.

25 Q. Do you recall that within the first couple of

1 months after filing the complaint that you agreed to a
2 consent order whereby the plaintiffs would take no action
3 with regard to control of the association?

4 A. Yes.

5 Q. During the pendency of this lawsuit, who has
6 been in control of the association?

7 A. That's a good question. I'm assuming you -- I
8 don't know the answer to that. I mean, if you ask us
9 that were elected, I would have been in control.

10 Q. Okay. I'm not talking about just from a
11 technical or a legal standpoint. I'm talking about in
12 terms of day-to-day operation, who actually has been
13 running the association?

14 A. Well, Bundy paid the bills.

15 Q. Has Mr. McNeal continued to act as president?

16 A. Yes.

17 Q. Has Mr. McNeal and his associates continued to
18 run the architectural committee of the association?

19 A. Yes.

20 Q. Do they do so today in your neighborhood?

21 A. Yes.

22 Q. What action if any did the plaintiffs actually
23 ever get around to taking as officers and directors,
24 other than being anointed as such?

25 A. Well, the only action that I personally took is

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1 I granted Andy Corriveau a waiver to put Hardiplank on
2 his house.

3 Q. Okay. And you also opened a bank account,
4 didn't you?

5 A. And we also opened a bank account in the name
6 of the Wright's Point Home Owners Association.

7 Q. Okay. Other than those two things, is there
8 anything else that the plaintiffs did at any point in
9 time that would be any sort of action as an officer or a
10 director of the association?

11 A. Interfacing with Bundy.

12 Q. When you say interfacing with Bundy, are you
13 talking --

14 A. Well, a lot of times one of the things I did
15 is -- we were trying to look for ways to save money in
16 the association. So one of the things I did is I looked
17 at all the water bills, for example, and I cross-
18 referenced all the water bills with all the water meters
19 because we found there was water bills coming from meters
20 that we couldn't find.

21 Q. Was not that done right after the --

22 A. Yes.

23 Q. -- May 2003 meeting?

24 A. Yes. Yes, it was.

25 Q. And was not that totally completed before you

1 open the account. So I went over and opened the account,
2 paid for the checks to be printed. And I think we held
3 it for about two or three months. And then at that point
4 in time I called you, our attorney, and said, John, you
5 know, we're sitting on this money; do you think it's
6 worthwhile to even continue with the bank account. And
7 at that point in time, we decided to basically close it.
8 So I went over, closed the account, got a cashier's
9 check, and ran it over to Bundy and told them who was
10 the -- whose -- you know, whose dues they were for.

11 Q. And is it fair to say that every penny of the
12 homeowner dues that went into that account came right
13 back out of the account and over to Bundy?

14 A. Yes. We never wrote a check.

15 Q. Is it correct to say that exactly, to the
16 penny, \$7500 went in and \$7500 came out --

17 A. Yes.

18 Q. -- and was delivered to Bundy?

19 A. Yes.

20 Q. What are the annual homeowner dues? The
21 amount.

22 A. \$1,000.

23 Q. Is it fair for me to assume, then, that at that
24 point in time the annual budget of the homeowners
25 association was \$44,000?

1 after I had had my last meeting with Bundy Management.
2 So after I talked with Mr. Lawrence, you know, I had no
3 further reason to contact Bundy Management.

4 Q. Have you made any defamatory statements about
5 any of the defendants?

6 A. No.

7 Q. Do you recall the point in time that the
8 request -- or that your action with regard to Mr.
9 Corriveau's Hardiplank took place?

10 A. Are you asking me for an approximate time
11 frame?

12 Q. Yes.

13 A. I recall that it was in like the November,
14 December time frame. You know, I'm getting a little
15 fuzzy because it was a little far back. Andy simply came
16 up to me and said, hey, would you approve the fact that I
17 would use Hardiplank. And I said, well, yeah; I don't
18 see why we shouldn't use it; now that we basically have,
19 you know, control of the organization, I don't see any
20 reason why we shouldn't use it. So I go ahead -- I went
21 ahead and granted him a waiver.

22 Q. Was that action based upon a discussion you had
23 already had at a homeowners meeting --

24 A. Yes.

25 Q. -- concerning Hardiplank?

1. Corriveau to have Hardiplank had absolutely nothing to do
2. with actions for forming a homeowners group?

3. A. Absolutely not.

4. Q. That letter postdates even the ratification of
5. the filing of this complaint, does it not --

6. A. Yes, I --

7. Q. It comes after?

8. A. Yes.

9. Q. Would you agree that any desire of Mr.
10. Corriveau to have Hardiplank had absolutely nothing
11. to do with the filing of this lawsuit?

12. A. Absolutely none. The important thing was
13. control.

14. Q. When you purchased your lot, what was your
15. understanding as to what if anything would occur outside
16. of the gates of the community?

17. A. That it was a separate development entirely.

18. Q. What was the basis for that understanding?

19. A. The fact that we were given two separate
20. marketing brochures. One was glossy, one was a Xerox.
21. Both showed forty-four lots. I believe both of them had
22. prices on them. There was no mention in either of those
23. brochures as to phase one or phase two. It simply showed
24. Wright's Point as being forty-four lots. It showed --
25. each of them showed two docks being put in. I think the

1 web page at the time also reflected that. The glossy
2 brochure I'm referring to is the beige-and-green McNeal
3 Realty brochure.

4 Q. Did you volunteer to be a president and
5 director of the association?

6 A. I was nominated.

7 Q. By whom?

8 A. I can't remember.

9 Q. Once nominated, did you agree to do so?

10 A. Yes.

11 Q. Did you believe at that time that you had the
12 right to do so?

13 A. Had the right to do so what?

14 Q. To be elected as an officer and a director --

15 A. Yes. Absolutely.

16 Q. -- by the other homeowners.

17 MR. NORTH: I have no further questions at this
18 time.

19 THE COURT: Ms. Estes, tell me what extent --
20 will you just jump in and let me know if you do have
21 questioning?

22 MS. ESTES: I sure will.

23 THE COURT: I appreciate it. Thank you. Mr.
24 Bailey?

25 MR. BAILEY: I apologize. I didn't mean to

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1 A. To be honest with you, I can't remember. But
2 it would make sense that I did.

3 Q. Okay. I'm not trying to trick you, but I'm
4 just wanting to --

5 A. You wouldn't do that, Joel.

6 A. -- make sure that we're clear.

7 Q. When you testified earlier -- my question to
8 you at page 229 at line 3 was: one of the things your
9 group did was approve a budget to pay Mr. North some sum
10 of money, did it not. Your answer, that's true. And I
11 said, what, \$8,000 was what was initially appropriated.
12 And you said, I can't remember the amount.

13 So just to be --

14 A. Yeah.

15 Q. -- just to be fair about it.

16 A. You know, I can't remember whether that was an
17 approval for a bill or a budget. I think at the time it
18 was a budget.

19 Q. Well, how much attorney's fees have you paid in
20 this case?

21 MR. NORTH: Your Honor --

22 A. Considerable.

23 MR. NORTH: -- let's clarify a couple of things
24 here.

25 First of all, why don't we limit the question

1 has any association money been used to pay any
2 attorney fees. What Mr. Cullen does personally
3 between himself and myself --

4 THE COURT: I agree with you. I agree with
5 you, Mr. North.

6 MR. BAILEY: The only reason I asked, Your
7 Honor, is they're asking for attorney's fees as part
8 of their complaint. I just thought we had a right to
9 know how much they're --

10 MR. NORTH: And at that point in time we'll
11 have a separate hearing and go through all the
12 attorney-fee evidence and what's reasonable and what's
13 been billed and all that. And that's a matter of a
14 separate proceeding. I assume that after we --

15 THE COURT: No, not necessarily, sir. You can
16 put up your case. If you are asking for attorney's
17 fees, you can put up your case. Typically you would
18 be the one putting it up, if you were asking for it,
19 but Mr. Bailey is asking for it at this point.

20 MR. BAILEY: I just don't want to get caught
21 later on. I just want to know what he's done.

22 MR. NORTH: Well, we've gone through three
23 years with Judge Coltrane insisting that all that gets
24 done after he rules on the merits of the case.

25 MR. BAILEY: We're not --

1 THE COURT: Judge Coltrane isn't hearing the
2 case, is he? He continued it, my understanding is,
3 three times.

4 Q. [Mr. Bailey] How much have you paid for
5 attorney's fees?

6 A. I think our bill is -- I think our bill is over
7 \$100,000.

8 Q. That's the bill. Have you paid any of that?

9 A. Yes, we have.

10 Q. How much has been paid?

11 A. I don't --

12 THE COURT: All right. That is irrelevant, Mr.
13 Bailey.

14 MR. BAILEY: Okay.

15 THE COURT: It does not matter what portion of
16 it has been paid or not paid --

17 MR. BAILEY: All right, Your Honor.

18 THE COURT: -- whatever it is.

19 MR. BAILEY: I think that's all I have, Your
20 Honor.

21 I thank you, Mr. Cullen --

22 THE COURT: Thank you, Mr. Bailey. Redirect,
23 sir.

24 - - -

25 - - -

1 MR. BAILEY: Thank you. I have no further
2 questions.

3 MS. ESTES: I would like to move to have Ms.
4 Pearson dismissed as --

5 THE COURT: Any objection, Mr. Bailey?

6 MR. BAILEY: No, ma'am.

7 THE COURT: All right. Ms. Pearson, thank you
8 for being here.

9 MR. NORTH: Can I clarify that she is being
10 dismissed as a party?

11 THE COURT: As a party.

12 MR. NORTH: Yes.

13 THE COURT: As a party in this case. Any
14 objection?

15 MR. NORTH: No objection. I just want to make
16 clear that she is being dismissed with prejudice for
17 all claims made against her in this case.

18 MR. BAILEY: We had an agreement, quite
19 frankly, Your Honor, that -- and I'll go ahead and put
20 it on the record with Ms. Estes -- that if Ms. Pearson
21 testified honestly and directly in accordance with her
22 deposition testimony, I would agree to dismiss her as
23 a party plaintiff. And we do hereby do that. We
24 dismiss her as a party plaintiff in this case.

25 THE COURT: And dismissed her counterclaims

1 against her?

2 MR. BAILEY: And we dismiss all counterclaims
3 against her. We are not looking to her for any money.
4 We will look solely to the other plaintiffs. Is that
5 what we covered --

6 MR. NORTH: I just wanted to clarify dismissal
7 with prejudice.

8 THE COURT: Ms. Estes, any comment as to that?

9 MS. ESTES: I have no comment other than thank
10 you.

11 THE COURT: Okay.

12 MR. BAILEY: In all honesty, it's a little late
13 for Mr. North to be concerned about what her rights
14 are. Ms. Estes, I think, is capable of protecting her
15 at this point.

16 THE COURT: Okay. Thank you. She is dismissed
17 as a plaintiff.

18 MS. PEARSON: Thank you.

19 THE COURT: Thank you, Ms. Pearson.

20 MS. PEARSON: Thank you.

21 [Whereupon, the witness is excused and exits
22 the witness stand]

23 THE COURT: All right. Ms. Estes, is that the
24 only witness you have?

25 MS. ESTES: That's it.

1 ANDREW A. CORRIVEAU,
2 Having Been First Duly Sworn,
3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MR. NORTH:

6 Q. State your name and address, please.

7 A. My name is Andy Corriveau. I reside at
8 in Beaufort, South Carolina.

9 Q. What is your profession?

10 A. I'm an insurance salesman.

11 Q. Okay. And you are a licensed insurance agent
12 in the state?

13 A. Yes, sir.

14 Q. Are you also a lot owner in phase one of
15 Wright's Point subdivision?

16 A. Yes.

17 Q. When did you purchase your property?

18 A. July of '02.

19 Q. And do you still own that property?

20 A. Yes, sir.

21 Q. Okay. Tell the Court your understanding as to
22 what Wright's Point subdivision consisted of at the time
23 you purchased your property.

24 A. We understood it to be a private, forty-four-
25 lot subdivision that had one lot -- I mean, one dock,

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1 with promise of a second dock to be built at a later
2 date, with nice sidewalks, gas lanterns, nice open space.

3 Q. How did you first become involved with the
4 homeowners association at Wright's Point?

5 A. I was invited to a meeting at Mr. Cullen's home
6 to discuss the possibility of forming a homeowners
7 association.

8 Q. Prior to that meeting, had you received from
9 Mr. Cullen a memo outlining the fact that there would be
10 an organizational meeting for the homeowners?

11 A. Yes.

12 Q. Had you had any dealings with Mr. McNeal at
13 that point in time?

14 A. Yes.

15 Q. Describe those for me.

16 A. Well, I only had one formal meeting with Mr.
17 McNeal. That was at the site. I had been talking with
18 Mr. Wayne Webb about purchasing some property in there,
19 and asked -- he told me that Mr. Bennett owned the
20 property in there, and so I wanted to meet him to talk to
21 him. And so he made arrangements for me to meet Mr.
22 Bennett -- Mr. McNeal, I'm sorry, at the site.

23 Q. Okay. At the site of the property --

24 A. Yes.

25 Q. -- you purchased?

1 A. Yes.

2 Q. And did you have a discussion with him at that
3 point in time?

4 A. Yes. We looked at some lots, and he showed me
5 some boundaries. And we had a very abbreviated
6 conversation. I don't think my conversation with Mr.
7 McNeal lasted more than five or ten minutes. And he just
8 introduced himself, showed me some lots, told me he was
9 interested in us buying in there, showed us a couple of
10 lot lines, and left.

11 Q. Okay. Was there any discussion about the size
12 of the development or what may take place outside the
13 gates?

14 A. Yes. Our -- my wife and I's first visit with
15 Mr. Wayne Webb was a couple of days prior to that. And
16 during that conversation we -- he brought us in there and
17 showed us some lots that they had listed, showed us a
18 couple of other properties that they did not have listed.
19 We even looked at two houses that Mr. Radcliff had built,
20 and talked in general about the neighborhood and what was
21 planned there and what was expected to go on.

22 Q. Was there any discussion about property owners
23 outside of the gate being part of the association?

24 A. My wife specifically asked him what was going
25 to happen outside the gates. And he told both of us at

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1 that time that that property was owned by another
2 developer; and that he thought that developer's plans
3 included building a small bed-and-breakfast near the
4 gate, closer to the water; and that there would be houses
5 between the gate and towards the front of the property,
6 or the property portion that was along the highway; and
7 that near the highway there would be mixed-use buildings,
8 and that that was a different -- a different developer
9 owned it. And my wife just wanted to make sure that
10 there was not going to be a trailer park out there.

11 THE WITNESS: I feel like I'm yelling.

12 THE COURT: You're fine. You're absolutely
13 fine. As long as the court reporter gets it, I can
14 certainly hear you.

15 THE WITNESS: Okay.

16 THE COURT: The witness was just saying he felt
17 like he was yelling, and I said luckily he only needs
18 to speak to me and so the court reporter can get it
19 down, so he is absolutely fine how he is speaking.

20 MR. NORTH: Your Honor, I would like to have
21 the witness be given Exhibit 12.

22 THE COURT: Sir, what was witness -- or Exhibit
23 Number 12?

24 MR. NORTH: There isn't one, Your Honor. I was
25 referring to the defendants' exhibits. I was

1 intending to refer to Exhibit 3.

2 THE COURT: Okay.

3 Q. [Mr. North] I'm handing you what's been marked
4 as Plaintiffs' Exhibit 3. Do you recognize that as
5 minutes of the May 6, 2003 meeting that you referred to
6 of the homeowners?

7 A. Yes. The initial meeting.

8 Q. Okay. And were you elected at that time as the
9 director?

10 A. Yes. As a board member.

11 Q. Look over the exhibit, if you would, and tell
12 me whether or not that describes what took place at that
13 meeting.

14 A. Just scanning it quickly I would say that, yes,
15 it does.

16 Q. Now, with regard to the discussion at that
17 meeting, of Hardiplank, did you notice that in the
18 minutes?

19 A. Yes.

20 Q. At that point in time, had your house even been
21 designed yet?

22 A. We were in the conceptual stages.

23 Q. Okay. Is that like the first third of the
24 process?

25 A. Yes. I would say that it was close to that.

1 Q. Okay. At that point in time was Hardiplank
2 even an issue for you?

3 A. Well, I had to ask Mr. Webb, at the meeting in
4 which he told me that the forty-four lots was a separate
5 development, whether or not Hardiplank was allowed and he
6 told me, no, that the developer of the forty-four-lot
7 section had resisted allowing Hardiplank. And I asked
8 him why, and he gave me some reasons. He said that --
9 and I can't -- I'm not sure if I remember correctly --
10 either he had it or Mr. McNeal had it on their house,
11 they liked it. And I asked him, well, I mean, is it
12 possible that they would ever consider putting it on the
13 house. And he said, well, you know, maybe.

14 Q. Is it fair to say that your activities in
15 joining a board of directors of the homeowners had
16 nothing to do with trying to have Hardiplank on your
17 house?

18 A. Had absolutely nothing to do with having
19 Hardiplank on my house.

20 Q. Did Hardiplank have anything to do with your
21 participating as a plaintiff in this lawsuit asking the
22 Court to declare the rights of the homeowners under the
23 covenant?

24 A. No.

25 Q. Did you have any face-to-face meetings with Mr.

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1 McNeal after the May 6th of 2003 homeowners meeting?

2 A. I think I might have bumped into him at lunch
3 one day at Duke's Barbeque or something, and we chatted.
4 I sat down and chatted with him for a few minutes. It
5 was just casual talk. Very pleasant.

6 Q. Casual, but nothing having to do with the
7 issues in this case?

8 A. Not that I recall. Very nice conversation.

9 Q. Were you involved in sending out notices for
10 the January 2004 annual meeting?

11 A. Yes.

12 Q. Is it fair to say that you took primary
13 responsibility for sending out those notices?

14 A. Yes.

15 Q. Describe what you did to get that accomplished.

16 A. Mr. Cullen gave me a recent list of property
17 owners and their addresses that he got from Bundy
18 Management. We went through it -- I went through it and
19 made sure that an invitation to the meeting was sent to
20 every single address on that list, and then I had my
21 secretary put postage on it and I asked her to bring it
22 to the post office box and mail them off.

23 [Whereupon, Plaintiffs' Exhibit Number 12,
24 letter to Mr. Cullen dated 3/16/04, is marked by the
25 court reporter]

1 [Whereupon, Plaintiffs' Exhibit Number 13,
2 accounting, is marked by the court reporter]

3 Q. [Mr. North] Do you have before you Exhibits 12
4 and 13? I'm sorry. Yes, 12 and 13.

5 A. Yes.

6 Q. Okay. Is Exhibit 12 a copy of the notice that
7 you sent to each of the homeowners?

8 A. Yes.

9 Q. Is Exhibit 13 the record that you just
10 referenced, that you obtained, that you used as the
11 source of information for mailing notice to each of the
12 homeowners?

13 A. I believe it is.

14 Q. You notice on Exhibit 13 that it's dated
15 December 16th, 2003?

16 A. Yes.

17 Q. And are those the records from Bundy
18 Management?

19 A. Mr. Cullen gave these to me. He said they came
20 from Bundy Management.

21 Q. Okay.

22 A. I had no reason to disbelieve him. I had
23 gotten copies of these records before and they look very
24 similar to it, so I would imagine they were.

25 Q. And I notice on Exhibit 12 it references the

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1 statement: this notice is given on the 24th day of
2 December, 2003. Is that the time that you sent the
3 notice out to each of the homeowners?

4 A. I couldn't get my secretary to work on
5 Christmas Eve. This actually went out a few days before
6 this.

7 Q. Do you know why the notice says it's on the
8 24th?

9 A. I just wanted to give them ample mailing time
10 to get it by the 24th.

11 Q. So it was actually sent out some days before
12 that?

13 A. Yes.

14 Q. I would like to hand you, if I could, this
15 Plaintiffs' Exhibit 7. Take a look of that, if you
16 would, and tell me if you recognize that as the minutes
17 of your homeowners annual meeting of January 21, 2004.

18 A. Just scanning them, I would -- I would say that
19 they were.

20 Q. Okay. At that meeting, were you elected as one
21 of the officers and directors of the homeowners
22 association?

23 A. Reluctantly, yes.

24 Q. Did you, at that time, believe that you had the
25 right to be elected as an officer or director of the

1 homeowners association?

2 A. Yes, I did.

3 Q. Had you been advised that the developer had
4 conveyed the last lot of the association by that point in
5 time?

6 A. Now, I hadn't been down to the courthouse, but
7 I understood that all the lots had been sold.

8 Q. I would like to hand you, if I could, Exhibits
9 9 and 10. Did you also handle the sending of notice with
10 regard to the March 2004 meeting of the homeowners?

11 A. Yes.

12 Q. Is Exhibit 9 a copy of the notice that was sent
13 out to each of the homeowners?

14 A. Yes.

15 Q. And what is Exhibit 10?

16 A. Exhibit 10 is, again, an official notice of
17 that meeting, along with proxy.

18 Q. Did those materials enclose an agenda?

19 A. I don't remember.

20 Q. Did the proxy that you sent out, this Exhibit
21 10, could you -- could you read the first sentence of the
22 second paragraph for me? In fact, just read the second
23 paragraph, if you would.

24 A. [Reading] The purpose of this meeting is to
25 review the legal issues facing our association and to

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1 determine a course of action to resolve those issues.
2 Additionally, we will review the actions taken at the
3 meeting of January the 21st, '04, and affirm those
4 actions. This notice is given on the 23rd day of
5 February, 2004, by the secretary of the corporation, by
6 mailing on this date a true and correct copy of this
7 notice to the address on file for each owner.

8 MR. NORTH: Your Honor, we are one copy short
9 of this. Perhaps I can --

10 THE COURT: Does Mr. Bailey know what it is and
11 he might be able to find it in discovery?

12 MR. NORTH: Well, it's one of his exhibits.
13 It's Defendants' Exhibit 40.

14 THE COURT: Okay.

15 MR. NORTH: I had rather give his to you and --

16 THE COURT: Right.

17 MR. NORTH: -- get him a copy.

18 THE COURT: Do you have that, Mr. Bailey,
19 already?

20 MR. BAILEY: I'm sure I can find it, Judge.

21 THE COURT: Thank you, sir. I appreciate it.

22 [Whereupon, Mr. North proffers documents to the
23 Court]

24 THE COURT: Thank you.

25 MR. BAILEY: It's going to be Number 14?

1 MR. NORTH: 14.

2 [Whereupon, Plaintiffs' Exhibit Number 14,
3 composite exhibit, is marked by the court reporter]

4 Q. [Mr. North] I'm giving you what has been
5 marked as Exhibit 14. I'll need you to -- there are
6 quite a few different things in that exhibit, an exhibit
7 put together by the defendants in your deposition.

8 MR. BAILEY: That's not what it is. It's not
9 an exhibit put together by the defendants in the
10 deposition.

11 THE COURT: It is exhibits that were entered in
12 when he gave --

13 MR. BAILEY: Exactly.

14 THE COURT: -- his deposition; is that correct?

15 MR. BAILEY: Exactly. Exactly.

16 THE COURT: They were attached to the
17 deposition.

18 MR. BAILEY: It's Mr. Corriveau's materials,
19 that he hadn't brought previously, that he supplied.
20 That's what I think it is.

21 THE COURT: Thank you.

22 MR. BAILEY: When he went back and checked and
23 got his records. It's his records, not mine.

24 THE COURT: Okay.

25 Q. [Mr. North] I would like to go through this

1 exhibit with you, to review what is included within it.
2 Do you notice on the second page a copy of this letter to
3 the various homeowners enclosing the notice of the
4 meeting?

5 A. Yes.

6 Q. Okay. And then the third page is, again, a
7 copy of that? Do you see on the fourth page an agenda --

8 A. Yes.

9 Q. -- for the meeting?

10 A. Uh-huh.

11 Q. Is that the agenda that you actually had for
12 that meeting?

13 A. As best I remember, yes.

14 Q. Okay. Take a look under new business. It
15 says, under number three, review of property owners'
16 concerns regarding possible fraudulent sales promotion of
17 Wright's Point by developer, McNeal Realty, Bennett
18 McNeal, and Wayne Webb. Who were the property owners
19 that were raising issues?

20 A. Well, the most vocal would have been Mr.
21 Pearson.

22 Q. Was that topic discussed at the meeting?

23 A. Yes.

24 Q. Were there any statements made by any of the
25 plaintiffs concerning any alleged fraudulent activities

1 by any of the defendants?

2 A. Not that I recall. I mean, there wasn't a lot
3 of rhetoric at the meeting. And I don't really think
4 that Mr. Pearson said a lot of things. I mean, he just
5 stated his position and how he felt. He didn't call
6 anybody out or anything like that.

7 Q. Okay. Next in the exhibit do you see a set of
8 the minutes to be approved for the January 21st meeting?

9 A. Correct.

10 Q. And after those minutes, can you tell me what
11 that -- what that next page is?

12 A. Are you talking about the attendance records?

13 Q. Yes.

14 A. Yes. That was a record that we compiled to
15 keep track of who attended the meeting.

16 Q. Okay. And does that show the identities of the
17 lots that were represented at the meeting, in person,
18 under column attended?

19 A. It lists all of the lot owners of all forty-
20 four lots, and makes a notation as to whether or not they
21 were personally there or had sent in a proxy or were
22 absent.

23 Q. Okay. So am I correct in assuming, then, the
24 handwritten tabulation on the second page shows twenty-
25 eight of the forty-four lots represented?

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1 A. Yes. Either by personally attending, or giving
2 someone a proxy.

3 Q. After that, do you see an attendance record
4 where certain people actually signed in?

5 A. Yes.

6 Q. Am I correct in understanding that thereafter
7 are various copies of the proxies that are referenced?

8 A. Yes.

9 And let me get back to this attendance record
10 where they signed their name. I don't know that this got
11 around for everyone to sign, so it may not be completely
12 accurate as far as someone who attended but forgot to
13 sign or did not get asked to sign.

14 Q. So you circulated it at the beginning, but you
15 don't know for sure if everybody --

16 A. Right.

17 Q. -- there --

18 A. Someone might have come in late.

19 Q. Okay. But did you have a roll call, or some
20 other way that you were able to verify that the people
21 with an A marked on the attendance record actually were
22 there?

23 A. That's -- I personally did that.

24 Q. Okay.

25 A. I counted heads, looked at people, made a

1 notation as to whether or not they were physically there.

2 Q. Okay. And then further down after all of the
3 proxies, do you see a certificate of mailing for the
4 March 10 meeting?

5 A. Yes.

6 Q. Okay. Who is the person that signed that?

7 A. She's one of my staff people.

8 Q. How do you pronounce her last name?

9 A. Sutchanella [phonetic].

10 MR. NORTH: I would ask at this time, just
11 for clarification from Mr. Bailey, whether or not he
12 would require Ferrera Sutchanella [phonetic] to
13 personally appear to say that she did all this, or
14 whether we can agree that this would be admitted as
15 evidence. We can --

16 THE COURT: Mr. Bailey?

17 MR. NORTH: -- easily call her.

18 MR. BAILEY: I think that, Your Honor, as far
19 as we're concerned, I mean, I don't see any need of
20 belaboring the point. If she signed it she would, I'm
21 assuming, testify that she prepared the document. I
22 think it says what it says. It is what it is.

23 MR. NORTH: Okay. Thank you.

24 THE COURT: It sounds like he stipulated to it.

25 MR. NORTH: Pardon?

1 THE COURT: I said it sounds like he stipulated
2 to it. It's fine.

3 Q. [Mr. North] And then do you see on the next
4 page a certificate of personal delivery?

5 A. Yes.

6 Q. Is that signed by Mr. Pearson?

7 A. Yes.

8 MR. NORTH: And again I would ask Mr. Bailey
9 whether he would prefer to have Mr. Pearson testify
10 that he personally delivered to these persons.

11 THE COURT: Can you stipulate to that, Mr.
12 Bailey?

13 MR. BAILEY: Yes, ma'am.

14 THE COURT: Thank you.

15 Q. [Mr. North] And then after that do you see the
16 directory that shows that it was faxed from Bundy
17 Appraisal and Management dated February 23, 2004?

18 A. Yes, I do.

19 Q. Are those -- is that the source of the
20 addresses for the mailing of the notice?

21 A. Yes.

22 Q. What is that next page that says aged
23 receivables?

24 A. That was some information that they sent over
25 about dues.

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1 Q. Did you have any discussion about -- with them
2 about what that means?

3 A. No. I think maybe we might have been just
4 interested to see who had paid and not paid.

5 Q. Well, this would seem to indicate that nobody
6 has paid.

7 A. That's what it suggests.

8 Q. Are the dues billed at the end of January?

9 A. You know, they're kind of iffy when you get
10 them. But I would say the first of the year. And this
11 was probably prepared, you know, about the time those
12 notices were being sent out.

13 Q. Well, it says right on it -- it's dated January
14 31. Do you see that?

15 A. Yes.

16 Q. Okay. Were you present at that March meeting
17 when twenty-eight of the forty-four lot owners ratified
18 your election as an officer and director?

19 A. Yes.

20 Q. And were you present when they ratified and
21 approved the filing of a declaratory judgment action on
22 behalf of the homeowners --

23 A. Yes, I was.

24 Q. -- to interpret the covenants?

25 A. Yes.

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1 Q. Did you, as an officer and director, actually
2 ever take any action as an officer and director?

3 A. The only thing I ever did was send out these
4 notices.

5 Q. Okay. During the entire time that this lawsuit
6 has been pending, has the association remained under the
7 control of Mr. McNeal?

8 A. Yes.

9 Q. And has the architectural review committee
10 continued to operate under the control of Mr. McNeal?

11 A. Yes.

12 Q. Did you ever do anything to convert any
13 homeowner dues or funds of the association?

14 A. I never handled any of their funds.

15 Q. And did you agree to have a consent order
16 entered that you would not act as an officer or a
17 director during the pendency of the case?

18 A. Yes.

19 Q. And that was in June of 2004?

20 A. Yes.

21 Q. Have you ever acted in concert with others for
22 the purpose of trying to inflict an injury on any of the
23 defendants?

24 A. No.

25 Q. Did you ever have any contacts with Bundy

1 Management?

2 A. I called and spoke with Lawrence Davis one
3 time, and he sent me some information.

4 Q. Personal discussion?

5 A. Yes. Pleasant conversation. He's always been
6 very nice to me.

7 Q. Okay. Have you ever interfered with any
8 contract of any of the defendants?

9 A. No. I'm not aware of any of their contracts
10 anyway.

11 Q. Have you ever defamed any of the defendants?

12 A. No.

13 MR. NORTH: I have no further questions, Your
14 Honor.

15 THE COURT: Cross-examination, Mr. Bailey?

16 MR. BAILEY: I hate to ask you this, Your
17 Honor, but could we possibly take five minutes?

18 THE COURT: Sure. We can take a five-minute
19 break. Absolutely. I didn't want you just to
20 continue for the night.

21 MR. BAILEY: I'm sorry.

22 THE COURT: Absolutely. Don't worry about
23 that. Five minutes is fine, y'all.

24 MR. NORTH: Before we do that, can I offer the
25 exhibits that have been marked -- Plaintiffs' Exhibits

1 that have been marked so far?

2 THE COURT: I think they're in without
3 objection. Is that correct, Mr. Bailey?

4 MR. BAILEY: As far as I know.

5 [Whereupon, Plaintiffs' Exhibit Numbers 1
6 through 14 are admitted into evidence by the Court]

7 THE COURT: All right. I've had them marked as
8 already being in, Mr. North.

9 MR. NORTH: Thank you.

10 THE COURT: Thank you.

11 All right. We'll take a quick five minutes,
12 everybody.

13 Again, Mr. Corriveau, as I've stated before,
14 and I know you heard me tell Mr. Cullen --

15 MR. CORRIVEAU: No conversations.

16 THE COURT: You got it, sir.

17 THE WITNESS: I'll stay right here.

18 THE COURT: You are free to go, if you need to.
19 Don't worry about it.

20 [Whereupon, a recess is taken from 7:27 p.m. to
21 7:34 p.m.]

22 THE COURT: All right, gentlemen. Whenever you
23 are ready.

24 MR. BAILEY: I'm sorry, Your Honor. I didn't
25 realize you were back on the bench.

1 Q. Okay. Were you here when I went through that
2 with Mr. Cullen?

3 A. Yes.

4 Q. Okay. And the allegation and the counterclaim
5 states that they are the developers, and the reply admits
6 that allegation. Are you familiar with that?

7 A. Yes. I heard the testimony.

8 Q. So you're familiar with it now?

9 A. I'm familiar with it now.

10 Q. Didn't know it before today?

11 A. That doesn't change my opinion as to whether or
12 not he's a developer.

13 MR. BAILEY: Judge, I think that's all the
14 questions I have of Mr. Corriveau. Thank you.

15 THE COURT: All right. Mr. North, redirect?

16 MR. NORTH: Yes.

17 REDIRECT EXAMINATION

18 BY MR. NORTH:

19 Q. Mr. Corriveau, do you have in front of you
20 Defendants' Exhibit Number 9?

21 A. Yes.

22 Q. Directing your attention to the last paragraph
23 on the second page. I note that nowhere in that
24 paragraph where you brought up your concerns about the
25 A.R.B. is Hardiplank even mentioned. Do you see that?

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1 A. That's correct.

2 Q. I also note that despite the fact that all
3 agreed that the board should appoint a new A.R.B., is it
4 true that, in fact, a new A.R.B. actually was never
5 incorporated and put into place and never active. Is
6 that also correct?

7 A. Yes, that's correct.

8 Q. So even though they may have voted that that's
9 what ought to be done, is it fair to say that they didn't
10 actually implement a new A.R.B.?

11 A. No, they did not.

12 Q. And during this exact point in time, December
13 and January, were you not continuing to deal with the
14 A.R.B. that was run by Mr. McNeal?

15 A. Yes, I did -- yes, I was.

16 Q. And you got -- as I understand from Defendants'
17 Exhibit 8, they sent out a letter approving your house
18 two days -- or five days after your annual meeting on
19 January 21 of 2004, did they not?

20 A. That's correct according to that letter.

21 Q. So, again, is it fair to say that your
22 activities and the activities of the plaintiffs in this
23 case in organizing a homeowners group had nothing to do,
24 in your opinion, with Hardiplank?

25 A. It's an unfortunate coincidence that my

1 Hardiplank issue is involved in this. The reasons
2 why we got together to form an association relate to
3 Mr. McNeal asking us to do so in our interest in
4 preserving the values and the amenities and the beauty
5 in our neighborhood, which were sorely neglected by Mr.
6 Porter and Mr. Bennett McNeal.

7 I mean, it's unfair to the property owners to
8 related my Hardiplank issue with their lawsuit to gain
9 control of this association, because none of them wanted
10 to do this to help me get Hardiplank. They all were in
11 agreement that Hardiplank was something that they would
12 like to see used. And I was delighted to hear that. And
13 when we had our meetings and I heard all that input, I
14 saw an option perhaps to have it looked at again and
15 revisited, and went ahead and did it, ordered the
16 materials, was stopped by Mr. Porter. I thought it was
17 prudent not to argue the issue, so I didn't put it up.

18 And I think it's unfair to the other owners who
19 have other legitimate concerns about the management of
20 our association, by a developer who is nonexistent, that
21 my case is mixed up in this.

22 Q. And is it your understanding that what is
23 prohibited is Hardiplank siding, not Hardiplank in
24 general?

25 A. Well, their letter specifically cites

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1 Hardiplank siding.

2 Q. And the rest of your plans and approval, other
3 than Hardiplank siding in Plaintiffs' Exhibit --
4 Defendants' Exhibit Number 8, was approved by their
5 architectural committee, was it not?

6 A. That's correct.

7 Q. So is it your contention that that house, with
8 the exception of Hardiplank siding, was approved and you
9 have no Hardiplank siding?

10 A. I have no Hardiplank siding on my house. And,
11 frankly, I believe that this is just -- they're just
12 trying to turn the screws on me with this.

13 Q. Turn the screws because of your involvement in
14 this case?

15 A. Yes. I think it's -- they've done this to
16 other members of our association in a harassment -- I
17 think they were just harassing us, and other members,
18 and myself.

19 Q. Did you receive any brochures at the time that
20 you purchased your lot?

21 A. My wife, at the meeting that we had with Mr.
22 Wayne Webb initially, our very first meeting when we were
23 talking about what was going to be happening out there,
24 asked if he had some materials. And he said that they
25 were at his office, and she went there and got some

1 materials. We were given an eight-and-a-half-by-
2 eleven-sheet plat that showed the forty-four lots, and
3 then we were also given a sort of a green-and-beige
4 brochure that had the lots that were available for sale
5 marked on it. And that was all the materials we got from
6 McNeal Realty.

7 MR. NORTH: Okay. I have no further questions,
8 Your Honor.

9 THE COURT: All right. Any recross?

10 MR. BAILEY: Just one final.

11 REDIRECT EXAMINATION

12 BY MR. BAILEY:

13 Q. Is it your contention, as I just understood you
14 to say, that the only prohibition that you received from
15 the architectural review board was Hardiplank siding and
16 not Hardiplank? that they were specific in deciding?

17 A. In one of their letters, they specifically
18 mentioned Hardiplank siding.

19 Q. How about this letter --

20 MR. BAILEY: Is it our Number 8 for
21 identification? Is this the one? Yes.

22 Q. [Mr. Bailey] Number 8 for identification, from
23 the defendants, the letter of December 3rd to you from
24 the board, Wright's Point Plantation architectural review
25 board --

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PROCEEDINGS

1
2 THE COURT: All right. Are we ready to
3 resume?

4 MR. NORTH: We are, Your Honor.

5 THE COURT: All right. Mr. North, if you will
6 call a witness, sir.

7 MR. NORTH: Yes. I would like to call --

8 THE COURT: Unless you've got something first.
9 I see Mr. Bailey standing, too, so --

10 MR. BAILEY: I have just one brief question,
11 Your Honor, for point of clarification.

12 THE COURT: Yes, sir.

13 MR. BAILEY: I just wanted to make sure that I
14 fully understand the full scope of the hearings
15 before you. Are we getting into damages at this
16 stage? The e-mail from Melisa said it was for the
17 declaratory action. But we can, if you want. I
18 didn't know what you're -- what we were doing. Are
19 you deciding the entire thing?

20 MR. NORTH: I understood that this trial
21 included the counterclaims, and everything would be
22 heard in this trial.

23 THE COURT: No question it includes the
24 counterclaims.

25 MR. BAILEY: I just wanted to make sure --

1 THE COURT: There's no question it included
2 the counterclaims.

3 MR. BAILEY: For purposes of my witnesses, I
4 just wanted to make sure.

5 THE COURT: Absolutely. We are going to hear
6 this once. Yes.

7 MR. BAILEY: I agree with you. I just --

8 THE COURT: Absolutely.

9 MR. BAILEY: The e-mail threw me off a little
10 bit.

11 THE COURT: Absolutely.

12 All right. Mr. North, you can call your
13 witness, sir.

14 MR. NORTH: Mr. Caldwell.

15 THE COURT: All right. Mr. Caldwell, if you
16 will come forward, sir, to be sworn.

17 [Whereupon, Mr. Caldwell takes the witness
18 stand]

19 [Whereupon, Mr. Caldwell is duly sworn by the
20 court reporter]

21 THE WITNESS: Good morning.

22 THE COURT: Good morning, sir.
23
24
25

JOHN CALDWELL,

Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. NORTH:

Q. State your name and address, please.

A. John Caldwell. It's , Beaufort.

Q. Are you employed?

A. No.

Q. Are you a former owner of real estate in phase
one of the Wright's Point development?

A. Yes, sir.

Q. When did you buy your real estate?

A. I bought it the end of May of 2003.

Q. And when did you sell that real estate?

A. The middle of December of 2004.

Q. Did you deal with either McNeal Realty,
Bennett McNeal, or Wayne Webb in connection with the
purchase of your house?

A. Yes, sir.

Q. Describe for me the chronology of your contact
with them and the substance of your discussions.

A. When I started looking for a house, I first
contacted Richard.

Q. Richard Radcliff?

1 A. Richard Radcliff. And I had known Richard for
2 a long time and he had always steered me in the right
3 direction, so that's who I contacted. When I went to look
4 at the house -- I'm not sure if Wayne was there the first
5 time I looked at it but I know when I signed the offer to
6 buy, he was there. And at that time we went through
7 basically, you know, what was -- what was at the house.
8 We talked about the pad. I was thinking about adding a
9 garage on the back and if not a garage, a utility house.
10 And, let's see. I guess at that point we signed the
11 contracts. And a couple of hours later he called me and
12 said everything was okay, the offer was accepted.

13 Q. Did you have any discussions with Wayne Webb
14 or Mr. McNeal concerning the parameters of the Wright's
15 Point development?

16 A. Well, I was under the impression by the
17 website, before I got out there, that it was a forty-four-
18 lot subdivision. I knew it had three distinctive legs,
19 but at that time I thought distinctive meant separate.
20 And I was asked if I knew what was going on out front -- I
21 think Wayne asked me -- and I said, yeah, what I saw on
22 the website. And he explained the commercial, with
23 residential over it, with luxury condos between.

24 THE COURT: Mr. Caldwell, if you would just
25 speak up a little bit. They are having a hard time

1 hearing. Okay?

2 THE WITNESS: Okay.

3 THE COURT: Thank you.

4 MR. BAILEY: I'm not sure the microphone is
5 working --

6 THE COURT: I don't know.

7 MR. BAILEY: If you can just speak up a little
8 bit, it will help.

9 THE WITNESS: It's not working. It didn't
10 work yesterday.

11 THE COURT: It didn't.

12 [Off the record momentarily]

13 Q. [Mr. North] Were you told that a different
14 developer was handling the development outside of phase
15 one?

16 A. We didn't really get into who was developing
17 anything. I was -- like I say, I was under the impression
18 that it was just a completely separate operation out
19 there, and that's all I knew about it at the time.

20 Q. Am I correct in understanding, then, that you
21 did not own real estate in phase one at the time of the
22 first homeowners meeting in May of 2003?

23 A. That's correct.

24 Q. Did you, after you purchased your real estate,
25 get a notice of the January, 2004 annual meeting?

1 A. Yes, sir.

2 Q. And did you attend that meeting?

3 A. Yes, sir.

4 Q. And at that meeting, were you elected as an
5 officer and director of the association?

6 A. Yes, sir.

7 Q. What was your position that you were elected
8 to?

9 A. I was vice president.

10 Q. Do you have in front of you Plaintiffs'
11 Exhibit Number 7?

12 A. Yes, sir.

13 Q. Take a look of that, if you will, and tell me
14 whether those minutes reflect what transpired at that
15 meeting.

16 A. That appears to be what I remember.

17 Q. Did you also attend a subsequent meeting, on
18 March 10th of 2004, of the homeowners?

19 A. Yes, sir.

20 Q. Were you present when the tally was taken of
21 the lot owners that were represented at that meeting?

22 A. Yes, sir.

23 Q. At that meeting, was your position as vice
24 president and director ratified by twenty-eight of the
25 forty-four lot owners?

1 A. It was.

2 Q. And at that time, did twenty-eight of the
3 forty-four lot owners ratify the filing of this
4 declaratory judgment action?

5 A. They did.

6 Q. Did you ever actually take any action, as a
7 vice president or a director, other than attend meetings
8 of homeowners?

9 A. That's all I ever did.

10 Q. And did you agree in June of 2004 to be bound
11 by a court order that you would take no action until the
12 Court decided this case?

13 A. Yes, sir.

14 Q. During the entire time that you owned property
15 in Wright's Point, who actually ran the association?

16 A. Mr. McNeal.

17 Q. And during that period of time, who actually
18 ran the architectural committee of the association?

19 A. I was under the impression that it was Mr.
20 McNeal, Mr. Ramsey, and Mr. Wayne Webb.

21 Q. Did you have any involvement with the
22 collection or deposit of any homeowner dues?

23 A. No. Other than my own, which I wrote a check
24 and deposited with the treasurer.

25 Q. Have you ever been part of any joint effort

1 with the other plaintiffs to intentionally inflict some
2 sort of injury on any of the defendants?

3 A. No, sir.

4 Q. Have you ever taken any of the association
5 funds for your own use?

6 A. No, sir.

7 Q. Did you at any point in time have any direct
8 contact with Bundy Management?

9 A. No.

10 Q. Did you ever interfere with any contract
11 involving any of the defendants?

12 A. No, sir.

13 MR. NORTH: I have no further questions, Your
14 Honor.

15 THE COURT: Mr. Bailey.

16 MR. BAILEY: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. BAILEY:

19 Q. Mr. Caldwell, you say you never interfered
20 with any contracts involving the defendants. Are you
21 aware that the -- of the restrictive covenants in effect
22 for Wright's Point?

23 A. Yes, sir.

24 Q. And are you aware that those constitute a
25 contractual relationship between the developer and the

1 first of all, is that right?

2 A. I think that's what this document says.

3 Q. Okay. And then it says it could be anybody --
4 other individuals that they may appoint, or such entity as
5 that committee may assign its duties; right?

6 A. Yes, sir.

7 Q. So that they would have the right to make
8 appointments to that committee. And you see what else it
9 says at the top of page 2: until all improvements are
10 constructed thereon and sold to permanent residents. Do
11 you see that?

12 A. Yes, sir.

13 Q. And my next question to you is at the time you
14 purchased your property in 2003, isn't it true that there
15 were lots limited to your area in phase one which had not
16 been improved in the sense that there were no houses on
17 them? they were vacant lots?

18 A. That's correct.

19 Q. And, in fact, have you been out there lately?

20 A. Yeah..

21 Q. Okay. There are lots there right now that
22 still don't have houses on them; correct?

23 A. Yes, sir.

24 Q. Now, the reason -- let me sidetrack for just a
25 second. The reason I asked you if you had been out there

1 lately is because you no longer live there, do you?

2 A. That's correct.

3 Q. You sold your property there, didn't you?

4 A. Yes, sir.

5 Q. So you no longer have any type of interest,
6 financial or otherwise, in Wright's Point Plantation, do
7 you?

8 A. Not in Wright's Point Plantation.

9 Q. Now, getting back to 1.01. Are you also aware
10 that at the time you bought your property there were
11 people living in phase one of Wright's Point -- excuse me
12 -- not living, but who owned property in phase one of
13 Wright's Point who were not residing there?

14 A. Yes, sir.

15 Q. And that also is true even as of today, isn't
16 it?

17 A. That's correct.

18 Q. So that the lots that have been sold in phase
19 one have not all been sold to permanent residents, have
20 they?

21 A. Not at Wright's Point. That's correct.

22 Q. Okay. Now, the next statement says that as
23 such time as all the lots in the subdivision have been
24 fully developed, at that point in time the developer would
25 notify the board and all the owners of the lots to that

1 MR. NORTH: Dr. Andrea Hucks.

2 THE COURT: Dr. Hucks, if you will come
3 forward to be sworn, please.

4 [Whereupon, Dr. Hucks takes the witness stand]

5 [Whereupon, Dr. Hucks is duly sworn by the
6 court reporter]

7 MR. NORTH: Your Honor, if I may approach the
8 bench --

9 THE COURT: Yes, sir.

10 MR. NORTH: -- additional exhibits.

11 THE COURT: Thank you, sir. I appreciate it.

12 MR. NORTH: Dr. Hucks, I'm handing you what
13 has been marked as Exhibits 3, 7 and 59. Just hang
14 on to those for one second, and we'll get to them in
15 a minute.

16 - - - - -

17 ANDREA HUCKS,

18 Having Been First Duly Sworn,
19 was Examined and Testified as Follows:

20 DIRECT EXAMINATION

21 BY MR. NORTH:

22 Q. For the record, can you state your name and
23 address, please.

24 A. Andrea Hucks, , Beaufort,
25 South Carolina.

1 Q. What is your profession?

2 A. I'm an internal medicine physician.

3 Q. Are you employed here in Beaufort?

4 A. Yes, sir.

5 Q. By whom?

6 MR. BAILEY: I'm sorry. Dr. Hucks, could I
7 ask you to speak up just a little bit --

8 THE WITNESS: Yes, sir.

9 THE COURT: Our microphones are not working.

10 MR. BAILEY: I'm a little hard of hearing --

11 THE WITNESS: Let me know if you still can't
12 hear. I'll try.

13 MR. BAILEY: Thank you. Thank you. That's
14 better.

15 A. I'm employed by Beaufort Memorial Hospital.

16 Q. [Mr. North] When did you purchase real estate
17 in phase one of Wright's Point development?

18 A. November of 2000.

19 Q. And do you reside at that location still
20 today?

21 A. Yes, sir.

22 Q. And you're a member of the Wright's Point Home
23 Owners Association?

24 A. Yes, sir.

25 Q. Were you present at a homeowners meeting on

1 May 6th of 2003?

2 A. Yes, sir.

3 Q. At that time were you elected as a co-
4 treasurer and director of the association?

5 A. Yes, sir.

6 Q. Were you also elected as the treasurer and
7 director at an annual meeting in January of 2004?

8 A. Yes, sir.

9 Q. Take a look if you would at Exhibit Number 3.

10 A. Okay.

11 Q. Does that exhibit reflect the activities that
12 took place during the annual meeting in January of 2004?

13 A. Yes, sir, it does.

14 Q. Did you also attend a March 10, 2004 meeting
15 of the homeowners?

16 A. Yes, sir.

17 Q. And were you present when the tabulation of
18 twenty-eight represented lot owners was performed at that
19 meeting?

20 A. I was.

21 Q. And at that meeting, did twenty-eight of the
22 forty-four lot owners ratify the election from January?

23 A. They did.

24 Q. And did twenty-eight of the forty-four lot
25 owners ratify the filing of this declaratory judgment

1 action to interpret covenants?

2 A. They did.

3 Q. At that meeting, did homeowners give you
4 copies -- or give you checks in payment of homeowner dues?

5 A. At which meeting? The --

6 Q. At the March --

7 A. -- March meeting?

8 Q. At the March, 2004 meeting.

9 A. Yes, sir. I believe we did get a couple of
10 checks at that meeting. I think we had actually gotten
11 some before that, as well.

12 Q. When you say we, who received the checks?

13 A. I guess I received them.

14 Q. Okay. Because you were the treasurer?

15 A. Correct.

16 Q. Did you solicit the delivery of checks to you,
17 or did people just send them to you?

18 A. No, sir. At no point in time did me or anyone
19 else that I know of ever solicit, bill, ask for money,
20 from any of the homeowners. It was the understanding, I
21 believe, of the homeowners at that time that we could
22 legitimately elect the new officers. And it was their
23 choice and their decision, without any urging or
24 encouragement from anyone else, to give that money to me
25 as the treasurer of what they believed to be the new

1 homeowners association.

2 Q. Did the homeowners that gave you the money
3 express a desire not to deliver it to Bundy Management or
4 to Mr. McNeal?

5 A. Yes, sir. Some of them did.

6 Q. What did you do with those funds?

7 A. I held the checks for a period of time,
8 because initially I didn't have anything else to do with
9 them. We were trying to determine what the most
10 appropriate next step would be. And then ultimately a
11 checking account was set up in the name of the new
12 homeowners association, and the checks were subsequently
13 deposited into that account.

14 Q. Did you set up that account or did somebody
15 else set it up?

16 A. Mr. Cullen, as a courtesy to me -- he's
17 retired, and I work full time. He assisted in getting
18 that account set up.

19 Q. Did you sign a signature card on that account?

20 A. Yes, sir, I did.

21 Q. Is that the only thing you did in connection
22 with that account?

23 A. I actually made the deposits.

24 Q. Did you ever make any withdrawals from that
25 account?

1 A. No, sir. Never.

2 Q. Did you ever handle the money at all, other
3 than putting it into an account?

4 A. No, sir. Not one single time.

5 Q. Do you recall that two or three months after
6 setting up the account the funds were then transferred to
7 Bundy Management?

8 A. Yes, sir.

9 Q. Other than the actions with regard to the
10 checks, have you actually taken any action as an officer
11 or director of the homeowners association?

12 A. No, sir.

13 Q. Have you done any act that has interfered with
14 the running of the association by Mr. McNeal?

15 A. No, sir. I have not.

16 Q. Have you done any act that has interfered with
17 Mr. McNeal's running of the architectural committee for
18 the association?

19 A. No, sir.

20 Q. Have you been part of any joint effort with
21 other plaintiffs to inflict any injury on any of the
22 defendants?

23 A. No.

24 Q. Have you taken any association funds for your
25 own use?

1 A. Absolutely not.

2 Q. Have you ever had any direct contact with
3 Bundy Management?

4 A. My only contact with Bundy Management would
5 have been sending them checks earlier on, for homeowners
6 dues, when we first purchased property in the
7 neighborhood. And I had some very cursory dealings with
8 them when we built our home. We had to put up a deposit,
9 and then I had to deal with them in trying to get my
10 deposit back. But that's the extent of my involvement
11 with Bundy Management.

12 Q. Okay. Have you done anything to interfere
13 with any contract between any of the defendants and
14 anybody else?

15 A. No, sir.

16 Q. Have you defamed any of the defendants?

17 A. No, sir.

18 Q. Did you agree that during the pendency of this
19 action, you would not act as an officer and director so
20 that you could let the Court decide the rights of the
21 parties?

22 A. Yes, sir, I did.

23 Q. In any of your involvement with any of these
24 meetings, has anything ever been said or done that gave
25 you the impression that the activities of the homeowners

1 had anything to do with Andy Corriveau and his issues with
2 Hardiplank?

3 A. No, sir. That never came up as an issue and
4 certainly never would have even crossed my mind.

5 Q. Do you recall, in the homeowner meeting,
6 discussions of Hardiplank and a consensus that the
7 homeowners were in favor of Hardiplank?

8 A. I do remember that discussion.

9 Q. Take a look if you would at Exhibit 59. What
10 is that document?

11 A. This is an actual brochure that I was given
12 early on when we purchased our lot back around 2000,
13 somewhere thereabouts. Somewhere within that year, I'm
14 guessing. It was a promotional brochure about Wright's
15 Point Plantation. Yeah, a promotional brochure.

16 Q. Does that brochure mention anything about a
17 phase one of the Plantation?

18 A. No, sir. It mentions no phases whatsoever.

19 Q. Does that brochure describe the Wright's Point
20 Plantation as a distinctive deepwater neighborhood?

21 A. Yes, it does. And exclusive and private.

22 Q. Where did you get that brochure?

23 A. I think that my husband may have picked it up
24 at McNeal Realty when we were looking at property. I'm
25 not sure.

1 Q. Did you have any dealings directly, in
2 connection with the purchase of your house, with McNeal
3 Realty?

4 A. No, sir.

5 Q. Does this brochure reference anything about
6 other phases or legs of the development?

7 A. No, sir. It doesn't make any mention of any
8 future development, no additional legs. No phases at all
9 are mentioned. There's simply a map that outlines the
10 original forty-four lots.

11 Q. When you were first elected as the director of
12 the homeowners association in May of 2003, was it your
13 understanding that the development was gone and that Mr.
14 McNeal had requested the homeowners to form a group to
15 manage the affairs of the neighborhood?

16 A. Yes, sir.

17 Q. Did you have that impression from any source
18 other than Mr. Cullen?

19 A. I had conversations with Mr. Cullen about
20 that. And I also believe that Mr. Bob Pearson was
21 involved with some discussions as well, and that was his
22 understanding also.

23 MR. NORTH: I have no further questions, Your
24 Honor.

25 THE COURT: Mr. Bailey.

1 in the restrictive covenants references parcel B, parcel
2 C, parcel D, and this 1.7-acre tract. Do you recall us
3 going through that?

4 A. I recall we went through the plat, and we went
5 through the covenants.

6 Q. Okay. If I represent to you that this is the
7 property that's referenced in the legal description of the
8 covenants, do you -- would you agree with that?

9 A. I don't recall.

10 Q. Okay. Well, take -- I won't go through it
11 with you piece --

12 A. Thank you.

13 Q. -- by piece, but just take -- if you'll take
14 my word for it and assume for the purposes of these
15 questions that that's true, parcel C would be the area
16 where you ultimately bought; correct?

17 A. Yes, sir.

18 Q. And, in fact, that -- you still own that lot
19 today?

20 A. I do.

21 Q. Do you own any other property in Wright's
22 Point?

23 A. I do. I own the adjacent lot.

24 Q. The adjacent lot. Okay.

25 A. Yes, sir.

1 Q. So you would have taken that lot -- and when
2 did you buy the adjacent lot?

3 A. That was just purchased this past December.

4 Q. Okay. So you purchased that lot, again, with
5 full knowledge of the restrictive covenants that are in
6 place and so forth; correct?

7 A. Yes, sir.

8 Q. All right. Do your parents own property
9 there, too?

10 A. They do.

11 Q. So you have a pretty significant investment
12 made out there in phase one; correct?

13 A. Well, two lots.

14 Q. Two lots and then your parents' house --

15 A. Well, I don't have any investment in that,
16 but --

17 Q. Okay. Let's talk about the lot that you have.

18 A. Okay.

19 Q. Is there -- has that been improved? Is there
20 any --

21 A. No, sir.

22 Q. Has not been approved. All right. And it's
23 vacant, then?

24 A. It is.

25 Q. Okay. Do you know most of your neighbors out

1 ROBERT PEARSON,

2 Having Been First Duly Sworn,
3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MR. NORTH:

6 Q. State your name and address, please.

7 A. Robert Pearson,
8 Beaufort, South Carolina.

9 Q. Are you the husband of Michael Pearson?

10 A. I am.

11 Q. Are you a property owner within the Wright's
12 Point subdivision, phase one?

13 A. I am.

14 Q. How long have you been a property owner?

15 A. We closed on our house 2 June, 2 or 3 June,
16 2003.

17 Q. Did you have contact with Mr. Cullen, in
18 connection with any discussions with Mr. McNeal,
19 concerning the setting up of a homeowners association?

20 A. Well, when we closed on our house, that
21 process had already started. What I was led to believe
22 by my neighbors, that were there at the time, and by
23 other events that -- by other events that occurred
24 specifically involving my contact with Bennett McNeal
25 and McNeal Realty --

MIA PERRON, CCR, CVR-CM

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1 And so we looked at my house, and then we
2 looked at the house that actually Mr. Patterson lived in,
3 and also the one that Mr. Caldwell lived in. And the
4 reason I'm telling you that is because when we were in Mr.
5 Patterson's kitchen, after we had looked at my house, Mr.
6 Webb had me sign a document that said, you know, these two
7 houses are our listing so I can't really be your realtor
8 for these houses so you have to sign this document
9 releasing us. So I did.

10 But basically for the purchase of our house,
11 Mr. Webb was -- he acted as the seller's -- I'm sorry --
12 as the buyer's agent in that transaction. And by the way,
13 he did a good job for me. He put some verbiage into the
14 contract that I didn't know about -- I mean, I didn't
15 think about. And it made a difference financially to me
16 of about \$8,000, because these were improvements that the
17 previous owner -- not improvements, but these were repairs
18 that the previous owner hadn't made by the time of closing
19 which he was supposed to do. In any case, that was my
20 deal with --

21 Q. Were you given any information by McNeal
22 Realty about whether or not the development was simply
23 forty-four lots or something bigger?

24 A. Well, everything I saw showed the forty-four
25 lots. And I went by the brochure that Ms. Hucks -- we had

1 one like that, that green one.

2 Q. Are you talking about Exhibit 59?

3 A. I'm not sure what the exhibit is. It's laying
4 right there on the recorder's desk.

5 MR. NORTH: Your Honor, I would like the
6 record to reflect that -- well, let me hand the
7 witness -- so you can actually hold it.

8 Q. [Mr. North] I'm handing you what has been
9 marked as Exhibit 59. Did you receive a flyer --

10 MR. BAILEY: For the record, Your Honor, it's
11 not Exhibit 59.

12 THE COURT: What is it?

13 MR. BAILEY: It's, I believe, 15.

14 THE COURT: It is Plaintiffs' 15. That's it.

15 THE WITNESS: Well, it says Plaintiffs' 59 on
16 here.

17 THE COURT: It had not been marked properly,
18 sir. She has the actual copy of it.

19 THE WITNESS: Oh. I'm sorry. Well, whatever.

20 MR. NORTH: Well, actually, Your Honor, my
21 intent is that 59 be actually marked. And it was
22 pre-marked. And I had just as soon have the
23 original be part of the record.

24 THE COURT: That's fine. You can put it in
25 there. She just needs to put the tab on it.

1 line of discussion? I don't --

2 THE COURT: Mr. North, I am assuming his
3 testimony -- or I guess he can go ahead and give it.
4 But let's get to the chase of what he is going to
5 say.

6 THE WITNESS: I don't know what he wants --

7 Q. [Mr. North] Is it fair to say that all of the
8 information from the various available sources, at the
9 point in time you bought your house in 2002, indicated
10 that the Wright's Point development was a forty-four lot
11 exclusive waterfront development?

12 A. Sir, at the time I -- yes, sir. And at the
13 time I went to the town -- again, Linda Bridges had this
14 plat, and it had a green area outside the gates, which is
15 where the other phases are, and it was listed as -- she
16 had it zoned as MU-2, mixed-use 2. Now, Wayne Webb had
17 told me that that element out -- that area outside the
18 gate was owned by Bennett McNeal. And he told me of their
19 plans to develop that, and how it would actually enhance
20 our property inside the gate, and talked about a possible
21 bed-and-breakfast, and some work -- living and work
22 spaces, sort of like in Habersham, that kind of a concept.
23 But he said that that was owned by Bennett McNeal.

24 Q. After you bought your house, who was actually
25 running the operation of the homeowners association?

1 A. That is the specific question at hand here. I
2 mean, that is exactly what they were referring to. But --

3 Q. Did Mr. McNeal --

4 A. -- but it seemed to me that they had had a
5 previous discussion about it, the details of it. But the
6 gist that I got from it was that they wanted to do a quid
7 pro quo, you can use our stuff if we can use your stuff
8 type thing, and run that by the homeowners and see if
9 they're amenable to that.

10 Q. Okay.

11 A. And the -- and that -- and the response to
12 that was, no, that's never going to happen.

13 Q. Okay.

14 A. The response by Mr. Cullen.

15 MR. NORTH: I have no further questions, Your
16 Honor.

17 THE COURT: All right. Mr. Bailey.

18 CROSS-EXAMINATION

19 BY MR. BAILEY:

20 Q. The documents that Mr. Webb had you sign --
21 correct?

22 A. [No response]

23 Q. Mr. Pearson?

24 A. Oh, I signed about a stack of documents like
25 that [indicates] when I was with Mr. Webb.

1 ANTHONY R. PORTER,

2 Having Been First Duly Sworn,
3 was Examined and Testified as Follows:

4 CROSS EXAMINATION

5 BY MR. NORTH:

6 Q. Would you state your name and address, please.

7 A. Anthony Porter,

8
9 Q. How long have you lived at that location?

10 A. A couple of years.

11 Q. Is it fair to say you've been there since
12 2003?

13 A. No.

14 Q. Where did you live in 2003?

15 A. My primary residence in 2003 was still in
16 Wright's Point although I had rented a home up in North
17 Carolina, because I was dividing my duties between both
18 states. But my primary residence remained Wright's Point
19 for purposes of my tax return that year, I believe.

20 Q. Okay. By the end of the year, though, had you
21 not actually moved your body to North Carolina as a
22 resident?

23 A. I don't recall when I physically, permanently
24 changed my primary residence from South Carolina to North
25 Carolina.

1 Q. Okay. You've sat here through the trial, have
2 you not?

3 A. Yes, sir.

4 Q. And you've heard witnesses talk about the fact
5 that in 2003 you were gone from the neighborhood and out
6 of your house. Did you hear that?

7 A. Yes, sir.

8 Q. Are you disputing the testimony of those
9 various witnesses as to the fact that you no longer were
10 living, on a daily basis, in Wright's Point in 2003?

11 A. No.

12 Q. Okay. Your father is Jimmy W. Porter, isn't
13 he?

14 A. Yes.

15 Q. What is his age?

16 A. I believe he's seventy-two.

17 Q. Okay. Does he reside in North Carolina?

18 A. Yes.

19 Q. Has he ever visited the Wright's Point
20 Plantation?

21 A. Yes.

22 Q. When was the last time that he was there?

23 A. I don't know.

24 Q. Give me your best estimate, if you could.

25 A. I have no idea.

1 Q. Has he been to the Wright's Point Plantation
2 since 2003?

3 A. I don't recall.

4 Q. Tell me -- describe for the Court your past
5 business relationships with Mr. McNeal.

6 A. We've been friends and partners, for many
7 years, on several different developments.

8 Q. Are all of those developments in the Beaufort
9 area?

10 A. I don't believe we've done a development
11 outside of Beaufort together.

12 Q. Would Polowana and Battery Point be a couple
13 of those developments?

14 A. Yes.

15 Q. You also have -- what is your business?

16 A. I'm in the land development business.

17 Q. How many different land developments have you
18 been involved with in the last five years?

19 A. Do you mean by that question how many
20 different subdivisions? or how many different master
21 developments?

22 Q. Let's just take subdivisions.

23 A. North of fifty.

24 Q. And are those located all over the country?

25 A. Not all over the country, no, sir.

1 Q. Okay. But in many other states?

2 A. Not in many other states, no, sir.

3 Q. How many states do you have -- have you had
4 developments in the last five years?

5 A. Five states.

6 Q. Okay. Have you also had developments
7 internationally?

8 A. I've worked on developments internationally,
9 yes, sir.

10 Q. Okay. In how many different countries?

11 A. During the last five years?

12 Q. Yes.

13 A. One country, and one territory.

14 Q. And which country?

15 A. Brazil.

16 Q. Are you a partner in a development in Brazil?

17 A. No.

18 Q. Okay. What is the nature of your business
19 interest in the Brazilian development?

20 A. I no longer have any interest in a development
21 in Brazil, although I'm pursuing future developments.

22 Q. Okay. Didn't you have a partner in your
23 Brazilian business?

24 A. Yes.

25 Q. And what was his name?

1 A. Louis Castillo was one of the partners.

2 Q. Okay.

3 A. Would you like to know the rest of them?

4 Q. No. That's adequate for my purpose.

5 Did you have a contract to sell Mr. Castillo
6 your house in Wright's Point Plantation?

7 A. No.

8 Q. You say you never had a contract to sell him
9 the house?

10 A. That's correct. We did have an agreement. He
11 agreed to buy the house for 3.2 million dollars, and we
12 moved forward with the process, and during financing it
13 became -- we needed to make him aware of this dispute, and
14 at that time we decided not to pursue it. He told me that
15 he was unwilling to make an investment in --

16 Q. Let me cut you off there. It's not
17 appropriate and I'm not asking you for hearsay about what
18 Mr. Castillo may have said. I do want to know from you,
19 though, did you not have a closing date scheduled for
20 immediately following the original setting of this case.

21 A. No. We've never scheduled a closing date.

22 Q. Did you not have a contract that had a closing
23 date on or before October 1st of 2006?

24 A. We never had a contract.

25 Q. Nothing in writing, you mean?

1 A. No, sir. We had an agreement, but we never
2 had a contract.

3 Q. And what distinction are you drawing between
4 an agreement and a contract?

5 A. A contract is a formal commitment to purchase.
6 Louis and I have been friends a long time, and we moved
7 forward with an agreement process. We didn't -- we never
8 went into a formalized contractual agreement. But I
9 will tell you that at this point in time today, he's
10 still willing to buy my home, if we can resolve this
11 manner in a -- this matter in a positive manner.

12 Q. Is it fair to say that if this matter is
13 resolved and you are successful in asserting your
14 positions in this case, that he will then buy your home?

15 A. It's fair to say that at a reduced price --
16 because the market has softened -- that he'll consider the
17 purchase, reconsider the purchase, again.

18 MR. NORTH: Your Honor, I have pre-marked some
19 exhibits for this particular witness, if I could
20 deliver them to you.

21 [Whereupon, Mr. North proffers documents to
22 the Court]

23 THE COURT: Thank you very much. I appreciate
24 that.

25 MR. NORTH: Now, they are all pre-marked and

1 in order. My only --

2 THE COURT: That's all right. That's --

3 MR. NORTH: -- whereas I would have loved to
4 dig into the middle of the pile instead of --

5 THE COURT: And that's fine if you do that, if
6 you can just alert us, too, and we'll number them as
7 they come out in order. That would be fine.

8 MR. NORTH: Okay.

9 Q. [Mr. North] Mr. Porter, I'm handing you a
10 variety of documents that have been marked as Exhibits 15
11 through 40.

12 MR. BAILEY: It seems I probably already have
13 a 15.

14 THE COURT: Sir, he is just referring right
15 now -- Mia is going to re-mark them.

16 MR. BAILEY: Oh. Okay.

17 THE COURT: She is going to re-mark them as he
18 enters --

19 MR. BAILEY: Okay. That's fine. In other
20 words, each document will be a separate document; is
21 that correct?

22 THE COURT: Right. He's just trying to help
23 us reference it because he's given us each a stack,
24 so he doesn't have to walk up here every single
25 time. And I appreciate that very much. But we'll

1 re-mark them as we go. Maria -- Mia, sorry -- will
2 put a proper sticker on them.

3 MR. NORTH: And I don't have a problem, if it
4 would make her job easier, to renumber Number 15 and
5 leave the other, if that makes it easier.

6 THE COURT: Sure. We could -- if it makes it
7 easier, we could just mark it as 15-A. Is that fine
8 with you? Because we already have a 15, let's just
9 make this 15-A and then go from there.

10 MR. NORTH: Sure.

11 THE COURT: All right.

12 [Whereupon, Plaintiff's Exhibit Numbers 15
13 through 40 are marked by the court reporter]

14 MR. NORTH: Thank you, Your Honor.

15 THE COURT: Thank you, Mr. North.

16 MR. BAILEY: Your Honor, I hate to interrupt,
17 but just one quick clarification. 15-A, since it's
18 multiple documents -- oh, they're all separated.
19 I'm sorry.

20 THE COURT: They're all separated.

21 MR. BAILEY: I didn't realize it. I
22 apologize.

23 [Off the record momentarily]

24 MR. BAILEY: That's the brochure up there.

25 THE COURT: Right.

1 MR. BAILEY: What is -- this is 15-A?

2 THE COURT: Yes. Mr. North, go ahead.

3 MR. NORTH: Thank you.

4 Q. [Mr. North] Mr. Porter, within your stack,
5 would you please turn to Exhibit 37? It's toward the end
6 of this stack.

7 A. [The witness review documents]

8 Q. Do you have that in your hand?

9 A. Yes, sir.

10 Q. Okay. Now, you say you've never had a
11 contract. But is not Exhibit Number 37 a signed and
12 written contract between yourself and Mr. Castillo?

13 A. No. This was a basis for an agreement.

14 Q. You're saying that this isn't an agreement,
15 it's just a basis for an agreement?

16 A. It was the beginning of a process that was
17 moving forward towards a final contract.

18 Q. I see. Well, if you look at page 5 of this
19 document, is it not signed by both parties?

20 A. Yes, sir.

21 Q. And doesn't this contract provide for an
22 earnest money deposit, no contingencies, and a closing
23 date on or before October 1 of 2006?

24 A. I may be misunderstanding your question here.
25 But I've just stated that it's not a contract, and then

1 you then changed the form of the question and tried to
2 make it a contract in your question. And I dispute that.

3 Q. Explain to me why this signed document,
4 Plaintiff's Exhibit Number 37, is not a contract.

5 A. Because it was the basis of an understanding
6 that I had formed with Mr. Castillo to move forward
7 towards the purchase of my home. That was its purpose.
8 And that's what he considered it, as well as I.

9 Q. Now, this home is actually titled in the name
10 of a personal irrevocable trust of yours, is it not?

11 A. Personal residence trust. Yes, sir.

12 Q. Okay. And wasn't the closing of this
13 transaction scheduled for the week immediately following
14 the original trial setting in this case?

15 A. We never scheduled a closing.

16 Q. Was it your intent to defer any closing of
17 this potential sale until the trial was over so that
18 somebody couldn't argue that you no longer had an interest
19 in Wright's Point real estate?

20 A. We never got to the point of closing. We
21 never got to the point of contract. What happened was
22 that Mr. Castillo wanted to buy the home. He went into
23 the financing portion of seeing if he could qualify, and
24 during that due diligence I disclosed to him that we had a
25 dispute with the homeowners in the neighborhood -- some of

1 the homeowners.

2 Q. Did Mr. Castile buy out your interest in
3 Brazil?

4 A. No.

5 Q. Who did you sell it to?

6 A. I didn't sell it.

7 Q. Okay. Did the business venture just wrap up
8 and end?

9 A. No.

10 Q. Okay. Then how did you go from having an
11 interest to now you don't have anything going down there?

12 A. I gave my interest to Mr. Castillo. We've
13 been friends for a long time, and he was active in the
14 development, and heavily invested into it, and I was
15 neither. I was a little bit active in it, but certainly
16 not enough to justify the interest that I held. So I
17 relinquished it to him. He's a good friend of mine, and
18 we just decided it was more fair for him to move forward
19 as the owner.

20 Q. And you're saying that transferring that
21 business interest in Brazil to him, are you saying that
22 that has nothing to do with his buying your house here in
23 Beaufort?

24 A. Nothing at all.

25 Q. Do you have any written contracts with Mr.

1 McNeal in connection with your various business ventures?

2 A. I'm certain there's numerable contracts with
3 Mr. McNeal.

4 Q. Written contracts?

5 A. I have no idea how many written agreements
6 Bennett and I have done. Are you asking about a specific
7 venture?

8 Q. I'm talking about whether or not in the past
9 you have had a written contract memorializing a business
10 transaction involving both yourself and Mr. McNeal.

11 A. I'm sure that we've had some form of
12 formalized agreements along the way, but for the most
13 part, we're friends and don't need that kind of
14 documentation in order to treat each other fairly.

15 Q. Do you remember testifying in your deposition
16 that your business dealings with Mr. McNeal are just on a
17 handshake?

18 A. I'm certain, because that's the basis of our
19 relationship.

20 Q. Do you remember testifying in your deposition
21 that you didn't have any written agreements with Mr.
22 McNeal, that you trusted each other implicitly, and
23 everything was done on a handshake?

24 A. It was done on a handshake, but I'm -- I'm
25 believing that I'm hearing your question -- the first

1 ~~thing that came to my mind was is at some point in time we~~
2 owned Polowana development together. So I would think
3 that those deeds would constitute a positive answer to
4 your question. I'm not trying to be contradictory to my
5 previous testimony, but I would think that a deed would
6 constitute a -- collective deeds. I'm certain that
7 there's -- that there are contractual documents that Mr.
8 McNeal and I have jointly participated in that had third-
9 party requirements to memorialize. But between us, it's
10 completely unnecessary.

11 Q. Have you ever had any business relationship
12 with Richard Ratclif or any company in which he had an
13 interest?

14 A. Yes, sir. Richard is a professional --

15 Q. What type of --

16 A. -- builder, and we've done business with him.
17 Bennett and I have done business with Richard for years,
18 and he's got absolute high character, and we would love to
19 move forward with him on any basis that he chooses to
20 participate with us.

21 Q. Have you ever had any business relationship
22 with McRay and Stultz out of Atlanta?

23 A. Yes, sir. I sold them some lots in phase one
24 of Wright's Point Plantation.

25 Q. Do you have any financial interest in Denny's

1 Construction Company?

2 A. No.

3 Q. Do you have any financial interest in
4 Structural Images, Inc., which is now known as Richard
5 Ratclif's Homes, Inc.?

6 A. No.

7 Q. Tell me in a very, very brief manner --
8 describe the process of developing a subdivision, the
9 basic steps.

10 A. Well, you begin by evaluating the market; then
11 you target property within that market that fits criteria
12 for whatever segment of the market that you're attempting
13 to penetrate; you acquire the property. Once you've done
14 complete due diligence to determine whether or not it can
15 be used for the specific purpose that you're targeting it
16 for, you then re-market the property, after having
17 enhanced its value through improvements.

18 Q. And by improvements you mean putting in the
19 utilities and the roads and subdividing it into lots?

20 A. That's a portion of improving property. Also,
21 improving property includes structures, amenities,
22 development rights.

23 Q. And then the final step is re-marketing the
24 real estate, selling the lots or portions of the property
25 to buyers? Is that a fair statement?

1 A. A portion of whatever property that you
2 purchase or -- in its entirety. It could be building
3 structures and reselling the structures with the land, it
4 could be land, it could be lots. I really don't -- in the
5 interest of being short, I'm going to quit right there. I
6 can talk about it all day, though, if you want me to.

7 Q. Is it fair to say that the last step is once
8 you have the land subdivided the way you want it and
9 you've got your improvements the way you want it, you then
10 sell the pieces hopefully at a profit? Is that a fair
11 statement?

12 A. Sometimes, for some developments.

13 Q. Okay. Describe for me, if you would, what
14 happened in connection with purchasing the land that is
15 now known as Wright's Point Plantation.

16 A. Bennett developed a relationship with a fellow
17 by the name of Lewis Wright and contracted with him to
18 purchase property, and we moved forward and also
19 contracted with Henry M. Logan to purchase adjacent
20 property. And I went -- Bennett and I were doing business
21 on all kinds of different levels, and I always appreciated
22 the end of Wright's Point as being a unique piece of
23 property. I wanted to build my final home there, so I
24 asked Bennett if I could move forward and be the formal
25 developer of record for that piece, because it's a tax

1 advantage to wind up with a --

2 If you're going to ultimately keep a piece of
3 property within a development, then if you begin with it,
4 rather than acquiring it in the middle of a process,
5 there's tax advantages to that. So I knew that I wanted
6 to make my final home in Wright's Point, and Bennett
7 graciously allowed me to do that. At the time, we needed
8 some closing money, and I think I borrowed \$750,000, or
9 something like that, from my father and moved forward to
10 close the property.

11 And at that time my father and I became joint
12 developers of record, with the understanding with Bennett
13 that as we moved forward with the development process,
14 that we were going to do our best to eliminate the debt in
15 a strategic manner and that a majority of the residual
16 property, after the debt had been brought under control,
17 would at that time be deeded to Bennett and that I would
18 wind up with two lots on the point for my home --
19 actually, it was four lots at the time -- and then as we
20 moved forward with the future development activities, that
21 I would continue to work on the development, and at some
22 point ultimately assign the development over to Bennett as
23 the developer of the residual property after the debt had
24 been brought under control.

25 Q. Now, when you say as the developer of the

1 residual property, are you talking about the land that is
2 outside of what is now what they call the gates of phase
3 one?

4 A. No, sir. We didn't define what the residual
5 property would be. We just went to work, and once -- we
6 both knew that we would do the best we could to get the
7 debt under control. And at the point that we had gotten
8 my father back his money, and any bank money we had had to
9 put on it, or at least got it close to that point, that
10 whatever residual property there was at that time, that I
11 would deed it to Bennet with the understanding that I
12 would continue to be involved in the development.

13 Because I'm going to live there for the rest
14 of my life, was what my intent was, until all this came up
15 and blew all that up. Matter of fact, I built a home that
16 was way more than twice what any feasible market would
17 support on the property, and I built -- involved in
18 building hundred of houses and would never have done that
19 on a speculative basis. But once your clients and
20 yourself instigated this lawsuit and created an impossible
21 condition, it was no longer tolerable to -- for it to be
22 feasible for me to live there in Wright's Point. You
23 created a -- you ruined my dream.

24 Q. You left Wright's Point in early 2003, did you
25 not?

1 A. I don't recall when it was that I -- from a
2 date standpoint, but I know that when we formally moved
3 was right after the -- call them whatever you want --
4 dissident, unhappy homeowners began to create this
5 purported homeowners association, part of that process.
6 They went down and opened an account at MCAS Federal
7 Credit Union and along the way, somehow -- and I never
8 will understand that -- they took my federal tax ID number
9 of one of my corporations and --

10 Q. Mr. Porter, let me interrupt you because we
11 have a number of things to go over and if we start hitting
12 ten of them at one time, we'll just have to come back to
13 it, which will waste the Court's time.

14 A. I apologize, sir. I was just trying to -- you
15 asked me what the development process was, and I was just
16 trying to go through it.

17 Q. Was the opening of the MCAS accounts by the
18 homeowners one of the things that ruined your dream?

19 A. Absolutely. Shortly thereafter, although I
20 have no physical proof of this, within forty-eight hours
21 of that, my phone began ringing off the hook, of every
22 banker in town, wanting to know if I was going to file
23 bankruptcy. And I turned fifty here a month ago and up
24 until that time I had never been late on a payment in my
25 life, on any bank loan, because as a developer your credit

1 is your lifeblood. Well I -- my credit on all fronts
2 immediately dried up a hundred percent right after MCAS
3 Federal Credit Union. I don't know. I know that bankers
4 communicate between each other when they feel like some --
5 one of their loans is in jeopardy, they protect each
6 other. It's just a thing that bankers do, like a
7 fraternity.

8 Q. Do you have -- do you have any developments in
9 North Carolina that have chains across the gates because
10 they're being foreclosed and shut down and taken over by
11 creditors?

12 A. We don't have chains across any gate because
13 any development is being foreclosed on. We have -- we
14 being many different sets of partners -- have many
15 different developments, and some of those developments are
16 in foreclosure. A foreclosure is -- well, basically, I
17 would never have physically moved to North Carolina and
18 gone to work there and had to work at a level that
19 possibly didn't have as much -- well, didn't have as much
20 funding support as it needed. I did that in self-defense
21 to try to survive the result of my credit being shut off
22 in Beaufort County as a direct result of your action.
23 And, yes, I do have developments under foreclosure today.
24 Absolutely I do.

25 Q. Is it fair to say that you have a tax lien

1 filed on all of your property here in Beaufort County in
2 an amount in excess of 4.6 million dollars?

3 A. It may well still be a lien of record. I've
4 run short of funds here ,here in the last year. You know,
5 it's a -- really, it's an irony.

6 Q. Now, the homeowner dues that you're talking
7 about, those --

8 A. Excuse me. If I could?

9 Q. Oh, sure.

10 A. If I could. It's an irony that all these
11 rumors are flying around Beaufort County, as a result of
12 your action, that I'm getting ready to file bankruptcy.
13 And in actuality, there was probably a two-year period
14 since I moved to North Carolina that I continued never to
15 be late on a bank payment. And here recently, as the
16 market has closed up nationally, developers everywhere are
17 suffering from that.

18 But in specific response to the tax lien, as
19 of today it's been reduced to \$34,000 and that may have
20 been eliminated here within the last two weeks, although
21 it hasn't yet -- unless it's just happened in the last
22 couple of days, it hasn't yet transferred forward to the
23 computer that the IRS uses nationwide. But all that has
24 been resolved down to about \$34,000 today. I actually
25 continue to work -- even when I get behind on things, as

1 I am today, I continue to work my way through it.

2 I'm not a -- a lot of developers are hit-and-
3 run people. I'm going to stick it out, and I've got --
4 try to have as best character I possibly can. Today my
5 tax lien is \$34,000. Or maybe that's gone, too. That is
6 going away right now. The IRS has agreed to eliminate
7 that, as well, so --

8 Q. Now, that's a tax lien from the tax year 2003,
9 isn't it?

10 A. It's 2003 and 2004, I believe.

11 Q. Okay.

12 A. I didn't have money to pay my taxes, at the
13 time, because of this.

14 Q. Okay. So at the end of 2003, you're saying
15 that all of your problems, and not being able to pay your
16 taxes, is a result of the homeowners in our little
17 Wright's Point subdivision getting together and saying we
18 should form our own group? Is that what you're saying?

19 A. I'm not saying that all of the problems -- the
20 market here in the last year, nationwide, has changed.
21 Everyone in the business understands that. But absolutely
22 stating that the majority of the decisions, both
23 personally and on a business level that I was forced to
24 make, which included picking my family up and leaving
25 Beaufort County.

1 right thing as she perceived it. I don't think she had
2 any malice of intent. And I never spoke with Ms. Hucks or
3 had any association with her, I don't believe I did, until
4 I sat here and watched her testify. So I do not believe
5 that Ms. Hucks felt she was doing anything inappropriate.
6 But I absolutely believe that Bob Cullen in all likelihood
7 misled Ms. Hucks towards taking action that she felt was
8 the right thing to do. And I'm in total support of the
9 right thing to do.

10 Q. Do you have the same feeling with regard to
11 the other plaintiffs, that it's Bob Cullen who was the
12 problem and that the others did not have malice in their
13 hearts or do wrong things?

14 A. No, sir. I believe that the rest of the
15 plaintiffs have individualized agenda, and this whole
16 thing is a bunch of hogwash to further their agendas; and
17 that they have absolutely no idea of the damage they've
18 caused, and the millions of dollars they've cost Mr.
19 McNeal and I, or else they would be in absolute deathly
20 fear of the repercussions of their actions in the event
21 that the Court rules in our favor.

22 Q. In 2003 isn't it a fact that all of the lots
23 in phase one had been sold to somebody, either -- you had
24 two of them that you had in a trust. But all of the
25 others had been conveyed to somebody, were they not?

1 A. In 2003?

2 Q. Yes.

3 A. I don't know at what date we sold the rest of
4 the lots. I would have to check the records.

5 Q. Let's go back to our exhibits for a minute.
6 Take a look, if you would, at the top one, Exhibit 15. Do
7 you recognize that as a copy of the plat that relates to
8 the original purchase of land from the Wright family and
9 their relatives?

10 A. [No response]

11 Q. Well, I'll tell you what, maybe what's even
12 better is --

13 MR. NORTH: Mr. Bailey, can I ask can we
14 simply stipulate, as we have previously discussed,
15 that some of these documents are what they are?

16 MR. BAILEY: I'm sorry?

17 THE COURT: Go ahead and --

18 MR. NORTH: I just want to stipulate that
19 Plaintiff's Exhibit 15 is a copy of a plat that is
20 attached to the covenants, and reflect the various
21 parcels that were purchased, and also referenced on
22 the various deeds that were conveyed to Mr. Porter
23 and Jimmy Porter in connection with the purchase of
24 this land.

25 MR. BAILEY: I have no knowledge that this

1 plat was ever attached to the covenants. It's
2 certainly referenced in the covenants as being the
3 plat. I don't have any objection to it being
4 admitted, Judge. I mean, it is what it is.

5 THE COURT: Okay. Thank you.

6 MR. BAILEY: We've referred to it several
7 times.

8 THE COURT: Thank you.

9 MR. NORTH: And let's go through a couple of
10 others. Can we agree, then, Plaintiff's Exhibit 16
11 is a true and correct copy of a deed from Mark T.
12 Logan to Mr. Porter, the 1.7 acres referred to on
13 the plats that have been marked in this case?

14 MR. BAILEY: Yes, sir.

15 MR. NORTH: And Plaintiff's Exhibit 17 is a
16 true and correct copy of a deed from John D. Wright
17 and the estate of Alice Wright to Jimmy W. Porter of
18 the land that is marked as -- described as parcel D?

19 MR. BAILEY: That's what it appears to be,
20 yes.

21 MR. NORTH: Okay. And Exhibit 54 [sic] is a
22 true and correct copy of a deed, again from John
23 Wright to Jimmy W. Porter, which I believe actually
24 corrects the legal description or corrects some
25 error in Exhibit 53 [sic]?

1 THE COURT: Actually, it's Plaintiff's 17 for
2 the record.

3 MR. NORTH: Yes. Thank you.

4 MR. BAILEY: I just got lost. I'm sorry. I
5 thought he was on 18.

6 THE COURT: No. He was on 17, and then he
7 just referenced 18.

8 MR. NORTH: And then, actually, Your Honor, I
9 did misspeak on that. There were two copies of that
10 deed, somehow, in my packet. There is only one deed
11 from John Wright to Jimmy W. Porter conveying parcel
12 D, is Plaintiff's Exhibit 17.

13 MR. BAILEY: Judge, maybe I can shorten it.
14 I've looked at the stuff. Any deed that's in there,
15 I will stipulate that it was a matter of public
16 record and it says what it says.

17 THE COURT: Thank you.

18 MR. NORTH: Okay.

19 Q. [Mr. North] Mr. Porter, getting back to the
20 original transaction: is it fair to say that what Bennett
21 McNeal got for bringing you the Wright's Point deal is
22 that he got four waterfront lots in phase one and all the
23 rest of the land, and you then got all of parcel D other
24 than the four waterfront lots? In a nutshell, isn't that
25 the deal the two of you struck?

1 A. No.

2 Q. Okay. What was the deal the two of you
3 struck?

4 A. I would wind up with four waterfront lots on
5 the point; Bennett would wind up with the residual
6 property outside of phase one, as well as four waterfront
7 lots in phase one; I would continue to participate in the
8 residual development in whatever way we decided was a fair
9 allocation as time went on, according to how much time,
10 how much work I did on what ultimately became Bennett's
11 property.

12 Q. And Bennett got his property almost
13 immediately after it was conveyed to you with regard to
14 parcel B, didn't he?

15 A. I don't recall exactly when it transferred to
16 Bennett, although we were in the middle of the hottest
17 market that Beaufort had ever experienced and we were --
18 the timing was great; and we had great sales, and were
19 really looking forward to going all the way through this
20 at flank speed; then we were stopped by you and your
21 plaintiffs.

22 Q. Did all of the money from developing phase one
23 go on your personal tax return? The income and the
24 expense?

25 A. I don't recall. Probably.

1 Q. I'm going to pull out your deposition. Would
2 you agree that the phase one income and expenses, page 71
3 of your deposition, you testified all -- every penny went
4 on your personal income tax return? You would agree with
5 that?

6 A. I would. But if I could clarify? I'm sure
7 Bennett spent money in addition to whatever expenses I
8 reported. So he well could have had some additional
9 expenses, in reflecting on it right now.

10 Q. Okay. And do you remember testifying on page
11 63 of your deposition that for finding the deal, Bennett
12 got four lots and all the land outside the gates?

13 A. That's what I'm saying as well, right now,
14 with the stipulation that I was to share in the profits
15 according to the amount of work that I did on it.

16 Q. Okay. And with regard to the conveyance from
17 the rights to your father, do you recall testifying that
18 that conveyance was made so that he could hold title and
19 collateral for monies advanced in connection with the
20 development?

21 A. Yes, sir.

22 Q. Okay. And once that loan situation was
23 resolved, is it fair to say that parcel D was then
24 conveyed for no consideration at all from your father to
25 Mr. McNeal?

1 A. I'm not sure what parcel D -- no, that's not
2 fair to say. Parcel D is -- has portions in phase one,
3 and there was lots within phase one that was not conveyed
4 to Mr. McNeal. So that's not accurate.

5 Q. Take a look, if you would, at Plaintiff's
6 Exhibit 22.

7 A. [The witness reviews documents]

8 Q. Is that a true and correct copy of the
9 warranty deed executed by you conveying, on April 23rd of
10 1999, the four waterfront lots within phase one to Mr.
11 McNeal?

12 A. Yes.

13 Q. And take a look, if you would, at Exhibit 63
14 [sic]. Is that a true and correct copy of deeds executed
15 by you conveying to Mr. McNeal, on April 28th of 1999,
16 parcel B within Wright's Point development? B, as in boy.

17 MR. BAILEY: Is that the old 63?

18 THE COURT: No. This is Plaintiff's 23.

19 MR. NORTH: 23. I'm sorry.

20 A. Could you repeat the question, please?

21 Q. [Mr. North] Yes. Is Exhibit 23 a copy of the
22 deed that you executed in favor of Mr. McNeal, d/b/a
23 McNeal Land Company, in 1999, conveying to him parcel B?

24 A. Yes.

25 Q. Okay. With regard to the conveyance of the

1 four waterfront lots in phase one, and with regard to
2 Plaintiff's Exhibit 23, is it fair to say that there was
3 no money paid by Mr. McNeal for that land, that that was
4 his part of the deal in finding the Wright's Point
5 development?

6 A. No.

7 Q. Okay. What was the consideration, if any,
8 that Mr. McNeal got for those conveyances or what he paid
9 to you for those conveyances.

10 A. \$10.

11 Q. Okay. And that's the extent of it; is that
12 correct?

13 A. That's the extent of Exhibit 23, so far as the
14 deed record is concerned. But I think it's very important
15 to point out that the deed record transferred full and
16 complete title to Bennett but we maintained our agreement
17 to do business, from a partnership perspective, without me
18 holding a portion of the property in my name or any of my
19 companies' names. So I deeded the property to Bennett,
20 but I maintained absolute interest in it.

21 And Bennett actually agreed to -- as we moved
22 forward with the future developments, to -- basically, he
23 gave me oversight on property that was deeded to him
24 because I had such a major investment on my home in there,
25 and -- and I was going to make it my home for the rest of

1 my life. So it wasn't just a monetary thing. It was --
2 Bennett accommodated me for my home.

3 Q. Do you remember testifying that when you moved
4 to North Carolina, phase one had already been subdivided
5 and almost all lots sold?

6 A. Yes, sir.

7 Q. Is it fair to say that by 2002 the debt to
8 your father had been repaid?

9 A. No.

10 Q. Is it fair to say --

11 A. Are you talking about the original 750,000-
12 dollar purchase money on Wright's Point?

13 Q. I'm talking about whatever it was that your
14 dad was collateralizing by taking title to parcel D.

15 A. No.

16 Q. Okay. Nonetheless, is it fair to say that in
17 2002 your father then, for no consideration, conveyed that
18 land to Mr. McNeal?

19 A. No.

20 Q. Okay. In what regard is that statement not
21 correct?

22 A. I'm sure if we looked at the deed right there,
23 it wasn't conveyed for no consideration. And I'm also
24 sure, even though I don't remember what happened at the
25 time, that there was an agreement with my father for

1 something to have transpired. He didn't just relinquish
2 that deed. But he's my father. I mean, he -- I'm sure he
3 said, okay, I'll -- if you want me to sign over this
4 collateral, I will. But I probably collateralized him on
5 something else concurrently. And I --

6 Q. But is this --

7 A. I owe him two million dollars today. It went
8 up from seven fifty. It went the wrong way as a result of
9 this. I honored my agreement with Bennett, but my father
10 has -- at seventy-two years old has had tremendous
11 suffrage as a result of this action.

12 Q. And so you honored your agreement with Bennett
13 to deliver him title to the land outside the gates and
14 arranged with your father to release that collateral and
15 convey it to Mr. McNeal; is that correct?

16 A. Yes, I guess it was conveyed directly to Mr.
17 McNeal. I would have to look at that exhibit. But,
18 however, it wound up at Mr. McNeal, my father of course
19 understanding that we were to participate in -- we, as co-
20 developers, were to participate in the future profits of
21 the development. My dad hasn't needed any contractual
22 documentation from Bennett for him to do the right thing,
23 either. Bennett hasn't needed it from either one of us.

24 Q. Do you recall that phase one had an official
25 plat that was filed and referred to in the covenants?

1 A. I think it had more than one. I think it had
2 revisions.

3 Q. And tell me about any revisions that you are
4 aware of.

5 A. I don't know how many we went through. Three
6 or four, maybe, that -- before it became the plat of
7 record today. Every developer --

8 Q. I'm not talking about early revisions. I'm
9 talking about from the point -- well, I'll tell you what.
10 Let me show you what we have been using here.

11 I'm going to show you a blown-up drawing of a
12 plat that shows that it was filed at book 64, page 150.
13 And I'm not referring to any earlier versions of this.
14 But would you agree that this is the official defined plat
15 under the covenants of Wright's Point?

16 A. That's the plat of record today. I think that
17 would be an accurate statement.

18 Q. Okay. And that plat shows forty-four lots,
19 does it not?

20 A. It shows forty-four lots, as well as phase two
21 and future development.

22 Q. Okay. But as far as the lots that are shown,
23 it only reflects forty-four lots; is that correct?

24 A. Yes.

25 Q. And under the covenants is it also correct

1 that lots are defined as those shown on the official plat?

2 A. I need to look at that definition.

3 THE COURT: Why don't you give him a copy of
4 the covenants.

5 [Whereupon, Mr. North proffers documents to
6 the witness]

7 A. My previous history, Mr. North, interacting
8 with you is always to -- careful of paraphrasing, so
9 forgive me if I'm spending time --

10 Q. [Mr. North] I'm handing you what's -- I'm
11 handing you a copy of the covenants, and if you'll take a
12 look at the definition section in the first couple of
13 pages. Do you see that plat is defined as that filed at
14 book 64, 150?

15 A. I'm not looking at the definition of lots --

16 Q. Yes.

17 A. -- and I'll be glad to read that to you,
18 because that's what I understand is the definition of
19 lots. And it's not a portion of a statement, it's an
20 absolute full and comprehensive statement as defined in
21 these covenants. And I'll --

22 Q. Okay.

23 A. I'll be glad to read that to you, if you would
24 like.

25 Q. Okay. Read to me what you're saying -- what

1 do the covenants say as the definition of a lot.

2 A. Lot or lots shall mean and refer to lots as
3 shown on the plat, capital P, which refers to this plat --
4 as may be amended from time to time. Each owner of a
5 dwelling unit within any multifamily lot shall be
6 considered as an individual lot owner for the purposes of
7 this document.

8 Q. Are you aware of any revision, to date, to
9 this official plat so far? I mean, not getting into the
10 issue about whether it can be amended. Are you aware of
11 any amendments to this official plat?

12 A. Yes. Richard Ratclif just took down twenty
13 more lots.

14 Q. Okay. And we'll get to that. But other than
15 that amendment to the plat, can we all agree that that's
16 the only amendment to date that you contend exists with
17 regard to the official plat?

18 A. No.

19 Q. Okay. And what other amendments to the
20 official plat do you contend exist?

21 A. There was a plat that was done originally with
22 the covenants, but this is not that plat. This is a
23 further revision.

24 Q. Earlier than this, you're talking about?

25 A. [No response]

1 Q. Let me clarify a question. Are you contending
2 that there was any revision to the official plat between
3 the date that it was filed at book 64, 150, and the
4 revised plat filed by Mr. Ratclif?

5 A. As I understand that question, this is now the
6 official plat today.

7 Q. You're talking about the one at book 64, 150?

8 A. This is the official plat of phase one today.
9 There is -- of lots of record. There is also an official
10 plat, of phase two, of lots of record as of today.

11 Q. And that's the one filed by Mr. Ratclif that
12 shows twenty additional lots; is that correct?

13 A. Yes.

14 Q. Okay. Other than those two plats, are you
15 aware of any other revisions to the official plat under
16 the covenant?

17 A. I can't recall any.

18 Q. Okay.

19 A. But at the same time, I haven't been actively
20 working with Richard here lately. I'm sure if I had a few
21 minutes to get caught up with him, if there's anything
22 that I've missed he'd bring me up to date.

23 Q. Let's go back to this for one quick minute.
24 I'm going to hand you the covenants again and direct your
25 attention on page 5 to section 2.03. Do you see that?

1 A. Yes.

2 Q. Do you see in the second paragraph of that
3 section the language wherein the developer reserves unto
4 himself, his heirs, and assigns, the right to develop and
5 submit additional phases to this declaration of covenants,
6 conditions, restrictions, and easements, Wright's Point
7 Homeowners Association, Inc., and related documents? Do
8 you see that sentence?

9 A. Yes.

10 Q. And thereafter, do you see that it shows how
11 that gets accomplished? First of all, it's got a
12 limitation on which properties can be developed and
13 submitted as an additional phase. And then at the end, do
14 you see where it shows the procedure for developing and
15 submitting an additional phase to the declarations and to
16 the association?

17 A. Yes.

18 Q. Okay. Now, with regard to the members of the
19 association, turning your attention to Section 5 -- or
20 Article 5, do you see in the first sentence that every
21 owner of a lot is deemed a member of the association? I'm
22 sorry. I misspoke. It's Article 4 on page 7.

23 A. Okay. Could you start again, please?

24 Q. Yes. Do you see in the first sentence of
25 Article 4, page 7, the provision that says every owner

1 shall be deemed a member of the association?

2 A. Yes.

3 Q. And do you agree that every owner means every
4 owner of a lot?

5 A. I'm not sure what --

6 Q. Okay.

7 A. -- a pertinent means. I don't know what the
8 definition of a pertinent is.

9 Q. Okay. Let's take one sidestep here for a
10 minute. Flip back to page 3, Section 1.16. Do you see
11 that owner is defined as a person having record title to a
12 lot?

13 A. You've lost me, now. Where are you at?

14 Q. 1.16.

15 A. Yes.

16 Q. Okay. And so you would agree that as they
17 define term under the covenant that owner does not include
18 a person that owns a parcel, it only includes persons that
19 own lots as depicted on the official plat -- would you
20 agree with that?

21 A. As an owner, you have -- you need to be a lot
22 owner, is the way I am reading this. But I believe that
23 as you move through this, once again, it says developer
24 reserves unto himself, his heirs, and assigns, the right
25 to develop and submit additional phases to this

1 declaration --

2 Q. That's true.

3 A. -- of covenants.

4 Q. We are not in disagreement on that.

5 A. And in this case, of course --

6 Q. Well, you're skipping to another point, and
7 I -- just for the clarity of what we're saying, let's
8 stick with owner for a minute.

9 You agree, do you not, that owner does not
10 include the record titleholder of a parcel, it only
11 includes individuals who own lots as shown on the official
12 plat?

13 A. No. I believe that when this was done, it was
14 comprehensive as to parcels A, B, C, and D and -- and 1.8.
15 That was the encompassed, owned property when this was
16 done. That was the intent of this covenants and
17 declarations was to include the comprehensive development
18 as owned property.

19 Q. That's fine. I'm not talking about the intent
20 of what you wanted to include in the development. I'm
21 talking about what is, in fact, the definition of an owner
22 under the covenants. And owners -- would you agree that
23 owners do not include parcel owners, they only include lot
24 owners?

25 A. The definition of owner in the covenants is

1 specific to a lot owner.

2 Q. Okay. And a lot owner is a person -- or a lot
3 is one described on the official plat. Would you agree?

4 A. No.

5 Q. Okay. Why not?

6 A. Because this is only a portion of the official
7 plat. The official plat, as of today, is this plus twenty
8 more lots.

9 Q. Okay. Well, let's just --

10 A. I -- I, as the developer, have agreed to amend
11 this to include the next twenty lots as inclusive in this,
12 as well, and subject to these covenants. So this is only
13 a portion of the lots today.

14 Q. Well, and --

15 A. Richard Ratclif owns fifteen of those, I
16 think, and his investor owns five.

17 Q. Please try to limit your answer just to my
18 question so that we can keep going quickly and efficiently
19 here.

20 A. I am.

21 Q. Would you agree that the twenty lots on some
22 revised plat is something that occurred this calendar year
23 in 2007?

24 A. Yes.

25 Q. Okay. Prior to that event, would you agree

1 that the only owners within the development were the
2 owners of the forty-four lots depicted on this official
3 plat?

4 A. Yes, I would, in that I maintain an interest
5 in the residual property as a lot owner, as well. So I
6 think that needs to be stipulated, that even if Bennet
7 held title to the residual land, I maintained an interest
8 in the residual land and I am a lot owner.

9 Q. And I understand that's a different issue.
10 Now, let's go back if we can to page 7,
11 Article 4. Would you agree that the members of the
12 association are the owners of the lots depicted on the
13 official plat?

14 A. Okay. We can keep on going at it again and
15 again. But this is just a portion of the official plat,
16 as of today.

17 Q. I'm going to limit this question just as of
18 the end of 2006. Would you agree that the only members of
19 the association were the owners of the forty-four lots
20 depicted on the official plat?

21 A. Yes.

22 Q. Okay. And then if you turn to Section 2.03,
23 is it your contention that you can then develop and submit
24 additional phases to this development by following the
25 language of 2.03 and the balance of the covenant?

1 A. Yes, sir.

2 Q. Okay. And is that what happened this year
3 with Mr. Ratclif and you submitting an additional phase to
4 the development?

5 A. A portion of phase two was twenty lots was
6 added, so now there are now sixty-four lot owners.

7 Q. Sixty-four lot owners. And your contention is
8 sixty-four members of the association?

9 A. No. No. I believe that a member can own more
10 than one lot, so I -- I don't think that's accurate.

11 Q. Okay. Sixty-four lots, whose owners would be
12 deemed the members of the association?

13 A. Yes.

14 Q. And if a member owned ten lots, would he not
15 have ten votes under the arrangement that you've set up
16 for these covenants and your association?

17 A. I believe so. Ten votes for what?

18 Q. You have one vote for each lot, do you not?

19 A. There's no votes today, because I maintain
20 complete control of the association.

21 Q. If the owners were going to vote, would they
22 not under the covenant have one vote for each lot?

23 A. I don't -- when I relinquish control of the
24 Association, at that point, yes, each lot owner would
25 receive one vote. I think the lots -- we've just been

1 through -- the definition of multifamily lots would be
2 considered one owner.

3 THE COURT: Mr. North, are you done with this
4 line of questioning, or do you still have more?

5 MR. NORTH: I can be easily done.

6 THE COURT: Okay. What I'm saying is is that
7 I don't want to stop in the middle of this --

8 MR. NORTH: I agree.

9 THE COURT: -- if we're going to start back
10 from lunch again and you're going to go through the
11 same thing all over again. But if you are finished
12 with this line of questioning and you're going to go
13 on to something else after lunch, now would be a
14 good time to break. Do you have follow-up questions
15 to what you just asked?

16 MR. NORTH: Well, they aren't tied to the
17 same topic. They're just the next step down the
18 analysis.

19 THE COURT: That would be another line of
20 questioning.

21 MR. NORTH: Okay.

22 THE COURT: All right. Ladies and gentlemen,
23 at this time we are going to go ahead and take a
24 lunch break. It is now 1:15. We are going to
25 reconvene back here at 2:15.

1 THE WITNESS: Yes, ma'am.

2 THE COURT: Thank you, sir. I appreciate it.

3 And no one out here is supposed to talk to him
4 about it, as well. Okay?

5 Y'all have a nice lunch.

6 [Whereupon, a recess is taken from 1:16 p.m.
7 to 2:24 p.m.]

8 THE COURT: Please be seated. All right. I
9 trust everyone had a nice lunch.

10 Mr. North, we are going to resume your
11 testimony with Mr. Porter.

12 MR. NORTH: Yes. Thank you, Your Honor.

13 Q. [Mr. North] Mr. Porter, I would like to hand
14 you again a copy of the covenant, directing your attention
15 first of all to section 1.12. And you see there the
16 definition of developer under the covenants?

17 A. Yes.

18 Q. And do you see that the developer is defined
19 to mean either you or, under subsection ii, any successor
20 in title or successor in interest to Anthony R. Porter?
21 Do you see that language?

22 A. Yes.

23 Q. Now, going back if we could to Section 2.03.
24 Tell me when you are there.

25 A. Okay.

1 Q. Do you see in the first sentence that the
2 developer reserves the right to modify, amend, revise, and
3 add to the plat at any time -- at any time, and from time
4 to time, setting forth such information which may be
5 necessary with regard to the subdivision? Do you see that
6 language?

7 A. Yes.

8 Q. And would you agree that the developer or the
9 assigns of the developer reserves that right to modify the
10 plat because of the way developer is defined?

11 A. Yes.

12 Q. Would you also agree that in order to revise
13 the plat, the official plat, the developer has to do it as
14 either a developer or an assignee of the developer --
15 would you agree with that -- as defined in paragraph 1.12?

16 A. No. It says --

17 Q. Why not?

18 A. -- developer reserves the right to modify,
19 amend. Any of my agents or -- could also modify, amend,
20 and revise. I don't have to personally -- when I deeded
21 property to Bennett it was with the full understanding
22 that the property was subject to the covenants, and that I
23 would remain the developer on that property even though I
24 didn't hold title to it. That was part of the --

25 Q. Is it your contention under paragraph 2.03

1 that when it says that the developer reserves the right to
2 revise and add to the plat, that persons other than you
3 personally, or your assigns, can modify and add to the
4 plat?

5 A. I have the right -- my assigns? No, that's --
6 I think that's accurate. I'm trying to think like a
7 lawyer. Bennett was my assign, Richard Ratclif is my
8 assign, so I think that's accurate.

9 Q. Okay. So as long as we assume that developer
10 as that is defined in Section 1.12, which means you or
11 assigns, you would agree that only the developer can
12 revise and add to the official plat; is that correct?

13 A. I think that as a point of clarity, that the
14 definition developer here is -- it's really like it's a
15 typo, because it doesn't have my dad's name listed, as
16 well. But he's also a portion -- he's a developer, co-
17 developer with me. And for some reason it was made clear
18 on page 1 of the covenants, and both my dad and I signed
19 the covenants, but for some reason the -- whoever was
20 typing it left his name out in 1.12. But it should have
21 been in there. It was just a clerical error.

22 Q. Okay. And when you say he should have been in
23 there, would you agree that as typed, whether it's a typo
24 or not -- as typed, Section 1.12 is quite clear in terms
25 of what is typed? That it does not say Jimmy Porter, it

1 simply says Anthony R. Porter? Would you agree with that?

2 A. Absolutely. With the distinction that it's an
3 obvious clerical error, and it was not the intent for it
4 only to be my name. It was just a clerical error. No big
5 deal. If you look at the end of the covenant you'll see
6 that my father signed as developer, as well as I, and he
7 didn't do that for -- because it was anything other than
8 the fact that he was a co-developer with me.

9 Q. Looking back at the definition of developer,
10 do you see how the successor or assigned of a developer is
11 described after your name?

12 A. Yeah.

13 Q. Okay. Read, if you would, the subsection 2
14 that describes a successor in title or a successor in
15 interest.

16 A. What does subsection 2 mean? Where are you
17 at?

18 Q. I'll tell you what. Just read section 1.12.

19 A. Developer shall mean and refer to, [a],
20 Anthony R. Porter, or, [ii], any successor in title or any
21 successor in interest to Anthony R. Porter, to all of the
22 property then subject to this declaration as provided in
23 the instrument of conveyance to any successor -- such
24 successor in title or interest is expressly designated as
25 the developer herein under by the grantor of such

1 conveyance, which grantor shall be the developer herein
2 under at the time of such conveyance.

3 Q. Would you agree that when subsection A omits
4 Jimmy Porter and you say it's a typo, that the same typo
5 and the same omission occurs in the very next line where
6 they then again -- the same typo or omission occurs the
7 second time? Do you notice that?

8 A. I'm not going to attempt to be a lawyer,
9 but I am going to tell you absolutely that my father was a
10 co-developer, and there was never any other intent. And
11 these covenants have ambiguities here and there, just like
12 any set of covenants does. But --

13 Q. But didn't you already --

14 A. -- I would like to clarify that.

15 Q. Didn't you already testify that all of the
16 money for the development of phase one went on your tax
17 return?

18 A. Yes.

19 MR. BAILEY: Judge, I hate to interrupt, but
20 the bottom line is it's really irrelevant. The
21 pleadings define the issues. They've admitted in
22 the pleadings that the developer is both the father
23 and the son. I don't know why we're --

24 THE COURT: I understand. He can continue
25 asking about it.

1 Continue, Mr. North.

2 Q. [Mr. North] And didn't we also establish that
3 your father took title because he needed collateral for a
4 loan that he had made to you in order for you to acquire
5 this property?

6 A. Yes. Also because he was a co-developer and
7 he had the right to take title to anything that -- he
8 could have taken title to all of it if he would have told
9 me that's what he wanted to do.

10 Q. Would you agree that a successor in title --
11 in title or a successor in interest, in order to be deemed
12 the developer, has to be designated as the developer in
13 the deed of conveyance?

14 A. Say that again. I'm sorry. I lost you.

15 Q. Would you agree that under Section 1.12 that
16 in order for some successor in title or successor in
17 interest to actually be deemed as developer, as defined in
18 these covenants that person would have to be designated as
19 the developer by you in the conveyance?

20 A. Okay. I may be dense here, but it just seems
21 like that's some kind of multiplicity of question that I
22 still don't understand. I'm sorry. I'm not trying to be
23 difficult, but I still don't understand the question.

24 Q. When this section 1.12 says that a successor's
25 developer is a person who obtained the interest from

1 Anthony R. Porter, would you agree that Jimmy Porter's
2 name is not part of that provision?

3 A. It's not typed in this 1.2. And my father was
4 not a successor to me. He was an original developer.

5 Q. And would you agree that the land that is made
6 up of parcel D was acquired by your father and was never
7 at any point in time titled to you personally?

8 A. I believe that's correct.

9 Q. And is not parcel D the land that was conveyed
10 directly by your father in 2002 to Mr. McNeal?

11 A. I believe so.

12 Q. And isn't that the same land that was then the
13 subject of this twenty-lot plat that has now been filed by
14 Mr. Ratcliff?

15 A. I'm not sure if the twenty lots are a hundred
16 percent on parcel D -- I would have to look at it for an
17 overlap -- but it's quite likely that it is.

18 Q. Okay. Take a look, if you would, at Section
19 1.01.

20 A. Okay.

21 Q. Do you see in the first sentence that the
22 Wright's Point architectural committee shall mean and
23 refer to Anthony R. Porter and Jimmy W. Porter or such
24 other individuals as developer may appoint, or such
25 entities to which the Wright's Point architectural

1 committee may assign its duties, until all improvements
2 are constructed thereon and sold to permanent residents?

3 A. Yes.

4 Q. Would you agree that -- at the point when it
5 says until all improvements constructed thereon and sold
6 to permanent residence, would you agree that the
7 architectural committee remains in existence until all
8 improvements are constructed and sold to permanent
9 residents?

10 A. That's a portion of the time that it remains
11 in effect, yes.

12 Q. Are you contending that it remains in
13 existence longer after -- past the point in time where all
14 improvements are constructed?

15 A. Yes.

16 Q. And what is the basis for that statement?

17 A. I have to notify the board and the owners of
18 the lots, formally, that I have relinquished the control
19 of the Architectural Review Board before it ceases to be
20 under my control.

21 Q. Okay. But would you agree that when houses
22 are built on all of the lots, at that point you have to
23 give up control of the architectural committee?

24 A. No.

25 Q. What is your contention?

1 A. Whenever I have deemed that all improvements
2 are made within the entire subdivision, to my satisfaction
3 and my original intent, at that time I'll notify the Board
4 and I'll relinquish control.

5 Q. Okay. But my original question was would you
6 agree that the committee ceases to exist when all of those
7 improvements are built?

8 A. No. The committee ceases to exist whenever I
9 notify the board that I relinquish control of the
10 committee in writing, formally, and not until then. Not
11 for any reason until then.

12 Q. Okay. And so when you say -- when you say
13 that -- you're referring to the fact that the next
14 sentence says, until such time as all lots in the
15 subdivision has been fully developed, the developer shall
16 notify the board and all owners, et cetera, and then the
17 passage of control goes to the owners; is that right?

18 A. I'm referring to my right as developer and as
19 the current head of the Architectural Review Board that
20 I'm going to retain that right until all improvements
21 within the entire development are complete to my
22 satisfaction.

23 Q. Well, if we look at the specific language of
24 Section 1.01, does it not provide that you have to turn
25 over control of the architectural committee when all of

1 the lots have been fully developed?

2 A. Fully developed is my definition of all
3 improvements having been completed in their entirety,
4 and the definition of improvement is completely my
5 discretionary definition of improvement.

6 Q. And doesn't it not also provide, however, that
7 you can turn over control prior to the completion and sale
8 of all lots?

9 A. I can turn over control at any time that I
10 choose to, as long as I do it in writing and formally
11 relinquish control.

12 Q. Is it not reasonable to interpret the term
13 fully developed to mean in a real-estate development the
14 completion and sale of all lots?

15 A. Not in my book.

16 Q. Okay. But do you think it's reasonable to
17 interpret fully developed as completing all improvements
18 if the architectural committee ceases to exist at the very
19 moment in time that the improvements are completed?

20 A. Mr. North, we can do it a hundred times. It
21 will not cease to exist until I formally relinquish
22 control, in writing, to the board after all improvements
23 within the development are completed to my satisfaction.

24 Q. Please turn within the covenants to Section
25 7.01. And you may not even need to refer specifically to

1 the paragraph. You may know this already. Would you
2 agree that under the covenant you had a right to control
3 the homeowners association until all lots have been
4 conveyed to a person other than developer or a builder?

5 A. Okay. Are you in 7.01? Is that the object of
6 your question?

7 Q. Yes.

8 A. Could you ask me the question again, please.

9 Q. Yes.

10 A. Would you agree that under the covenant, you
11 had the power as developer to control the association
12 until the point in time that all lots had been conveyed to
13 persons other than developer or builder?

14 A. Yes.

15 Q. I'm handing you what's been marked as
16 Plaintiff's Exhibit 13. Do you recognize that as a copy
17 of the Bundy Management record, listing out the names and
18 addresses of the property owners within phase one as of
19 December, 2003?

20 A. Yes.

21 Q. Would you agree that out of the forty-four
22 names listed on there, that two of those names are yours?

23 A. Yes.

24 Q. And would you also agree that the only names
25 on there that are yours are two lots?

1 A. Yes.

2 Q. And would you agree that as of December, 2003,
3 all lots had been conveyed to somebody other than you?

4 A. [No response]

5 Q. It may have been a builder, but they had been
6 conveyed to somebody?

7 A. Can you say that again?

8 Q. Yes. Would you agree that as of December,
9 2003, all of the lots in phase one had been conveyed by
10 you to somebody?

11 A. No.

12 Q. And why not?

13 A. I maintain two in my personal residence trust.

14 Q. I intended to exclude those two. But you
15 would agree that if we don't talk about those two, the
16 other forty-two lots have been conveyed?

17 A. That's an accurate statement.

18 Q. Okay. Take a look if you would at Exhibits 24
19 and 25.

20 A. Okay.

21 Q. And 26, for that matter. Is it correct to say
22 that Exhibits 24 and 25 are true and correct copies of
23 deeds executed by you conveying the two lots that you
24 still own in phase one to the Anthony R. Porter qualified
25 personal residence trust?

1 A. Yes.

2 Q. And as of the end of 2003 would it be fair to
3 say, then, that all forty-four lots have been conveyed to
4 either third parties or to your trust?

5 A. To my personal residential trust for my two
6 lots, I think that would be accurate, yes.

7 Q. Okay. And is Plaintiff's Exhibit 26 a true
8 and correct copy of that personal residence trust?

9 A. I believe so.

10 Q. And that's an irrevocable trust, is it not?

11 A. You're going to have to qualify that with the
12 lawyers. I believe that there is some shrewd language in
13 here that actually would allow me, under certain
14 circumstances, to revoke it.

15 Q. To revoke it?

16 A. I believe I could. That's what it was
17 explained to me by Harley Rouse [phonetic] when he wrote
18 it for me. And he also absolutely said when he wrote it,
19 because we were prepared for this issue, that it would be
20 only for -- that he would come to testify that it was for
21 tax purposes only and didn't constitute a physical
22 transferral of my property to someone other than myself.

23 MR. NORTH: Your Honor, I would move to strike
24 the last comment as not responsive.

25 THE COURT: You asked him a question, and he

1 answered it. I'll give it the weight as I deem
2 appropriate or not appropriate.

3 Q. [Mr. North] And, Mr. Porter, if you would
4 turn to page 6 of your personal residence of trust,
5 Exhibit 26. Do you see at the bottom of the page Article
6 11 entitled irrevocability?

7 A. Yes.

8 Q. And do you see that the first sentence states
9 that this agreement shall be irrevocable?

10 A. Yes.

11 Q. Does this trust have a separate tax
12 identification number?

13 A. I don't -- I don't know. I don't think so.
14 It might.

15 Q. Are you, as trustee, still responsible for the
16 debts of yourself personally?

17 A. Yes.

18 Q. Is it your position that the assets that you
19 hold in your trust are available to satisfy the debts that
20 you have personally?

21 A. Are you talking about the debts on the
22 personal qualified residence trust, or all my debts?

23 Q. All your debts.

24 A. No. The qualified personal residence of trust
25 is completely separate. That's the whole purpose of

1 creating the qualified personal residence of trust is to
2 create a completely separate situation so that no matter
3 what I'm doing out in my business, that my home remains in
4 an intact condition.

5 Q. Intact financially where creditors cannot
6 seize it?

7 A. Intact as a separate entity. I'm not going to
8 say whether or not creditors can seize it or not. I'm not
9 an attorney for a creditor. Its whole purpose is to
10 create a separation of your home place and to create an
11 advantageous tax structure.

12 Q. Take a look, if you would again, at the
13 covenants under the definition of person.

14 A. Where are you at, Mr. North?

15 Q. Section 1.17 of the covenants.

16 A. Okay.

17 Q. Do you see that person is defined to include
18 either a natural person or a trust?

19 A. It says person shall mean and refer to a
20 natural person, corporation, partnership, association,
21 trust, or other legal entity, or any combination thereof.

22 Q. Would you agree that a trust is a separate
23 legal entity and a separate legal person in the state of
24 South Carolina?

25 A. I am -- I know that when I created this trust

1 that it was specifically, with Tom Michael and Harley
2 Rouse [phonetic], gone through to make certain that it
3 would not constitute a conveyance triggering the last lots
4 sold in Wright's Point subdivision. And towards that end,
5 Harley was willing to come and testify to that fact that
6 when he created it, he created it in such a way that it
7 would not trigger that. So I'm not qualified to go past
8 that in answering your question. I'm stating it's my
9 home. End of story.

10 Q. Have you discussed any of this with this
11 attorney anytime recently?

12 A. No. But it's totally irrelevant, because
13 Richard Ratclif is absolutely a qualified builder and owns
14 a lot right down the street from me. It's just a red
15 herring.

16 Q. Do you recall being involved in a quiet title
17 action with a purchaser of one of these two lots who
18 bought it at a tax sale?

19 A. Yes.

20 Q. And do you remember filing an answer in that
21 case where your position was that notice of the complaint
22 to you personally was not noticed to the trust?

23 A. Tommy Kimberland [phonetic] handled that for
24 me. And that was the reason that the property was
25 returned to me is because it hadn't been noticed

1 correctly, yes, sir.

2 Q. Isn't it a fact that you had to buy the land
3 back?

4 A. No. I don't have -- I never lost it. They
5 just -- they just gave up title. I think I paid their
6 court costs, or something like that, just to keep from
7 running up anymore attorney bills. But they would not
8 have relinquished a multi-million dollar house if they --
9 if there wasn't a deficit in notice, Mr. North.

10 Q. Do you recognize that as a copy of the
11 tax deed that conveyed title to one of your phase one
12 lots in --

13 A. Yes.

14 Q. -- the summer of 2003?

15 A. Tax title. Yes.

16 Q. And would you agree that that tax sale related
17 from a tax -- or that tax deed was the result of a tax
18 sale in October of 2002?

19 A. An incorrectly-noticed tax sale. Yes, sir.

20 Q. Okay. So --

21 A. An invalid tax sale.

22 Q. -- would you agree that the tax sale of your
23 property in Wright's Point in 2002 clearly predated any
24 activity of any homeowner within Wright's Point having to
25 do with the Association?

1 A. I can't begin to understand that question.

2 The tax sale --

3 Q. Would you agree that one --

4 A. -- of any homeowner --

5 Q. -- one of your properties was sold at tax
6 auction in 2002, a year before anybody -- any of the
7 homeowners in phase one talked about organizing a
8 homeowner's association?

9 A. I have no idea when any homeowners talked
10 about organizing a homeowners association. But the tax
11 sale was invalidated by Tommy Kimberland [phonetic] due to
12 insufficient notice. It was never -- it never -- the
13 purported purchaser relinquished any right in my home
14 because they didn't have clear title.

15 Q. Take a -- on Exhibit 27, do you notice that
16 the purchaser of that sale are the Marion Properties, LLC?

17 A. Yes, sir.

18 Q. Take a look at Exhibit 28, if you would. Do
19 you see in that document that Marion Properties conveyed
20 the land to yet a different limited liability company?

21 A. Yes, sir.

22 Q. And finally Exhibit 29 and 30. Would you
23 agree that those are the complaints and answers in the
24 quiet title action that was filed by the purchaser of that
25 real estate to clear title?

1 A. I'm just now looking at these documents. I've
2 actually never -- Tommy Kimberland [phonetic] handled
3 this. But I do know that the property was sold at the tax
4 sale; the tax sale was invalidated due to insufficient
5 notice. Tommy Kimberland [phonetic] handled the whole
6 thing. At the end of it, it was my home again. It was
7 always my home, but the reason the people relinquished it
8 is because they didn't have clear title to it and they
9 realized that.

10 Q. Now, would you agree that Exhibit 31 is a true
11 and correct copy of the deed reconveying the property in
12 question from the tax sale back to your personal residence
13 of trust?

14 A. It appears to be.

15 Q. Would you agree, then, that between the date
16 of the deed issued by -- on the tax sale, and March 8th of
17 2005, your trust, neither you nor your trust, had title to
18 that lot?

19 A. No. No. It was an invalid tax sale, Mr.
20 North. I've said it three times. That's four. We never
21 relinquished title to it.

22 Q. Now, you had two lots during this period of
23 time. One -- would you agree that one had your house on
24 it?

25 A. Yes.

1 Q. And the other was a vacant lot next door to
2 it?

3 A. Yeah.

4 Q. And the lot that was sold in the tax sale
5 would-be deeds conveying title to third parties was the
6 vacant lot, was it not?

7 A. I think so. I think that whenever you have
8 presumed delinquent taxes, that they take -- when there's
9 more than one parcel, they take the one of lesser value or
10 something like that. I really don't understand it.

11 Q. Okay. And during the period of time that
12 these deeds were floating around, would you agree that
13 your residence trust only had legal title to a piece of
14 property upon which your personal residence sat?

15 A. No.

16 Q. Why not?

17 A. For the same reason that -- this is now the
18 fifth time -- it was an invalid tax sale due to incorrect
19 noticing. The tax sale, in effect, never occurred, which
20 is why the purchases relinquished any claim back to my
21 personal residence of trust.

22 Q. Without regards to the status of the vacant
23 lot, would you agree that the second lot that you owned
24 during this period of time had built upon it your personal
25 residence?

1 A. Yes.

2 Q. And that is not a lot that you held for
3 purposes of sale, is it?

4 A. My house and the lot next door were both in my
5 personal residence of trust.

6 Q. During this period of time off and on, didn't
7 you have your residence property listed with a realtor for
8 sale?

9 A. Yes. It's for sale today for the right price.

10 MR. NORTH: Your Honor, for the record I want
11 to show that Plaintiff's Exhibit 32 is a copy of the
12 deed from Jimmy Porter to McNeal Partnership, LP, in
13 2002, which conveyed parcel D to that entity. And
14 Plaintiff's Exhibit 33 is a corrected deed that
15 involved the same transaction at the same point in
16 time.

17 THE COURT: I'm assuming you are going to ask
18 him about these; is that correct?

19 MR. NORTH: Not necessarily. I think I've
20 already asked him about the conveyances from his
21 father to Mr. McNeal, and I don't think -- if the
22 Court has any questions about it -- I thought that
23 the record was clear with regard to what had
24 transpired.

25 THE COURT: That's fine, as long as there is

1 no objection from Mr. Bailey.

2 MR. BAILEY: None, Your Honor.

3 Q. [Mr. North] Mr. Porter, take a look at
4 Plaintiff's Exhibit 34 if you would. Is that a notice of
5 a meeting that you prepared in connection with an
6 informational meeting in June of 2005 at your residence?

7 A. It was prepared by Tom Michael on my behalf.

8 Q. Was this notice then sent to the property
9 owners within phase one?

10 A. I don't know how it was conveyed and to who.
11 Its intent was to be sent to all property owners.

12 Q. Did you actually conduct a homeowners meeting
13 at your residence on July 9th of 2005?

14 A. No. I believe Tom Michael conducted it.

15 Q. Do you recall making an introductory statement
16 to the homeowners that gathered at that time?

17 A. I'm sure I did. I'm sure, at the very
18 minimum, I welcomed them into my home.

19 Q. Do you remember telling the assorted
20 homeowners at that time that you were a real estate
21 developer with a twelve-figure income?

22 A. No. Twelve figures? How much is that?

23 Q. It's a lot.

24 A. I wish I had it this year.

25 Q. Take a look if you would at Plaintiff's

1 And I've been active for quite a while; he's been
2 inactive. He's vested me with full agency privileges for
3 everything we do. But he dislikes reporting income, so
4 I'm sure he was happy if I put it on my income.

5 Q. I can't resist this. Please take a look at
6 Plaintiff's Exhibit 36.

7 A. Okay.

8 Q. Is that a true and correct copy of the 4.6
9 million-dollar tax lien filed here in Beaufort County?

10 A. Appears to be.

11 Q. Okay. So could I assume, then, that like your
12 father, you don't like to pay taxes, either?

13 A. No. That's a very non-professional statement
14 to make.

15 Q. You're probably right. I apologize.

16 A. But I don't like to pay taxes. But I have
17 resolved these taxes to within \$34,000, which I think
18 completely negates your joke.

19 Q. Do you have any proof of that? documentary
20 evidence of that?

21 A. No. But you're welcome to check the records
22 in thirty days and verify it. It's irrelevant, but it's a
23 fact.

24 Q. Do you have Exhibit 15 before you?

25 A. Yes, sir.