

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas  
J.C. Nicholson, Jr., Circuit Judge

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Court of Common Pleas Case No. 2015-CP-08-00547  
Appellate Case No. 2106-001156

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**RECEIVED**

MAR 06 2017

**SC Court of Appeals**

COKERS COMMONS HOMEOWNER'S ASSOCIATION, INC.,

Respondent,

v.

PARK INVESTORS, LLC; CCT RESERVE, LLC, F/K/A HARRIS STREET, LLC; AND  
WHIPPLE DEVELOPMENT CORPORATION,

Defendants.

Of which WHIPPLE DEVELOPMENT CORPORATION is the

Appellant.

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**RECORD ON APPEAL**

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with the contracting party, the Association. This Court agrees. While the South Carolina Supreme Court case of Laurens Emergency Medical Specialist, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) may allow for indemnity claims between contracting parties (so-called "second party indemnity"), the Court here, as in Laurens, sees no language in the contract of indemnity between Whipple and the Association calling for such second party indemnification. To the contrary, as in Laurens, this Court finds the contract of indemnity at bar to be one of third party indemnification.



Generally, "the construction of contracts is a question of law for the court." Watson v. Underwood, 407 S.C. 443, 455, 756 S.E.2d 155, 161-62 (Ct. App. 2014), citing, Hope Petty Motors v. Hyatt, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct.App.1992). Determining what the parties intended becomes a question of fact for the jury only when the contract is ambiguous. Id. "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." Bates v. Lewis, 311 S.C. 158, 161 n. 1, 427 S.E.2d 907, 909 n. 1 (Ct.App.1993). "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Id. "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Id.

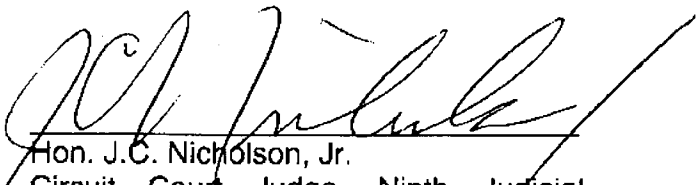
Here, the Court finds as a matter of law the contract of indemnity between Whipple and the Association presented to this Court is clear and unambiguous, and can be construed with no other meaning than one of third party indemnity, and not of second party indemnity. As referenced above, this Court finds no clear language of second party indemnity in the contract of indemnity, and, only finds language of third party indemnity. Accordingly, this Court finds that Whipple cannot maintain a claim of second party indemnity against the Association.

Whipple contends that even if the Covenants and Restrictions provide only for indemnification involving third party claims, the Association's motion still should be denied because a dispute exists as to whether or not the claims in the present case are properly being brought by the Association instead of by individual members of the Association. This Court rejects Whipple's argument because only the Association has been named as a party to this action.

Nothing in this Order shall in any way, shape, or form prevent Whipple from pursuing a claim of indemnity, pursuant to the operative Covenants and Restrictions presented to this Court for review, from any third party.

**IT IS THEREFORE ORDERED** that Plaintiff's Motion for Partial Summary Judgment is **GRANTED**.

This 22 day of April, 2016 at Charleston, South Carolina.

  
Hon. J.C. Nicholson, Jr.  
Circuit Court Judge, Ninth Judicial  
Circuit

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2015-CP-08- 647

COKERS COMMONS HOMEOWNER'S  
ASSOCIATION, INC.,

Plaintiff,

vs.

PARK INVESTORS, LLC, CCT RESERVE,  
LLC, f/k/a HARRIS STREET, LLC, and  
WHIPPLE DEVELOPMENT  
CORPORATION

Defendants.

COMPLAINT

(Non-Jury Trial Demanded)

2015 MAR -2 PM 3:03  
CLERK OF COURT  
BERKELEY COUNTY, SC

FILED

COME NOW THE PLAINTIFF, Cokers Commons Homeowner's Association, Inc., by and through their undersigned counsel, complaining of the Defendants herein, and allege unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Cokers Commons Homeowner's Association, Inc. is a corporation organized and existing under the laws of the State of South Carolina.

2. Defendant, Park Investors, LLC is a South Carolina limited liability company formed on or about April 9, 2010 and is the current owner of that certain piece of land, known as the amenities area, within the Coker's Commons subdivision, TMS No. 235-06-10-087, commonly known as 117 Kirkland Street, Goose Creek, South Carolina (hereinafter, "the Amenities Area").

3. Harris Street, LLC is a Delaware limited liability corporation whose sole member was Edward L. Terry. On or around February 4, 2011, Harris Street, LLC was

merged into CCT Reserve, LLC (hereinafter, "CCT"). CCT is a limited liability company organized under the laws of Georgia. On August 31, 2012, CCT filed a Chapter 11 Petition in the United States Bankruptcy Court for the Northern District of Georgia. See *In re CCT Reserve, LLC*, C.A. No. 12-71670-PWB (Bankr. N.D. Ga.). Harris Street, LLC is the present record owner of the HOA Open Space Lot within the Cokers Commons subdivision, TMS No. 235-06-12-057.

4. Defendant, Whipple Development Corporation (hereinafter, "Whipple") is a corporation organized and existing under the laws of the State of South Carolina. Whipple was the proclaimed owner of the Subject Property by virtue of the signature of Edward M. Terry as Vice President of Whipple Development Corporation to the Declarations of Covenants, Conditions and Restrictions for Cokers Commons (hereinafter, the "CCR's") dated March 10, 2008, recorded March 14, 2008 in Book 7225, Page 1 and re-recorded April 15, 2008 in Book 7288, Page 283.

5. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum as the Subject Property is located in Berkeley County, South Carolina.

#### FACTUAL ALLEGATIONS

6. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

7. Mr. Edward L. Terry (hereinafter the "Developer" or "Mr. Terry") is a real estate developer from Atlanta, Georgia that is/was the general partner of Westgate Partners, L.P., (hereinafter, "Westgate"). Westgate purchased the Cokers Commons tract (TMS No. 235-00-00-054) (hereinafter, the "Tract") from Montague Lands in 2005.

8. Phase 4 of Cokers Common consists of 2 phases, Phases 4-A and 4-B. Phase 4-A consists of 50 lots and the Amenities Lot. These lots are shown as Lots 1 thru 37, and 81 thru 93 on a plat dated April 7, 2008, and recorded in Plat Cabinet M, Pages 38-P and 39-P. Phase 4-B consists of 56 lots as shown on a plat dated August 5, 2008, and recorded in Plat Cabinet M, Page 300-P together with an HOA Open Space lot. These lots are shown as Lots 38 thru 80, and Lots 94 thru 106 on the plat.

9. At the time the CCR's were initially recorded on March 14, 2008, the Tract was owned by Westgate. However, the Declarant name as indicated on the CCR's is Whipple Development Corporation, the then purported owner of the Tract according to CCR's.

10. Westgate then conveyed the Tract by deed to Harris Street, LLC on April 14, 2008, recorded April 28, 2008 in Book 7312, Page 19.

11. According to the CCR's, the Declarant was to convey fee simple title to the common areas of the subdivision to the Plaintiff prior to the conveyance of the first lot.

12. Harris Street, LLC conveyed the first lot in the Cokers Commons subdivision to Brentwood Homes, Inc. (another Edward Terry related entity) in 2008 who in turn conveyed the lot to an individual purchaser in 2008. Despite the Developer making the conveyance of lots out of Harris Street, LLC, the Amenities Lot and the HOA open space lot were not conveyed (and still not have been conveyed) to the Plaintiff, as per the CCR's.

13. The Amenities Lot area includes a pool whose maintenance and upkeep has been abandoned by the developer for nearly six years. The pool has become a blight and the local municipality of Goose Creek has issued nuisance warnings due to the

condition of the pool. The landowner members of Plaintiff's have not been able to use or enjoy the pool despite repeated requests to Mr. Edward Terry to remediate the condition. As described herein, the Amenities Lot area and the HOA Open Space Area have been abandoned by Mr. Edward Terry's entities, have not been kept up, and should have been conveyed to the Association in 2008 and were not.

**FOR A FIRST CAUSE OF ACTION**

(Specific Performance as to Park Investors and Harris Street)

14. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

15. The Developer agreed to convey the common areas to the Plaintiff before conveyance of the first lot. The Amenities Lot area and HOA open space lot are common areas, designated and designed to be used for all owners of the subdivision.

16. The Developer never conveyed the common areas as contractually required, has still retained ownership of them, and let them fall into disrepair and blight.

17. The Plaintiff respectfully asks the Court to compel the conveyance by deed of the Amenities Lot and HOA open space lot to the Plaintiff as Plaintiff has no adequate remedy at law and such specific performance is equitable under the circumstances.

**FOR A SECOND CAUSE OF ACTION**  
**(Action for Declaratory Relief)**

18. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

19. Pursuant to Title 15, Chapter 53 of the South Carolina Code of Laws, the Plaintiff seeks a declaratory judgment declaring that all property owners of record in the Phase 4 of Cokers Commons are subject to the CCR's.

20. Although Whipple was not the owner of the Tract at the time the CCR's were recorded on the property, the Developer was the general partner of the owner, Westgate. The identification of Whipple as the Declarant on the CCR's was either a technical error or correct as there was a commonality of interest between the Developer, Whipple and Westgate such that the CCR's are still valid and binding upon all owners of Phase 4 of Cokers Commons.

21. The Plaintiff seeks from the Court a declaration of Plaintiff's rights as to the common areas as set forth herein and in the CCR's.

**FOR A THIRD CAUSE OF ACTION**  
**(Nuisance as to Park Investors and Harris Street)**

22. Plaintiff hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

23. Defendants Park Investors and Harris Street are the record owners of the Amenities Lot and the HOA open space lot. As alleged herein, the common areas have been abandoned, neglected, and have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons. The common areas, by contrast and comparison, were intended to preserve, protect and enhance the quality of

life of its owners, as described in the CCR's.

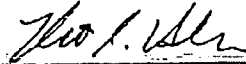
24. The Defendants neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff's constituent member's use and ownership of their properties as well as their use of the common areas, causing damages. The Defendants should be required to restore the condition of the common areas to their pre-existing condition to the time at which they were abandoned.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiff against the Defendants, jointly and severally, as follows:

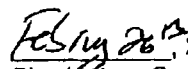
1. For specific performance as described herein;
2. For a declaration of Plaintiff's rights as to the amenities lot and HOA open space lot;
3. For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
4. For punitive damages in an amount to be determined by the trier of fact;
5. For equitable relief as sought herein including but not limited to injunction;
6. For all costs associated with investigating and prosecuting this action; and
7. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 

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, 2015.  
Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2015-CP-08-00547

COKERS COMMON HOMEOWNER'S )  
ASSOCIATION, INC. )

Plaintiff, )

-vs- )

PARK INVESTORS, LLC, )  
CCT RESERVE, LLC, f/k/a HARRIS )  
STREET, LLC and WHIPPLE )  
DEVELOPMENT, INC., )

Defendants. )

**ANSWER & COUNTERCLAIMS**

**(Jury Trial Demanded)**

FILED  
15 MAY 14 AM 11:39  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

TO: PLAINTIFF ABOVE-NAMED:

Defendants Park Investors, LLC; CCT Reserve, LLC, f/k/a Harris Street, LLC; and Whipple Development, Inc. (hereinafter collectively referred to as "Defendants"), by and through their attorneys, fully answering the Complaint, and asserting Counterclaims, respectfully allege and would show unto this Honorable Court as follows:

**FOR A FIRST DEFENSE**  
(Qualified Denial)

1. Except as otherwise admitted, qualified, or explained hereinafter, Defendants deny each and every allegation contained in the Complaint and demand strict proof thereof.

2. Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 1 of the Complaint and, therefore, deny same and demand strict proof thereof.

3. In response to paragraph 2 of the Complaint, Defendant Park Investors, LLC admits only that it is a South Carolina limited liability company formed on or about April 9, 2010 and

craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 2 of the Complaint that are inconsistent therewith. Defendants CCT Reserve, LLC, f/k/a Harris Street, LLC, and Whipple Development, Inc. lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 2 of the Complaint and, therefore, deny same and demand strict proof thereof.

4. In response to paragraph 3 of the Complaint, Defendant CCT Reserve, LLC, f/k/a Harris Street, LLC, admits only that Harris Street, LLC formerly was a Delaware limited liability company and, as set forth in a certificate of merger dated February 4, 2011, which was filed with the Georgia Secretary of State, it was merged into CCT Reserve, LLC, the surviving entity; that on or about August 31, 2012 CCT Reserve, LLC filed a Chapter 11 bankruptcy petition in the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB, and said action was ended on July 2, 2013 and CCT Reserve, LLC was discharged; and craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 3 of the Complaint that are inconsistent therewith. Defendants Park Investors, LLC and Whipple Development, Inc. lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 3 of the Complaint and, therefore, deny same and demand strict proof thereof.

5. In response to paragraph 4 of the Complaint, Defendant Whipple Development, Inc. admits only that it is a corporation formed under the laws of the State of South Carolina, but denies the remaining allegations of said paragraph. Defendant Whipple Development, Inc. craves reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and denies any allegations of paragraph 4 of the Complaint that are inconsistent therewith. Defendants Park Investors, LLC and CCT Reserve, LLC, f/k/a Harris Street, LLC, lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 4 of the Complaint and, therefore, deny same and demand strict proof thereof.

6. Responding to the allegations of Paragraph 5 of the Complaint, the allegations of said paragraph call for legal conclusions to which the Defendants are not required to respond. To the extent a response is deemed necessary, Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 5 of the Complaint and, therefore, deny same and demand strict proof thereof.

7. Responding to the allegations of Paragraph 6 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 5 of the Complaint.

8. Responding to the allegations of Paragraph 7 of the Complaint, upon information and belief, Defendants admit only that Edward L. Terry is a citizen and resident of the State of Florida and that he was the general partner of Westgate Partners, L.P. Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina,

involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 7 of the Complaint that are inconsistent therewith.

9. Responding to the allegations of Paragraphs 8, 9, 10, 11, and 12 of the Complaint, Defendants lack sufficient information or knowledge to form a belief as to the truth or accuracy of the Plaintiff's allegations contained in Paragraph 8 and, therefore, deny same and demand strict proof thereof. Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 8 of the Complaint that are inconsistent therewith.

10. Responding to the allegations of Paragraph 13 of the Complaint, Defendants admit only that the property at the Coker's Commons subdivision in Goose Creek, South Carolina, contains a pool. Defendants deny the remaining allegations of paragraph 13 of the Complaint.

11. Responding to the allegations of Paragraph 14 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 13 of the Complaint.

12. Defendants deny the allegations of Paragraphs 15, 16, and 17 of the Complaint.

13. Responding to the allegations of Paragraph 18 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 17 of the Complaint.

14. Defendants deny the allegations of Paragraphs 19, 20, and 21 of the Complaint, except the portion stating, upon information and belief, that Whipple Development, Inc. was not the owner of the property located at the Coker's Commons subdivision in Goose Creek, South Carolina,

which is referenced in the Complaint. Defendants admit, upon information and belief, that Whipple Development, Inc. was not the owner of the property located at the Coker's Commons subdivision in Goose Creek, South Carolina, which is referenced in the Complaint.

15. Responding to the allegations of Paragraph 22 of the Complaint, Defendants repeat, allege, and incorporate by reference as if fully set forth herein their answers to the allegations in paragraphs 1 through 21 of the Complaint.

16. Responding to the allegations in the first sentence of Paragraph 23 of the Complaint, Defendants crave reference to the documents recorded with the Register of Deeds for Berkeley County, State of South Carolina, involving ownership of property at the Coker's Commons subdivision in Goose Creek, South Carolina, and deny any allegations of paragraph 23 of the Complaint that are inconsistent therewith. Defendants deny the remaining allegations of Paragraph 23.

17. Defendants deny the allegations of Paragraph 24 of the Complaint.

18. Defendants deny the Plaintiff is entitled to any of the relief requested in the prayer for relief.

**FOR A SECOND DEFENSE**  
(Failure to State a Claim)

19. The Complaint, in whole or in part, should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(6) for failure to state a claim against the Defendant. The facts as alleged in the Complaint do not state an actionable claim or support a theory of recovery against the Defendants as a matter of law.

**FOR A THIRD DEFENSE**  
(Waiver)

20. Plaintiff's claims are barred in whole or part by the doctrine of waiver due to their own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

**FOR A FOURTH DEFENSE**  
(Estoppel)

21. Plaintiff's claims are barred in whole or part by the doctrine of estoppel due to their own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the

property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

**FOR A FIFTH DEFENSE**

(Failure to Comply with Covenants, Restrictions, Articles, and/or Bylaws)

22. Plaintiff's claims are barred in whole or part because of its own failures to comply and/or conform with the terms of the covenants and restrictions, articles, and bylaws, if any, affecting the property, in such particulars as the evidence will show, including but not limited to the Plaintiff's failure to provide the written notice required for election of a proper board of directors for any homeowner's association and/or any meeting of owners with interests in the property; failure to provide the written notice required for taking any action to enforce any covenants and restrictions, articles, and bylaws, if any, affecting the property, including the present lawsuit; failure to conduct a properly noticed meeting of the owners to elect a board of directors; failure to conduct a meeting of the owners with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit; failure to conduct a meeting of the board of directors with a proper quorum to authorize the filing of this lawsuit; failure to elect a proper board of directors; failure to obtain the necessary affirmative vote of 75% of the members needed to commence this litigation; and failure to comply

with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

**FOR A SIXTH DEFENSE**  
(Failure to Satisfy Conditions Precedent)

23. Plaintiff's claims are barred due its failure to satisfy all conditions precedent to any obligation on the part of the Defendants to perform, including but not limited to, the conditions imposed in the covenants and restrictions, articles, and bylaws, if any, affecting the property.

**FOR A SEVENTH DEFENSE**  
(Laches)

24. Plaintiff's claims are barred in whole or part by the doctrine of laches.

**FOR AN EIGHTH DEFENSE**  
(Statute of Limitations/Statute of Repose)

25. Plaintiff's claims are barred in whole or part by the expiration of the applicable statute of limitations and/or statute of repose.

**FOR A NINTH DEFENSE**  
(Unclean Hands)

26. Plaintiff's claims are barred in whole or part by their unclean hands.

**FOR A TENTH DEFENSE**  
(*Ultra Vires* Acts)

27. Plaintiff is not a duly empowered or authorized entity to initiate this lawsuit and is operating *ultra vires* in this action.

**FOR AN ELEVENTH DEFENSE**  
(Lack of Standing)

28. Plaintiff lacks standing to assert the claims raised in the Complaint.

**FOR A TWELFTH DEFENSE**

(Not Real Party in Interest)

29. Plaintiff is not a real party in interest under SCRCP 17 with authority to bring the claims asserted in the Complaint.

**FOR A THIRTEENTH DEFENSE**

(Discharge in Bankruptcy)

30. Plaintiff's claims are discharged in whole or part by virtue of the Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB.

**FOR A FOURTEENTH DEFENSE**

(Extinguishment of Claim)

31. The Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB, have extinguished and/or discharged in whole or in part the claims asserted by the Plaintiff.

**FOR A FIFTEENTH DEFENSE**

(Arbitration)

32. Plaintiff's claims are subject to the arbitration provision in the Covenants, Conditions and Restrictions for Cokers Commons and must be dismissed.

**FOR A SIXTEENTH DEFENSE**

(Abandonment)

33. Plaintiff's claims are barred in whole or part due to the Plaintiff's abandonment of its alleged rights.

**FOR A SEVENTEENTH DEFENSE**  
(Absence of Damages)

34. Plaintiff's claims fail because it can show no damages.

**FOR AN EIGHTEENTH DEFENSE**  
(Consent)

35. Plaintiff's claims are barred in whole or part due to its consent to Defendants' alleged nuisance or misconduct.

**FOR A NINETEENTH DEFENSE**  
(Superseding/Intervening Negligence)

36. Plaintiff's claims are barred because even if Defendants' conduct constituted a nuisance as alleged by Plaintiff, which is specifically denied, the intervening and/or superseding negligence of an entity or entities other than Defendants was the direct and proximate cause of the damages suffered by Plaintiff.

**FOR A TWENTIETH DEFENSE**  
(Comparative and/or Contributory Negligence)

37. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the fault, negligence, and/or culpable conduct of Plaintiff and/or its agents, as a result of which such damages are barred or must be reduced accordingly.

**FOR A TWENTY-FIRST DEFENSE**  
(Assumption of Risk)

38. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the assumption of the risk of Plaintiff and/or its agents, as a result of which such damages are barred.

**FOR A TWENTY-SECOND DEFENSE**  
(Failure to Mitigate Damages)

39. Plaintiff has failed to mitigate its damages and, therefore, its claims are barred in whole or part.

**FOR A TWENTY-THIRD DEFENSE**  
(Coming to the Nuisance)

40. If and to the extent that Plaintiff was damaged as alleged, which is denied, such damages were the result, in whole or in part, of the Plaintiff's coming to the nuisance, as a result of which such damages are barred.

**FOR A TWENTY-FOURTH DEFENSE**  
(Statute of Frauds)

41. Plaintiff's claims are barred in whole or in part based on the failure to comply with the Statute of Frauds.

**FOR A TWENTY-FIFTH DEFENSE**  
(Reservation of Additional and Further Defenses)

42. Defendants reserve any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

**FOR A TWENTY-SIXTH DEFENSE AND BY WAY OF  
COUNTERCLAIM AGAINST THE PLAINTIFF**  
(Declaratory Judgment)

As defense and/or a counterclaim against Plaintiff Cokers Commons Homeowner's Association, Inc., Defendants Park Investors, LLC; CCT Reserve, LLC, f/k/a Harris Street, LLC; and Whipple Development, Inc. allege and state as follows:

43. Defendants repeat, allege, and incorporate by reference as if fully set forth herein its

answers to the allegations contained in the Complaint and its allegations in paragraphs 1 through 42 herein-above.

44. At all times pertinent herein, Defendant Park Investors, LLC is and was a limited liability company organized and existing under the laws of the State of South Carolina.

45. At all times pertinent herein, Defendant CCT Reserve, LLC is and was a limited liability company formed under the laws of the State of Georgia.

46. At all times pertinent herein, Defendant Whipple Development, Inc. is and was a corporation formed under the laws of the State of South Carolina.

47. Upon information and belief, Plaintiff Cokers Commons Homeowner's Association, Inc. is a corporation formed under the laws of the State of South Carolina.

48. Defendant Park Investors, LLC currently owns property located within the Coker's Commons subdivision in Goose Creek, South Carolina.

49. Upon information and belief, Defendant CCT Reserve, LLC formerly owned property located within the Coker's Commons subdivision.

50. Upon information and belief, Defendant Whipple Development, Inc. is named as the "declarant" in the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283, which are incorporated herein by reference. However, upon information and belief, Defendant Whipple Development, Inc. did not own any property in the Coker's Commons subdivision in Goose Creek, South Carolina, and more specifically, did not own and was not deeded the property described in the above-referenced Covenants, Conditions and Restrictions when said Covenants, Conditions and Restrictions were executed and recorded.

51. Upon information and belief, Whipple Development, Inc. lacked the right, power, or authority to record the above-referenced Covenants, Conditions and Restrictions upon or affecting any property in the Coker's Commons subdivision in Goose Creek, South Carolina, because it did not own and was not deeded the property at the time the Covenants, Conditions and Restrictions were executed and recorded and did not possess such an interest in the property as to amount to a privity of estate.

52. Upon information and belief, the above-referenced Covenants, Conditions and Restrictions are invalid, null, void, and unenforceable.

53. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to provide the written notice required for election of a proper board of directors for the homeowner's association and/or for any meeting of owners or members with interests in the property.

54. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to conduct a properly noticed meeting of the owners or members with a proper quorum to elect a board of directors and/or to authorize the filing of this lawsuit.

55. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. has not properly elected a proper board of directors in accordance with and as required by the covenants and restrictions, articles, and bylaws, if any, affecting the property.

56. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. presently does not

have a duly elected, qualified, and acting board of directors.

57. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to conduct a meeting of a properly elected board of directors with a proper quorum to authorize the filing of this lawsuit.

58. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to provide the written notice required under the covenants and restrictions, articles, and bylaws, if any, affecting the property for taking any action to enforce said covenants and restrictions, including the commencement of the present lawsuit.

59. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, prior to institution of this litigation, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to obtain the necessary affirmative vote of 75% of the members of Cokers Commons Homeowner's Association, Inc. authorizing it to commence this litigation.

60. Upon information and belief, even assuming arguendo the Covenants, Conditions and Restrictions are valid, prior to institution of this litigation, Plaintiff Cokers Commons Homeowner's Association, Inc. failed to comply with the dispute resolution and/or arbitration procedures and requirements of the covenants and restrictions, articles, and bylaws, if any, affecting the property.

61. Upon information and belief, without proper power, authorization, or approval, persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc. caused the present lawsuit to be filed, commenced, and prosecuted against the Defendants.

62. Defendants bring this action pursuant to S.C. CODE ANN. § 15-53-30 for the purpose of obtaining a declaratory judgment with respect to (a) the legality and validity of the above-described Covenants, Conditions and Restrictions; (b) the authority of Plaintiff Cokers Commons Homeowner's Association, Inc. to file, commence, and prosecute this lawsuit against the Defendants; and (c) the propriety of the commencement and prosecution of the present litigation by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.

63. Due to the facts, conditions, and circumstances set forth herein-above, an actual and justiciable controversy has arisen and now exists between the Plaintiff and the Defendants regarding (a) the legality and validity of the above-described Covenants, Conditions and Restrictions; (b) the authority of Plaintiff Cokers Commons Homeowner's Association, Inc. to file, commence, and prosecute this lawsuit against the Defendants; and (c) the propriety of the commencement and prosecution of the present litigation by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc. Declaratory relief is necessary to adjudicate the rights of the parties.

64. Defendants are entitled to a declaratory judgment declaring the rights of the parties and, more specifically, declaring (a) that the above-described Covenants, Conditions and Restrictions are invalid, null, void, and unenforceable; (b) that Plaintiff Cokers Commons Homeowner's Association, Inc. lacks the proper right, power, or authority to file, commence, and prosecute this lawsuit against the Defendants; and (c) the present litigation was improperly commenced and

prosecuted by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.

65. Defendants have no adequate remedy at law.

**FOR A TWENTY-SEVENTH DEFENSE AND BY WAY OF**  
**COUNTERCLAIM AGAINST THE PLAINTIFF**  
(Indemnity)

As defense and/or a counterclaim against Plaintiff Cokers Commons Homeowner's Association, Inc., Defendant Whipple Development, Inc. alleges and states as follows:

66. Defendant Whipple Development, Inc. repeats and realleges the allegations contained in Paragraphs 1 through 65 herein-above as if reiterated verbatim.

67. Upon information and belief, Defendant Whipple Development, Inc. is named as the "declarant" in the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283, which are incorporated herein by reference.

68. The above-referenced Covenants, Conditions and Restrictions adopt and incorporate written Bylaws of Cokers Commons Homeowner's Association, Inc., which are incorporated herein by reference.

69. Pursuant to Article XIII of the Bylaws, Plaintiff Cokers Commons Homeowner's Association, Inc. agreed to indemnify and hold harmless Defendant Whipple Development, Inc. against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which Defendant

Whipple Development, Inc., the declarant, may be involved by virtue of it being or having been the declarant, except for gross negligence or fraud.

70. In its Complaint in this action, Plaintiff Cokers Commons Homeowner's Association, Inc. has asserted claims against Defendant Whipple Development, Inc. because or on the basis that it is or was the declarant under the above-referenced Covenants, Conditions and Restrictions and involving acts or omissions that do not constitute gross negligence or fraud.

71. Defendant Whipple Development, Inc. is, therefore, entitled to indemnification from Plaintiff Cokers Commons Homeowner's Association, Inc. for its attorney's fees, litigation expenses, and other costs incurred in defending this action brought by the Plaintiff, and award of pre-judgment and post-judgment interest, and to be held harmless from any liability in this action.

**WHEREFORE**, Defendants pray that this Honorable Court grant its judgment against Plaintiff and in favor of the Defendants as follows:

- (1) dismissing the Plaintiff's Complaint with prejudice;
- (2) awarding judgment against the Plaintiff and in favor of the Defendants under their Counterclaim for a declaratory judgment and declaring (a) that the above-described Declaration of Covenants, Conditions and Restrictions for Cokers Commons are invalid, null, void, and unenforceable; (b) that Plaintiff Cokers Commons Homeowner's Association, Inc. lacks the proper right, power, or authority to file, commence, and prosecute this lawsuit against the Defendants; and (c) the present litigation was improperly commenced and prosecuted by Plaintiff Cokers Commons Homeowner's Association, Inc. and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of Plaintiff Cokers Commons Homeowner's Association, Inc.;
- (3) awarding judgment against the Plaintiff and in favor of Defendant Whipple

Development, Inc. under its Counterclaim for indemnity and rendering a judgment for indemnity in favor of Defendant Whipple Development, Inc. and against Plaintiff, ordering that Defendant Whipple Development, Inc. be awarded all costs, attorney's fees, and other litigation costs incurred by it in the defense of this lawsuit, and that Defendant Whipple Development, Inc. be held harmless from all liability in this lawsuit;

(4) awarding prejudgment interest, post-judgment interest, costs, and disbursements of this action to the Defendants; and

(5) awarding such other legal and equitable relief as to the Court seems necessary and proper.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402  
(843) 577-6726 telephone  
(843) 724-8036 facsimile  
[dblankhard@rrhlawfirm.com](mailto:dblankhard@rrhlawfirm.com)

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina  
May 11, 2015.

**A JURY TRIAL IS DEMANDED AS TO ALL ISSUES SO TRIABLE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 11<sup>th</sup> day of May, 2015, a true and correct copy of **Defendants' Answer and Counterclaims** was placed in an envelope and hand-delivered to:

Brent S. Halversen, Esquire  
Halversen & Associates  
171 Church Street, Suite 330  
Charleston, SC 29401



Attorney for Defendants

FILED  
15 MAY 14 AM 11:39  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, SC

0030

involving liability from third parties, not in between the contracting parties themselves. See Smoak v. Carpenter Enterprises, 319 S.C. 222, 460 S.E.2d 381 (1995)(An indemnification provision is limited to the reimbursement for damages, costs, expenses, etc. incurred in third party actions, not actions between the contracting parties themselves.) The claim for indemnity here is between the declarant and the HOA, not a third party liability that Whipple became obligated for due to the HOA's actions or omissions.

- 2) Defendants' first cause of action for Declaratory Relief alleges the Covenants and Restrictions are invalid and unenforceable. Therefore, notwithstanding the infirmity stated above, Whipple cannot simultaneously allege the Covenants and Restrictions are invalid and seek to enforce the very same provisions.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and grant the Plaintiff partial summary judgment on Count II of Defendant's Counterclaim.

**HALVERSEN & ASSOCIATES, LLC**

By: *Brent S. Halversen*

Brent S. Halversen  
171 Church Street, Suite 330  
Charleston, SC 29401  
T: 843-284-5790  
F: 864-326-4884  
Email: [brent@halversenlaw.com](mailto:brent@halversenlaw.com)  
*Attorneys for the Defendant*

*January 21, 2016.*  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

I certify that I served the foregoing Notice and Motion for Partial Summary Judgment upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 29<sup>th</sup> day of January, 2016.

**HALVERSEN & ASSOCIATES, LLC**

By: *Brent S. Halversen*

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171 Church Street, Suite 330  
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Charleston, SC  
January 29, 2016

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CLERK OF COURT  
SOUTH CAROLINA  
CHARLESTON COUNTY, SC

*Tam*

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2015-CP-08-00547

COKERS COMMON HOMEOWNER'S  
ASSOCIATION, INC. )

Plaintiff, )

-vs- )

PARK INVESTORS, LLC, )  
CCT RESERVE, LLC, f/k/a HARRIS )  
STREET, LLC and WHIPPLE )  
DEVELOPMENT, INC., )  
Defendants. )

**DEFENDANT WHIPPLE DEVELOPMENT  
INC.'S MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFF'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

VB  
FILED  
16 APR 15 AM 9:17  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

Defendant Whipple Development, Inc. (hereinafter "Whipple") submits this memorandum of law in opposition to the Motion for Partial Summary Judgment filed by the above-named Plaintiff.

#### APPLICABLE STANDARD

"A party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact." Standard Fire Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460, 462 (1990). All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. Eagle Construction Co. v. Richland Construction Company, Inc., 264 S.C. 71, 212 S.E.2d 580 (1975). "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766, 769 (2011). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

cc: DFB

In this case, Plaintiff did not file any affidavit or evidence with its motion, thus the motion must be decided based solely on the pleadings and documents incorporated therein. See Cumbee v. Georgetown County, 2005 WL 7084279, \*2 n.2 (S.C. Ct. App. 2005). Plaintiff's submission of affidavits at this late date would be untimely. See S.C. R. CIV. PRO. 6(d); Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327, 329 (1997).

### **BACKGROUND**

Whipple is a corporation formed under the laws of South Carolina. *See* Defendants' Answer & Counterclaims ¶ 46 (hereinafter "Answer"). Whipple is named as the "Declarant" in the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Berkeley County Register of Deeds (hereinafter "C&R"). *Id.* ¶ 50 (a copy of the C&R is attached hereto as "Exhibit A"). However, at the time the C&R was executed and recorded, Whipple did not own any property in the Coker's Commons subdivision and did not own the property at issue in this lawsuit. *Id.* At that time, the subject property was owned by Westgate Partners, L.P. *See* Complaint ¶ 9; Answer ¶¶ 14, 50-51.

On March 2, 2015, this lawsuit was commenced purportedly by and in the name of Cokers Common Homeowner's Association, Inc. (hereinafter "HOA"). The Complaint alleges that Whipple failed to convey title to the "common areas of the Cokers Commons subdivision"—including areas known as the "Amenities Lot" (which encompasses a swimming pool) and the "HOA open space"—to the HOA in accordance with the provisions of the C&R and seeks to enforce those provisions. *See* Complaint ¶¶ 11-13, 15-16. The Complaint further alleges that the "common areas" (including the "Amenities Lot" and the "HOA open space") have become a nuisance due to neglect. *See* Complaint ¶¶ 23-24. The Complaint also asserts that the common areas "have become a blight to the

neighborhood, negatively affecting the quality of life of the owners of Cokers Commons,” that “[t]he landowner members” of the HOA “have not been able to use or enjoy the pool,” and “[t]he Defendants[’] neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff’s constituent member’s use and ownership of their properties as well as their use of the common areas, causing damages.” *See* Complaint ¶¶ 13, 23-24.

On May 14, 2015, the Defendants (including Whipple) filed an Answer & Counterclaims. The Answer disputes that this action is being brought by a validly elected and operating HOA. *See* Answer ¶¶ 20-22, 53-61. Instead, the Answer asserts that “without proper power, authorization, or approval, persons or entities other than a duly elected, qualified, and authorized board of directors of [the HOA] caused the present lawsuit to be filed, commenced, and prosecuted against the Defendants.” *See* Answer ¶ 61. The Answer also specifically seeks a judicial determination that the persons prosecuting this action have done so without proper authority and that “the present litigation was improperly commenced and prosecuted by [the HOA] and/or by persons or entities other than a duly elected, qualified, and authorized board of directors of [the HOA].” *See* Answer ¶¶ 62-64.

Whipple has also asserted a counterclaim for indemnification against the HOA. *See* Answer ¶¶ 66-71. This claim avers that Whipple is named as the “Declarant” in the C&R, which adopts and incorporates written Bylaws. *See* Answer ¶¶ 67-68. Whipple’s claim further alleges that “[p]ursuant to Article XIII of the Bylaws, [the HOA] agreed to indemnify and hold harmless [Whipple] against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which [Whipple] may be involved by virtue of it being or having been the declarant, except for gross negligence or fraud.” *See*

Answer ¶ 69. The claim also asserts that Whipple is “entitled to indemnification from [the HOA] for its attorney’s fees, litigation expenses, and other costs incurred in defending this action.” *Id.* ¶ 71.

### ANALYSIS

#### A. Whipple is Entitled to Indemnification under the Terms of the Bylaws.

As discussed above, Article XIII of the Bylaws entitles Whipple (the “Declarant” under the C&R) to be indemnified by the HOA against all costs and expenses reasonably incurred in connection with the defense of any claim or action in which Whipple may be involved by virtue of it being or having been the Declarant (except for gross negligence or fraud which is not alleged in this case). Citing to Smoak v. Carpenter Enterprises, Inc., 319 S.C. 222, 460 S.E.2d 381 (1995), the Plaintiff has moved for summary judgment involving Whipple’s indemnification claim based on its argument that “indemnity is only a remedy involving liability from third parties, not in (sic) between the contracting parties themselves.”

However, a third party indemnification clause is only one form an indemnity may take. Plaintiff’s motion fails because the indemnification provision in this case encompasses second party indemnity. In Laurens Emergency Med. Specialist v. M.S. Bailey & Sons Bankers, 348 S.C. 191, 194, 558 S.E.2d 531, 532 (Ct. App. 2002), rev’d, 355 S.C. 104, 584 S.E.2d 375 (2003), the Court of Appeals held that although indemnification provisions may require the existence of a third party claim, the “parties may craft an indemnity clause to provide for other forms of compensation, including one in which a first party is liable to a second party for a loss or damage the second party might incur” even in the absence of a third party claim. The Court quoted with approval the definition for an “indemnity contract” found in BLACK’S LAW DICTIONARY, which states:

A contract between two parties whereby the one undertakes and agrees to indemnify the other against loss or damage arising from some contemplated act on

the part of the indemnitor, or from some responsibility assumed by the indemnitee, or from the claim or demand of a third person, that is, to make good to him such pecuniary damage as he may suffer.

BLACK'S LAW DICTIONARY 692 (5th ed. 1979) (emphasis added); see also Gamble v. Reeves Transp. Co., 190 S.E.2d 95, 96 (Ga. Ct. App. 1972) (defining "indemnity" as follows: "A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance *on the part of one of the parties or of some third person.*" (emphasis added)); Dobbins v. Ad Shoppe, Inc., 1987 WL 888381, \*2 (Va. Cir. Ct. 1987) (same); Szymanski-Gallagher v. Chestnut Realty Co., 597 A.2d 1225, 1229 n.2 (Pa. Super. 1991) (same).

Although the Supreme Court in Laurens reversed the Court of Appeals based on the facts of that particular case, it did not dispute that parties may agree to a second party indemnification provision which does not require a third party claim. See Lesavoy v. Lane, 2008 WL 2704393, \*13 (S.D.N.Y. 2008) ("Lesavoy also argues that under South Carolina law, a claim for indemnification must, by definition, rely on underlying liability to a third party. However, under South Carolina law 'parties may craft an indemnity clause to provide for other forms of compensation, including one in which a first party is liable to a second party for a loss or damage the second party might incur.'" (citing Laurens)).

The indemnification provision in the Bylaws encompasses not only third party claims, but also second party claims. The provision states that "[i]t is intended that the forgoing indemnification shall include indemnification against all costs and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or

other, in which any such director, officer, Board, committee member or Declarant, may be involved by virtue of such persons being or having been such directors, officer, Board, committee member or Declarant . . . .” See Exhibit A, Art. XIII, § 1 p. 32 (emphasis added). Indemnification is not limited only to situations in which a third party sues Whipple (the Declarant). Instead, the provision states that the Declarant is entitled to indemnification against all costs and expenses incurred in connection with the defense of any claim in which it may be involved by virtue of it being or having been the Declarant. Such actions against Whipple can involve second party claims by the HOA or its Board.

Furthermore, even assuming *arguendo* that the Bylaws only provide for indemnification in the context of third party claims, Plaintiff’s motion completely ignores the fact that Whipple’s Answer specifically asserts that the claims in the current lawsuit are not being properly brought by the HOA, but in actuality are claims being improperly brought by individual lot owners purportedly in the name of the HOA. Whipple alleges in its pleading that it is being required to defend against claims of third parties brought under the guise of the HOA. Indeed, as discussed above, the Complaint specifically refers to alleged injuries that the “landowner members of” the HOA have suffered because of the matters alleged in the Complaint. Although the current lawsuit is styled or captioned in the HOA’s name, the Complaint alleges that the neglected common areas of the HOA “have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons,” that “[t]he landowner members” of the HOA “have not been able to use or enjoy the pool,” and “[t]he Defendants[’] neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff’s constituent member’s use and ownership of their properties as well as their use of the common areas, causing damages.” See Complaint ¶¶ 13, 23-24. In short, Whipple is being required to defend against third party claims posing as claims of the HOA,

thus the indemnification provision applies and Whipple is entitled to indemnification from the HOA under the terms of the Bylaws.

**B. The Rules of Civil Procedure Expressly Permit Whipple to Plead Claims and Defenses in the Alternative Regardless of Consistency.**

Plaintiff's motion also argues that Whipple's Answer & Counterclaims "cannot simultaneously allege" that the C&R is invalid "and seek to enforce the very same provisions." Plaintiff is referring to the portions of Defendants' Answer which assert that the C&R is invalid and unenforceable because Whipple did not own the subject property at the time the C&R was executed and recorded, thus Whipple could not legally impose any covenants or restrictions upon the subject property. *See Answer ¶¶ 50-52.*

However, the South Carolina Rules of Civil Procedure specifically permit parties to raise claims and defenses regardless of consistency. Rule 8(e) specifically states:

**(e) Pleading to Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

*(2) A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.*

S.C. R. Civ. PRO. 8(e); see also Roddey v. NationsWaste, Inc., 2005 WL 7084315, at \*5 (S.C. Ct. App. July 28, 2005) (noting that "a plaintiff may join as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent"); Franke

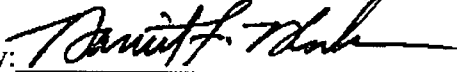
Associates by Simmons v. Russell, 295 S.C. 327, 330, 368 S.E.2d 462, 464 (1988) (noting that Rule 8(e)(2) “permits a party to plead inconsistent causes of action”).

Despite Plaintiff’s protestations to the contrary, the rules specifically allow parties to assert alternative positions in their pleadings regardless of their consistency. Although Whipple has asserted in its Answer that the C&R is unenforceable for the reasons set forth above, Whipple has also asserted alternative claims and defenses in the event the Court should determine that the C&R is valid and enforceable. Nothing in the rules prevents this type of pleading.

### CONCLUSION

For the forgoing reasons, Defendants respectfully request the Court to deny the Plaintiff’s Motion for Partial Summary Judgment.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402  
(843) 577-6726 telephone  
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ATTORNEYS FOR DEFENDANTS

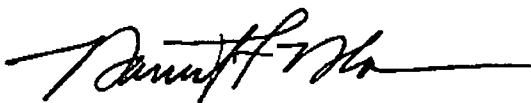
Charleston, South Carolina  
April 14, 2016.

VB  
15 APR 15 AM 9:27  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.  
FILED

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14<sup>th</sup> day of April, 2016, a true and correct copy of forgoing pleading was placed in an envelope and hand-delivered to:

Brent S. Halversen, Esquire  
Halversen & Associates  
171 Church Street, Suite 330  
Charleston, SC 29401



Attorney for Defendants

## EXHIBIT A

**Berkeley County  
Cynthia B. Forte  
Register of Deeds  
Moncks Corner 294616120**

00010574 Vol: 7288 Pg: 283



53 2008 00010574

**Instrument Number:** 2008- 00010574

As

**Recorded On:** April 15, 2008

**Restrictive Covenants**

**Parties:** WHIPPLE DEVELOPMENT CORPORATION

To

COKERS COMMONS

**Billable Pages:** 33

**Recorded By:** BRUSH LAW FIRM

**Num Of Pages:** 38

**Comment:**

**\*\* Examined and Charged as Follows: \*\***

|                       |       |
|-----------------------|-------|
| Restrictive Covenants | 43.00 |
| Recording Charge:     | 43.00 |

**\*\* THIS PAGE IS PART OF THE INSTRUMENT \*\***

I hereby certify that the within and foregoing was recorded in the Clerk's Office For: Berkeley County, SC

**File Information:**

Document Number: 2008- 00010574

Receipt Number: 174057

Recorded Date/Time: April 15, 2008 03:08:01P

Book-Vol/Pg: Bk-R VI-7288 Pg-283

Cashier / Station: S Ritter / Cash Station 11

**Record and Return To:**

BRUSH LAW FIRM

12-A CARRIAGE LANE

CHARLESTON SC 29407



*Cynthia B. Forte*

**Cynthia B Forte - Register of Deeds**

**Berkeley County  
Cynthia B. Forte  
Register of Deeds  
Moncks Corner 294616120**

00007384 Vol: 7225 Pg: 1

Doc # 00010574

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**Instrument Number: 2008- 00007384****Recorded On: March 14, 2008****As  
Restrictive Covenants**

00010574 Vol: 7288 Pg: 284

**Parties: WHIPPLE DEVELOPMENT CORPORATION****To****COKERS COMMONS****Billable Pages: 30****Recorded By: BRUSH LAW FIRM****Num Of Pages: 35****Comment:**

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**\*\* Examined and Charged as Follows: \*\***

|                       |       |
|-----------------------|-------|
| Restrictive Covenants | 40.00 |
| Recording Charge:     | 40.00 |

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**\*\* THIS PAGE IS PART OF THE INSTRUMENT \*\***

I hereby certify that the within and foregoing was recorded in the Clerk's Office For: Berkeley County, SC

**File Information:**

Document Number: 2008- 00007384  
Receipt Number: 169199  
Recorded Date/Time: March 14, 2008 03:40:03P  
Book-Vol/Pg: Bk-R VI-7225 Pg-1  
Cashier / Station: S Ritter / Cash Station 11

**Record and Return To:**

BRUSH LAW FIRM  
12-A CARRIAGE LANE  
CHARLESTON SC 29407



*Cynthia B. Forte*  
Cynthia B Forte - Register of Deeds

0043

RIR 37

\*\*Re-record to add legal

00007384 Vol: 7225 Pg: 2  
00010574 Vol: 7288 Pg: 285DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS  
FOR  
COKERS COMMONS

THIS DECLARATION is made this 10<sup>th</sup> day of March, 2008, by Whipple Development Corporation, (hereinafter referred to as the "Declarant").

## WITNESSETH:

WHEREAS, Declarant is the owner of the real property in Berkeley County, South Carolina, more particularly described in Exhibit "A" attached hereto, and Declarant desires to create thereon an exclusive residential community of single-family attached residential townhome units to be named Cokers Commons; and

WHEREAS, Declarant desires to insure the attractiveness of the community, to prevent any future impairment thereof, to prevent nuisances, to preserve, protect and enhance the values and amenities of all properties within the community and to provide for the maintenance and upkeep of the exterior of all residential units and the Common Area, as hereinafter defined; and to this end, desires to subject the real property shown upon the attached Exhibit "A", to the coverage of the covenants, conditions, restrictions, easements, charges and liens hereinafter set forth, each and all of which is and are for the benefit of said property described below, and each Owner and occupant thereof; and

WHEREAS, the Declarant has deemed it desirable, for the efficient preservation, protection and enhancement of the values and amenities in the community and to provide for the maintenance and upkeep of the exterior of all residential units and the Common Area, to create an organization to which will be delegated and assigned the powers of (i) owning, maintaining and administering the Common Areas; (ii) maintaining the exterior of the residential units and all other improvements which are the responsibility of the Association; (iii) administering and enforcing the covenants, conditions, and restrictions herein; (iv) collecting and disbursing the assessments and charges hereinafter created; and (v) performing all other activities as required or permitted hereunder.

WHEREAS, Declarant has incorporated or will incorporate under South Carolina law, Cokers Common Homeowners Association, Inc., as a non-profit corporation for the purpose of exercising and performing the aforesaid functions.

NOW, THEREFORE, Declarant hereby declares that all of the Properties, described in Article II, Section below, and such additions thereto as may be hereafter made pursuant to Article I, Section 2 hereof, shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the Properties and be binding on all parties having any right, title, or interest in the Properties or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each Owner thereof.

(34)

ARTICLE IPROPERTIES SUBJECT TO THIS DECLARATION

Section 1. Existing Property. The real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration and within the jurisdiction of the Association is more particularly described in Exhibit "A", which is attached hereto and incorporated herein by reference ("Properties").

Section 2. Additions to Existing Property. Additional land may be brought within the scheme of this Declaration in the following manner:

(a) Additional land may be annexed to the existing property by Declarant, in future stages or development, without the consent of any other Owner or any mortgagee, provided that said annexations must occur within five (5) years after the date of this Declaration.

(b) The additions authorized under Subsection (a) above shall be made by filing of record a Supplement to Declaration of Covenants, Conditions and Restrictions with respect to the additional land, which shall extend the scheme of this Declaration to such properties and thereby subject such additions to the benefits, agreements, restrictions and obligations set forth herein.

Section 3. Replatting. Declarant shall have and hereby reserves the right, at any time or from time to time, to file a replat of all or any part of the Properties owned by Declarant to affect a reconfiguration of any Lots or Common Area in the Properties, subject to any necessary approval, joinder or consent of the appropriate county and/or municipal authorities.

ARTICLE IIDEFINITIONS

1. "Association" shall mean and refer to Cokers Commons Homeowners Association, Inc., its successors and assigns.
2. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any Lot which is a part of the Properties, including contract sellers, but excluding those having any interest merely as security for the performance of an obligation.
3. "Properties" shall mean and refer to that certain real property hereinbefore described in Article I, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.
4. "Lot" shall mean and refer to any plot of land shown upon the attached site plan, as reasonably amended by Declarant from time to time, with the exception of the Common Area, and shall include all improvements thereon. Each plot of land is the area for one (1) residential unit, designed for single-family ownership.

5. "Declarant" shall mean and refer to Whipple Development Corporation, its successors and assigns, if such successors or assigns should acquire all of the Declarant's interest in the Properties.

6. "Common Area" shall mean all fixtures, real property and personal property owned by the Association for the common use and enjoyment of the Owners. Common Areas, with respect to the property subject to this Declaration, shall be shown on the various plats of Cokers Commons recorded or to be recorded in the County Public Registry and designated thereon as "Common Areas," but shall exclude all Lots as herein defined and all public streets shown therein. "Common Area" shall include, but not limited to, the (i) completed permanent detention or retention pond(s); and (ii) all private streets shown on said plats as now recorded or shall be hereinafter recorded in the County Public Registry. The Common Area to be owned by the Association at the time of the conveyance of the first Lot is more particularly shown on the plat(s) of the Properties to be recorded in the County Public Registry.

7. "Board of Directors" shall mean and refer to the Board of Directors of the Association.

8. "Member" shall mean and refer to an Owner who holds membership in the Association pursuant to Article IV of this Declaration.

9. "County Public Registry" shall mean and refer to the office of the Register of Deeds of Berkeley County, South Carolina,

### ARTICLE III

#### PROPERTY RIGHTS

Section I. Owners' Easements of Enjoyment. Every Owner shall have a right and easement of enjoyment in and to the Common Area, which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

(a) The right of the Association to charge reasonable admission and other fees for the use of any recreational facility situated upon the Common Area;

(b) The right of the Association to suspend the voting rights and right of use of the recreational facilities by an Owner: (1) during any period for which the Owner is delinquent in the payment of applicable assessments; (2) for a period not to exceed sixty (60) days for any infraction of its published rules and regulations; and (3) during any period that an Owner is otherwise in default of the Owner's obligations under this Declaration, including but not limited to the obligation to comply with the architectural control provisions and protective covenants and restrictions contained herein.

(c) The right of the Association to mortgage, 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 by the Members. No such mortgage, dedication, or transfer shall be effective unless an instrument signed by two-thirds (2/3) of each class of Members agreeing to such dedication or transfer has been recorded;

- (d) The right of Owners to the exclusive use of parking spaces as provided in this Article;
- (e) The right of the Association to limit the number of guests of Members;
- (f) The right of the Association, in accordance with its Articles and Bylaws, to borrow money for the purpose of improving the Common Areas and facilities and in aid thereof to mortgage said property, and the rights of such mortgagee in said Properties shall be subordinate to the rights of the Owners hereunder;
- (g) The right of the Association to adopt, publish, and enforce rules and regulations as provided in Article IX;
- (h) The right of the Association to enter any Lot in order to perform any maintenance, alteration, or repair required herein to be performed by the Association, and the Owner of such Lot shall permit the Association or its representative to enter for such purpose at reasonable times and with reasonable advance notice;
- (i) The right of the Association or its representative to enter any Lot in the case of any emergency threatening such Lot or any other Lot for the purpose of remedying or abating the cause of such emergency. Such right of entry shall be immediate and shall not require prior notice; and
- (j) The rights of the Declarant reserved in Article X and Article XI of this Declaration.

Section II. Title to the Common Areas. The Declarant hereby covenants for itself, its heirs and assigns, that it will convey fee simple title to the Common Areas depicted on maps of the Properties to the Association, free and clear of all encumbrances and liens, except those encumbrances and liens set forth in this Declaration, utility easements, and storm drainage easements, prior to the conveyance of the first Lot on that particular map. Following conveyance of Common Areas to the Association, Declarant shall be entitled to a proration credit for all expenses of the Association incurred by Declarant (including insurance and real estate taxes), which have not theretofore been reimbursed to Declarant. The Common Areas shall be conveyed without any express or implied warranties, which warranties are hereby expressly disclaimed by Declarant.

Section III. Parking Rights. Ownership of each Lot shall entitle the Owner or Owners thereof to the use of designated parking space(s), which shall be as near and convenient to said Lot as reasonably possible, together with the right of ingress and egress in and upon said parking areas. The Association may assign vehicle parking spaces for each Lot. The two automobile parking spaces for Lots having garages shall be the garage and the appurtenant driveway.

Section IV. TV Antennas and Cablevision. The Association may provide one or more central television antennas for the convenience of the Members and may supply cablevision and the cost of these may be included in annual or special assessments. However, should the Association not provide said service the placement and size of any outside antenna must have approval of the Association.

ARTICLE IVMEMBERSHIP, VOTING RIGHTS, AND PURPOSES

Section I. Every Owner shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot.

Section II. The Association shall have two classes of voting membership:

Class A. Class A Members shall be all Owners with the exception of the Declarant and shall be entitled to one (1) vote for each Lot owned. When more than one person holds an interest in any Lot, all such persons shall be Members. The vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Lot.

Class B. The Class B Member(s) shall be the Declarant and shall be entitled to three (3) votes for each Lot owned. The Class B membership shall cease and be converted to Class A membership on the happening of either of the following events, whichever occurs earlier:

- (a) when eighty percent (80%) of the Lots on the Properties are deeded to persons other than Declarant or Declarant's affiliate; or
- (b) ten (10) years after the later of the date this Declaration is recorded in the County Public Registry or the date any supplement adding additional land is recorded.

Section III. Until the Class B Members are converted to Class A Members, Declarant is entitled to appoint all Board of Directors members, and the Association need not hold a meeting to elect directors until conversion of the Class B Members.

Section IV. The Association shall have the right, duty and responsibility to: (i) acquire, administer, maintain and care for the Common Areas; (ii) administer, maintain and care for repair and restore the exterior of the Lots; (iii) establish, levy and collect assessments; (iv) engage contractors, vendors, employees or agents as it deems necessary to carry out all rights, duties and responsibilities; (v) make payment to contractors, vendors, employees or agents for services provided in carrying out the purposes of the Association; (vi) enforce this Declaration; (vii) perform all rights, duties and responsibilities set forth in the Declaration, Articles and Bylaws of the Association.

ARTICLE VCOVENANT FOR MAINTENANCE ASSESSMENTS

Section 1. Creation of the Lien and Personal Obligation of Assessments. Each Owner of any Lot by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association: (1) annual assessments or charges and (2) special assessments, such assessments to be established and collected as hereinafter provided. The annual and special assessments, together with interest, late charges, costs and reasonable attorney's fees, shall be a charge on the Lots and shall be a continuing lien upon the Lots against which each such assessment is made. Each such assessment, together with interest, late charges, costs and reasonable 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 fell due. The personal obligation for the delinquent assessments shall not pass to his or her successors in title. If the Association should be dissolved or cease to exist, then in that event, every Owner of a Lot at the time of required maintenance shall be jointly and severally liable for any and all costs attendant thereto.

Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the residents of the Properties and in particular for: (1) the improvement, maintenance, repair, and reconstruction of the Common Areas and of the exterior of the residential units, including landscaping; (2) the maintenance, repair, and reconstruction of (a) private water and/or sewer lines (and any meters or lift stations associated therewith), (b) any pond (detention or retention), (c) pool and pool house, (d) private streets, (e) parks, street lights, driveways, walks, and parking areas and such maintenance to include the cutting and removal of weeds and grass, the removal of trash and rubbish, or any other maintenance; (3) the use and enjoyment of the Common Areas, including, but not limited to, the cost of repairs, replacements, and additions; (4) the cost of labor, equipment, materials, management, and supervision thereof; (5) the payment of taxes and public assessments assessed against the Common Areas; (6) the procurement and maintenance of insurance in accordance with this Declaration; (7) the employment of attorneys to represent the Association when necessary; (8) the provision of adequate reserves for the replacement of capital improvements, including, without limiting the generality of the foregoing, roofs, paving, and any other major expense for which the Association is responsible; and (9) such other needs as may arise.

Section 3. Reserves. The Association shall establish and maintain an adequate reserve fund for the periodic maintenance, repair, and replacement of improvements to the Common Areas, and those other portions of the Properties, which the Association may be obligated to maintain, and for unusual and unforeseen expenses of the Association. Such reserve fund is to be established, insofar as is practicable, out of annual assessments for common expense. Further, the reserve fund may be applied to operational deficits provided adequate reserves are maintained.

Section 4. Maximum Annual Assessment. Until January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment shall be per Lot (except that pursuant to Section VII, the maximum annual assessment for Lots owned by Declarant which are not occupied as a residence shall be:

(a) From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment may be increased by the Board of Directors effective January 1 of each year without a vote of Membership, but subject to the limitation that any such increase shall not exceed the greater of twenty percent (20%) of the prior years annual assessment.

(b) From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, or until increased as provided for in (b) or (c) below, whichever last occurs, the maximum annual assessment may be increased above the increase in Section 4 (a) above by a vote of two-thirds (2/3) of each class of Members who are voting in person or by proxy, at a meeting duly called for this purpose.

(c) The Board of Directors may fix the monthly assessment at an amount which shall not exceed one twelfth (1/12) of the maximum annual assessment,

Section 5. Special Assessments. In addition to the annual assessments authorized above, the Association may levy in any assessment year a special assessment applicable to that year for the purpose of supplying adequate reserves funds for the replacement of capital improvements; for defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area or upon a Lot, and in connection with exterior maintenance, including fixtures and personal property related thereto; for insurance costs of the Association; or for unusual, unforeseen and nonrecurring expenses of the Association, provided that any such assessment shall have the assent of the Board of Directors.

Section 6. Notice and Quorum for any Action Authorized Under Section IV Written notice of any meeting called for the purpose of taking any action authorized under Section IV shall be sent to all Members no less than thirty (30) days nor more than sixty (60) days in advance of the meeting. At the first such meeting called, the presence of Members or of proxies entitled to cast fifty percent (50%) of all the votes of each class of Membership shall constitute a quorum. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be one-half (1/2) of the required quorum at the preceding meeting. No such subsequent meeting shall be held more than sixty (60) days following the proceeding meeting.

Section 7. Uniform Rate of Assessment. Both annual and special assessments shall, except as herein otherwise specifically provided, be fixed at a uniform rate for all Lots and shall be collected on a monthly basis. Provided, however, that the assessment for Lots owned by Declarant which are not occupied as a residence, shall at all times be twenty-five percent (25%) of the assessments for other Lots.

Section 8. Date of Commencement of Mutual Assessments: Due Dates. The development consists of One Hundred Six (106) proposed Lots. The annual assessments provided for herein shall commence as to each building on the day of the month on which the first Lot in such building is conveyed by Declarant, to a non-related entity for occupancy, except Declarant shall have the following option: (i) Declarant shall commence paying twenty five (25%) percent of the regular assessments for all Lots

it owns upon such conveyance or (ii) Declarant may elect not to pay any assessments whatsoever provided it funds any deficiency in the operational budget of the Association until it commences payment of the assessments in (i) above. Such annual assessments shall be paid ratably on a monthly basis. The Board of Directors shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner subject thereto. The due dates shall be established by the Board of Directors. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer of the Association setting forth whether the assessments on a specified Lot have been paid. Non-related entity means an entity, which is not owned, managed, or operated by any common individuals.

Section 9. Effect of Nonpayment of Assessments: Remedies of the Association. A late charge of Twenty Five and No/100 Dollars (\$25.00) shall be added to any assessment not paid within fifteen (15) days after the due date, together with interest from the due date at eighteen percent (18%) per annum. The Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property, and in either event: interest, costs, and reasonable attorney's fees of any such action shall be added to the assessment. No Owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Common Area or abandonment of his or her Lot.

Section 10. Subordination of the Lien to Mortgages and Ad Valorem Taxes. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage and ad valorem taxes. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage or tax foreclosure or any proceeding in lieu thereof shall extinguish the lien of such assessments as to payments, which became due prior to such sale or transfer. No such sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.

Section 11. Working Capital Fund: At the time of closing of the sale of each Lot, a sum equal to at least two months' assessment for each Lot shall be collected and transferred to the Association for use as working capital. The purpose of said fund is to insure that the Association will have adequate cash available to satisfy expenses, and to acquire additional equipment or services deemed necessary or desirable. Amounts paid shall not be considered advance payment of monthly installments of annual assessments.

Section 12. Default By Association: Upon default by the Association in the payment to the jurisdiction entitled thereto of any assessments for public improvements or ad valorem taxes levied against the Common Areas, which default shall continue for a period of six (6) months, each Owner of a Lot shall become personally obligated to pay the jurisdiction a portion of the taxes or assessments in an amount determined by dividing the total taxes and/or assessments due to the jurisdiction by the total number of Lots in the Properties. If the sum is not paid by the Owner within thirty (30) days following receipt of notice of the amount due, the sum shall become a continuing lien on the property of the Owner, his or her heirs, devisees, personal representatives, and assigns. The taxing or assessing jurisdiction may either bring an action at law against the Owner personally obligated to pay the same, or may elect to foreclose the lien against the property of the Owner.

## ARTICLE VI

### EXTERIOR MAINTENANCE AND PARTY WALLS

Section I. In addition to maintenance of the Common Areas, the Association shall provide exterior maintenance upon each Lot as follows: paint and/or stain the exterior of the residential unit on the Lot; repair, replace and care for roofs, gutters, downspouts, exterior building surfaces, trees, shrubs (excluding those planted by an Owner), grass, walks, mailboxes, fences installed by Declarant or the Association, exterior post lights (excluding electricity therefor), and other exterior improvements. Such exterior maintenance shall not include glass surfaces. Further, the Owner of any Lot may at his or her election, plant flowers in the front and rear beds established by Declarant in developing the Lot, provided that such maintenance by the Owner does not hinder the Association in performing its maintenance of the exterior of the residential unit and the remaining yard spaces. No maintenance by an Owner shall reduce the assessment payable by him or her to the Association. The Owner shall not plant any vegetation in the front yard except with the prior written approval of the Association.

In the event that the need for maintenance or repair is caused through the willful or negligent act of the Owner, his or her family, or guests, or invitees, the cost of such maintenance or repairs shall be added to and become a part of the assessment to which such Lot is subject, which is not subject to any maximum. The Association is hereby granted an easement right of access to go upon any Lot for performance of repairs or maintenance, the responsibility of which is the Association's hereunder.

Subject to the provisions of this Declaration as expressly set forth in the obligations of the Association, all maintenance, repair or replacement of the Lot and all structures, and other improvements located within the Lot shall be the sole responsibility of the Owner thereof who shall perform such maintenance in a manner consistent with the community and the applicable provisions of this Declaration.

## Section Two. Party Walls.

(a) General Rules of Law to Apply. Each wall which is built as a part of the original construction of the residential units upon the Properties and placed on the dividing line between the Lots shall constitute a party wall, and, to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto. No alterations may be made to any party wall other than alterations to the interior surfaces. Said Party Walls shall be deemed to the roof line.

(b) Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall shall be shared by the Owners who make use of the wall in proportion to such use, to include that portion of roof on the entire building.

(c) Destruction by Fire or Other Casualty. If a party wall is destroyed or damaged by fire or other casualty, any Owner who has used the wall may restore it, and if the other Owners thereafter make use of the wall, they shall contribute to the cost of restoration thereof in proportion to such use without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under any rule of law regarding liability for negligent or willful acts or omissions. Said repairs shall begin within thirty days from said destruction and be completed in a timely fashion.

(d) Weatherproofing. Notwithstanding any other provision of this Article, an Owner who by his or her negligent or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

(e) Right to Contribution Runs With Land. The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall pass to such Owner's successors in title.

(f) Arbitration. In the event of any dispute arising concerning a party wall or under the provisions of this Article, each party shall choose one arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision shall be by a majority of all the arbitrators.

## ARTICLE VII

### ARCHITECTURAL CONTROL

No landscaping, building, fence, signs, wall, antenna, satellite dish, or other structure or improvement shall be commenced, erected, or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein (including but not limited to, color or painting or the exterior and type of exterior finish, any existing or builder-installed construction material, plant material or ground cover) be made, except in exceptional cases, when in such case, three copies of the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three

(3) or more representatives appointed by the Board (said committee being hereinafter referred to as the "Architectural Control Committee"). Absent such approval, the proposed improvement may not be commenced.

In the event an Owner of any Lot in the Properties shall make unauthorized changes to the premises and the improvements situated thereon in a manner unsatisfactory to the said Board of Directors or the Architectural Control Committee, said Board of Directors or the Architectural Control Committee shall have the right, through its agents and employees, to enter upon said Lot and to repair, maintain and restore the Lot and the exterior of the buildings and, any other improvements erected thereon. The cost of such restoration and exterior maintenance and any other costs or attorney's fees incurred in the enforcement of the rights under these provisions shall be added to and become a part of the assessments to which such Lot is subject. Any approval by the said Board of Directors or the Architectural Control Committee shall be in accordance with the requirements set forth hereafter, and must be in writing.

## ARTICLE VIII

### INSURANCE

Section 1. Insurance coverage on the Property shall be governed by the following provisions:

(a) Ownership of Policies. All insurance policies upon the Common Areas shall be purchased by the Association for the benefit of all the Association. Properties on the Townhomes shall be purchased by the Owner for the benefit of the Owners and their mortgagees as their interest may appear. Owners must obtain insurance coverage at their own expense upon their own Townhome and for their personal liability and living expense and such other coverage, as they may desire. However, the Association may choose to negotiate with an insurance company to provide its members with uniform coverage at a discounted premium. Each Unit Owner may choose to participate in the program or make their own choice. However, a copy of said policy shall be furnished to the Association who shall be named as a lienholder on said policy.

(b) Coverage. The Association will provide coverage for the Common Areas only. Improvements and personal property of the Association included in the Common Areas and facilities shall be insured in an amount equal to one hundred percent (100%) insurable replacement value as determined annually by the Association with the assistance of the insurance company providing coverage. Such coverage shall provide protection against:

- (i) Loss or damage by fire and other hazards covered by a standard extended coverage endorsement;
- (ii) Such other risks as from time to time shall be customarily covered with respect to buildings on the Common Areas, and
- (iii) Such policies shall contain clauses providing for waiver of subrogation.

(c) Liability. Public liability insurance shall be secured by the Association with limits of liability of no less than One Million Dollars (\$1,000,000.00) per occurrence and shall include an endorsement to cover liability of the Owners as a group to a single Owner, There shall also be obtained such other insurance coverage, as the Association shall determine from time to time to be desirable and necessary.

(d) Premiums. Premiums for insurance policies purchased by the Association shall be paid by the Association and shall be included as part of the annual assessment described in Article V above.

(e) Proceeds. All insurance policies purchased by the Association shall be for the benefit of the Association and shall provide that all proceeds thereof shall be payable to the Association as insurance trustee under this Declaration. The sole duty of the Association as insurance trustee shall be to receive such proceeds as are paid and to hold the same in trust for the purpose stated herein or stated in the Bylaws and for the benefit of the Association.

Section 2. Distribution of Insurance Proceeds. Proceeds of insurance policies received by the Association, as insurance trustee shall be distributed to or for the benefit of the beneficial Association in the following manner

- a) Expense of the Trust. All expenses of the insurance trustee shall be first paid or provisions made therefor.
- b) Reconstruction or Repair. The remaining proceeds shall be paid to defray the cost of repairs to the Common Areas.

Section 3. Fidelity Insurance or Bond. All persons responsible for or authorized to expend funds or otherwise deal in the assets of the Association or those held in trust, shall first be bonded by a fidelity insurer to indemnify the Association for any loss or default in the performance of their duties in an amount equal to six (6) months' assessments, plus reserves accumulated.

## ARTICLE IX

### USE RESTRICTIONS

Section 1. Rules and Regulations. The Board of Directors of the Association shall have the power to formulate, publish and enforce reasonable rules and regulations concerning the use and enjoyment of the Lots and the Common Areas. Such rules and regulations may provide for imposition of fines and/or penalties for the violation thereof, or for the violation of any of the covenants and conditions contained in this Declaration.

Section 2. Antennas and Satellite Dishes. No outside radio transmission tower, receiving antenna, or satellite dish shall be erected by an Owner within the restricted property without the prior written approval of the Architectural Control Committee.

Section 3. Quiet Enjoyment. No obnoxious or offensive activity shall be carried on upon the Properties, nor shall anything be done which may be or may become a nuisance or annoyance to the neighborhood.

Section 4. Dwelling Size. The total square footage of the main structure located on a Lot, exclusive of one-story open porches and garages shall not be less than 900 square feet.

Section 5. Nuisances. No activity deemed noxious or offensive by the Architectural Control Committee shall be carried on upon any Lot or within the Common Area, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood as determined by said Architectural Control Committee. Examples of such offensive activities shall include, but to be limited to, the origination or emission of any loud or disturbing noise or vibrations; the maintenance of an auto repair site, the maintenance of unsightly outdoor storage of personal property (including toys, motorcycles or other motor vehicles, tricycles, bicycles, wood piles or other miscellaneous items) on porches, patios, terraces or yards; or similar unsightly activity not in keeping with the aesthetic character and high level of appearance of the community. The Architectural Control Committee, with the approval of the Board of Directors, may establish reasonable rules and regulations for enforcing the provisions of this Section Five.

Section 6. Parking of Vehicles and Use of Property. No commercial vehicle, house trailer, boat, boat trailer, camper, tent, shed, or any other such vehicle, trailer, vessel or temporary structure or an automobile, truck or pick-up truck used for family purpose or family recreation shall be permitted to be parked or placed within the Properties, the Common Areas, specifically including the streets, except within area(s) which may be specifically designated for such purposes by the Association; provided, however, commercial vehicles, temporary buildings and other structures shall be permitted during the construction period by Declarant or as a temporary real estate sales office or construction office of Declarant. The Lot shall be used for residential purposes. No garage, outbuilding, or other appurtenant structure shall be used for residential purposes, either temporarily or permanently, nor shall any portion of the Property (except as expressly stated in the preceding sentence) be used except for residential purposes and for purposes incidental or necessary thereto. Home offices shall be allowed provided it does not create any traffic other than Owners and Occupants within the Properties. "Residential purposes" means residing in a Lot for any period of time.

Section 7. Signs. With the exception of signs erected by Declarant pursuant to Article XII hereof, no sign of any kind whatsoever shall be erected upon or displayed or otherwise exposed to view on any Lot or any improvement thereon without the prior written consent of the Board of Directors of the Association.

Section 8. Livestock and Poultry. No animals, livestock or poultry of any kind shall be raised, bred or kept on any Lot; provided, however, dogs, cats or other household pets may be kept, provided they are not kept, bred or maintained for any commercial purposes and provided the facilities for such pets and pets themselves do not create a nuisance as determined by the Board of Directors or its designated committee, in which case the nuisance will immediately be abated upon request of said Board of Directors or its designated committee.

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Section 9. Control of Dogs. Every person owning or having possession, charge, care, custody or control of any dog shall keep such dog exclusively upon his or her own Lot; provided, however, that such dog may be off the Lot if it be under the control of a competent person and restrained by a chain, leash or other means of adequate physical control and each pet owner is responsible for cleaning and removing any defecation.

Section 10. Garbage and Refuse Disposal. No Lot shall be used or maintained as a dumping ground for rubbish, and all trash, garbage or other waste shall be stored in sanitary containers in accordance with the rules and regulations of any health or public safety authority having jurisdiction over the property. The sanitary containers shall only be placed outside at the earliest the evening before garbage pickup day and shall be immediately returned inside an enclosed area after garbage has been picked up. All incinerators or other equipment shall be kept in a clean and sanitary condition. No trash, garbage, or other waste may be placed within the Common Area, except in containers approved by the Board of Directors. All Owners shall utilize the scavenger service designated by the Board of Directors.

Section 11. Storage. No household furnishings, equipment, lawn furniture or related personal property, including childrens' play objects, grills, bicycles, and lawn ornaments of the Owner shall remain outside the residential unit or garage overnight, meaning it must all be removed from the front yards, front porches and placed out of the view of the public. Reasonable arrangements of seasonal flower pots and hanging baskets are permitted.

Section 12. Fines and Penalties. The Association, by the Board of Directors, may impose fines and/or penalties for any violation of this Declaration or this Article.

Section 13. Rules and Regulations Concerning the Use of the Lot. Rules and Regulations concerning the use of the Lots may be promulgated by the Association acting by and through its Board of Directors, each of which shall be deemed to be incorporated herein by reference and made a part thereof, as amended from time to time. The Association shall deliver such rules and regulations to Owners prior to the time that they become effective. The rules and regulations promulgated from time to time shall be deemed to be reasonable and enforceable, so long as they bear any relationship to the safety, health, happiness and enjoyment of the Owners, and in furtherance of a plan to provide for the congenial occupation of the Lots, to promote and protect the cooperative aspects of ownership, the value of the Lots and/or facilitate the administration of the community as a first class, safe, healthy, happy, quiet and restful residential community. The board of directors of the Association is hereby granted specific power and authority to enforce said rules and regulations.

ARTICLE XEASEMENTS

All of the Properties, including Lots and Common Areas, shall be subject to such easements for driveways, walkways, parking areas, water lines, sanitary sewers, storm drainage facilities, gas lines, telephone, and electric power line and other public utilities as shall be established by the Declarant or by its predecessors in title; further, the Association shall have the power and authority to grant and establish upon, over, under, and across the Common Areas conveyed to it, such further easements as are requisite for the convenient use and enjoyment of the Properties. In addition, there is hereby reserved in the Declarant and its agents and employees an easement and right of ingress, egress, and regress across all Common Areas, now or hereafter owned by the Association, for the purpose of construction of improvements within the Properties, including the right of temporary storage of construction materials on said Common Areas.

So long as Declarant owns any property described on Exhibit "A", Declarant reserves blanket easements and the right to grant such specific easements over all the Properties, including Lots and Common Areas, as may be necessary in conjunction with the orderly development of the property described on Exhibit "A" or any adjacent property (including without limitation the planning, construction, marketing, leasing, management and maintenance of improvements) for use, enjoyment, access, construction and maintenance of public or private utilities and storm drainage (whether subsurface or surface). No such easements may be located within the area beneath any building located thereon.

All Lots shall be subject to easements for the encroachment of initial improvements constructed on adjacent Lots by the Declarant to the extent that such initial improvements actually encroach including, but not limited to, such items as overhanging eaves and walls.

Declarant reserves access easements over all Lots for construction, either for that Lot or any adjacent property and easements for the installation of public or private utilities and storm drainage (whether subsurface or surface).

There are reserved cross-easements in favor of Owners of Lots that comprise a building for access to and from each other Lot comprising the building including permanent eaves and walls, and the Common Area adjacent to the Lots comprising the building, including, but not limited to the transportation of roll-out garbage containers; however, this does not include access to approved decks, patios or areas with approved fences.

## ARTICLE XI

### DECLARANT'S RIGHTS

The right is reserved by Declarant, or its agents, to place and maintain on the Properties all model homes, sales offices, advertising signs and banners and lighting in connection therewith and other promotional facilities at such locations and in such forms as shall be determined by Declarant. There is also reserved unto Declarant, its agents and prospective purchasers and tenants, the right of ingress, egress and transient parking in and through the Properties for such sales purposes. Declarant also reserves the right to maintain on the Properties without charge (a) a general construction office for Declarant's contractors and (b) appropriate parking facilities for the employees of Declarant's agents and contractors. Notwithstanding any other provision to the contrary, no annual or special assessment shall be due for any models of the Declarant. Notwithstanding any provision herein to the contrary, the rights and easements created under this Declaration are subject to the right of Declarant to execute all documents and do all other acts and things affecting the Properties, which in the Declarant's opinion, are required to implement any right of Declarant set forth in this Declaration (including the making of any dedications or conveyances to public use) provided any such document or act is not inconsistent with the then existing property rights of any Owner.

In any event and notwithstanding any provision in this Declaration to the contrary, Declarant reserves the right and power, and each Owner by acceptance of a deed to a Lot is deemed to and does give and grant to Declarant a power of attorney, which right and power is coupled with an interest and runs with the title to a Lot and is irrevocable (except by Declarant), without the consent, approval or signature of each Owner, to (i) amend the Declaration and all attachments, to the extent necessary to conform to the requirements then governing the purchases or insurance of mortgages by The Mortgage Corporation, Federal National Mortgages Association, Governmental National Mortgages Association, Federal Home Loan Mortgage Corporation, Mortgage Guaranty Insurance Corporation, Department of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, or any other similar agency or organization, (ii) induce any such agencies or entities to make, purchase, sell, insure or guarantee first mortgages covering Lot ownership, (iii) to correct typographical errors, surveyor errors in descriptions or otherwise, or obvious factual errors or omissions, the correction of which would not impair the interest of any Owner or mortgagee, (iv) bring this Declaration into compliance with all applicable laws, (v) to amend any Exhibits, or (vi) to exercise any Declarant rights or development rights; and further provided that if there is an Owner other than the Declarant, the Declaration shall not be amended to increase the scope or the period of control of the Declarant. Each deed, mortgage, other evidence of obligation, or other instrument affecting a Lot and the acceptance thereof shall be deemed to be a grant and acknowledgment of, and consent to the reservation of, the power of Declarant to vote in favor of, make, execute and record any of the foregoing amendments. The rights of Declarant under this Section shall terminate at such time as Declarant no longer holds or controls title to a Lot and the right of Declarant to add the Additional Property has expired.

## ARTICLE XII

### DISPUTE RESOLUTIONS AND LIMITATIONS ON LITIGATION

Section 1. Agreement to Avoid Costs of Litigation and to Limit Rights to Litigate Disputes. The Association, Declarant, all Persons subject to this Declaration, and any Person not otherwise subject to this Declaration who agrees to submit to this Article (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes involving the Properties in order to avoid the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances or disputes between such Bound Party and any other Bound Party involving the Properties including, without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement of this Declaration, the By-Laws, the Association rules, or the Articles (collectively "Claim"), except for those Claims authorized in Section Two, shall be resolved using the procedures set forth in Section Three in lieu of filing suit in any court or initiating proceedings before any administrative tribunal seeking redress or resolution of such Claim.

Section 2, Exempt Claims, The following Claims ("Exempt Claims") shall be exempt from the provisions of Section 3;

(a) Any suit by the Association against any Bound Party to enforce the provisions of Article V (Assessments);

(b) Any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Associations ability to enforce the provisions of Article VII (Architectural Control) and Article IX (Use Restrictions);

(c) Any suit between Owners (other than, Declarant) seeking redress on the basis of a Claim which would constitute a cause of action under federal law or the laws of the State of South Carolina in the absence of a claim based on the Declaration, By-Laws, Articles or rules of the Association, if the amount in controversy exceeds \$105,000.00;

(d) Any suit arising out of any written contract between Owners, or between the Declarant and any Builder, which would constitute a cause of action under the laws of the State of South Carolina in the absence of the Declaration, By-Laws, and Articles of the Association; and

(e) Any suit in which all parties are not Bound Parties.

Any Bound Party having an Exempt Claim may submit it to the alternative dispute resolution procedures set forth in Section 3, but there shall be no obligation to do so. The submission of an Exempt Claim involving the Association to the alternative dispute resolution procedures of Section Three shall require the approval of the Association.

Section 3. Mandatory Procedures for All Other Claims. All claims other than Exempt Claims shall be resolved using the following procedures:

- (a) Notice. Any Bound Party having a claim ("Claimant") against any other Bound Party ("respondent"), other than an Exempt Claim, shall notify each respondent in writing of the Claim (the "Notice"), stating plainly and concisely:
  - (1) The nature of the Claim, including date, time, location, persons involved and respondent's role in Claim;
  - (2) The basis of the Claim ("Claimant") (i.e., the provisions of this Declaration, the By-Laws, the Articles or rules or other authority out of which the claim arises);
  - (3) What Claimant wants Respondent to do or not to do to resolve the Claim;
  - (4) The Claimant wishes to resolve the Claim by mutual agreement with Respondent and is willing to meet in person with Respondent at a mutually agreeable time and place to discuss in good faith ways to resolve the Claim.
- (b) Negotiation.
  - (1) Each Claimant and Respondent (the "Parties") shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good negotiation.
  - (2) Upon receipt of a written request from any Party, accompanied by a copy of the Notice, the Board may appoint a representative to assist the Parties in resolving the dispute by negotiation, if in its discretion it believes its efforts will be beneficial to the Parties and to the welfare of the community.
- (c) Mediation.
  - (1) If the Parties do not resolve the Claim through negotiation within 30 days of the date of the Notice (or within such other period as may be agreed upon by the Parties) ("Termination of Negotiations"), Claimant shall have 30 additional days within which to submit the Claim to mediation under the auspices of any dispute resolution center or other such independent agency providing similar services in the same geographical area upon which the Parties may mutually agree.
  - (2) If Claimant does not submit the Claim to mediation within 30 days after Termination of Negotiations, Claimant shall be deemed to have waived the Claim and Respondent shall be released and discharged from any and all liability to Claimant on account of such claim; provided, nothing herein shall release or discharge Respondent from any liability to Persons not a Party to the foregoing proceedings.

- (3) If the Parties do not settle the Claim within 30 days after submission of the matter to the mediation process, or within such time as determined reasonable or appropriate by the mediator, the mediator shall issue a notice of termination of the mediation proceedings ("Termination of Mediation"). The Termination of Mediation notice shall set forth when and where the Parties met, that the parties are at an impasse, and the date that mediation was terminated.
- (4) Each Party shall, within five days of the Termination of Mediation, make a written offer of settlement in an effort to resolve the Claim. The Claimant shall make a final written settlement demand ("Settlement Demand") to the Respondent. The Respondent shall make a formal written settlement offer ("Settlement Offer") to the Claimant. If the Claimant fails to make a Settlement Demand, Claimants original Notice shall constitute the Settlement Demand. If the Respondent fails to make a Settlement Offer, Respondent shall be deemed to have made a "zero" or "take nothing" Settlement Offer,
- (d) Final and Binding Arbitration,
  - (1) If the Parties do not agree in writing to accept either the Settlement Demand, the Settlement Offer, or otherwise resolve the Claim within 15 days of the Termination of Mediation, the Claimant shall have 15 additional days to submit the Claim to arbitration in accordance with the Rules of Arbitration contained in Exhibit "13" or the Claim shall be deemed abandoned, and Respondent shall be released and discharged from any and all liability to Claimant arising out of such Claim; provided, nothing herein shall release or discharge Respondent from any liability to Persons not a Party to the foregoing proceedings.
  - (2) This subsection (d) is an agreement of the Bound Parties to arbitrate all Claims except Exempt Claims and is specifically enforceable under the applicable arbitration laws of the State of South Carolina. The arbitration award (the "Award") shall be final and binding, and judgment may be entered upon it in any court of competent jurisdiction to the fullest extent permitted under the laws of the State of South Carolina.

#### Section 4. Allocation of Costs of Resolving Claims.

- (a) Each Party shall bear its own costs incurred prior to and during the proceeding described in Section 3 (a), (b) and (c), including the fees of its attorney or other representative. Each Party shall share equally all charges rendered by the mediator(s) pursuant to Section 3 (c).
- (b) Each Party shall bear its own costs (including the fees of its attorney or other representative) incurred after the Termination of Mediation under Section 3 (c) and shall share equally in the costs of conducting the arbitration proceeding (collectively, "Post Mediation. Costs"), except as otherwise provided in subsection Section 4 (c).

(c) Any Award, which is equal to or more favorable to Claimant than Claimant's Settlement Demand shall Claimant's Post Mediation Costs to the Award, such Costs to be equally divided by all Respondents. Any Award which is equal to or less favorable to Claimant than Respondent's Settlement Offer to that Claimant shall also award to such Respondent its Post Mediation Costs, such Costs to be borne by all such Claimants.

Section 5. Enforcement of Resolution. If the Parties agree to a resolution of any Claim through negotiation or mediation in accordance with Section 3 and any Party thereafter fails to abide by the terms of such agreement, or if any Party fails to comply with the terms of any Award following arbitration, then any other Party may file suit or initiate administrative proceedings to enforce such agreement or Award without the need to again comply with the procedures set forth in Section Three, in such event, the Party taking action to enforce the agreement or Award shall be entitled to recover from the non-complying Party (or if more than one non-complying Party, from all such Parties pro rata) all costs incurred in enforcing such agreement or Award, including, without limitation, attorneys fees and court costs.

Section 6. Commencement of Litigation. Any litigation by the Association (i) other than the "Exempt Claims" set out in Section Two or (ii) against the Declarant shall both require an affirmative vote of seventy five percent (75%) of the Members of the Association prior to the institution of such litigation.

### ARTICLE XIII

#### GENERAL PROVISIONS

Section 1. Enforcement. The Declarant, Association, or any Owner shall have the right to enforce, by proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Declarant, Association or any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

Section 2. Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

Section 3. Amendment. The covenants and restrictions of this Declaration shall run with and bind the land, for a term of twenty (20) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. Except as provided herein, this Declaration may be amended during the first twenty (20) year period by an instrument signed by not less than sixty seven percent (67%) of the Lot Owners. No amendment in any circumstance may alter, amend, or eliminate any right, privilege, or benefit of Declarant.

Section 4. Management and Contract Rights of Association. Declarant shall enter into a contract with a management company or manager for the purposes of providing all elements of the operation, care, supervision, maintenance, and management of the Properties. Declarant contemplates that the initial manager may be the Declarant or a firm affiliated with the

Declarant. The initial Board of Directors of the Association shall ratify and approve the management contract, which will provide for such manager or management company to act as a managing agent for the Association with respect to the Properties. Any such contract or lease entered into by Declarant or by the Association while Declarant is in control thereof shall contain a provision allowing the Association to terminate such contract, without justification or penalty, upon sixty (60) days notice.

Section 5. FHA / VA Approval. As long as there is a Class B Membership, the following actions will require the prior written approval of the Federal Housing Administration or the Veterans Administration: annexation of additional properties not included in this Declaration, dedication of Common Area, and amendment of this Declaration of Covenants, Conditions, and Restrictions.

Section 6. Rights of Noteholders. Any institutional holder of a first mortgage on a Lot ("Mortgage Holder") will, upon request, be entitled to (a) inspect the books and records of the Association during normal business hours, (b) receive an annual financial statement of the Association within ninety (90) days following the end of its fiscal year, (c) receive written notice of all meetings of the Association and the right to designate a representation to attend all such meetings, (d) receive written notice of any condemnation or casualty loss that affects either a material portion of the project or the unit securing its mortgage, (e) receive written notice of any sixty-day delinquency in the payment of assessments or charges owed by the Owner of any unit on which it holds the mortgage, (f) receive written notice of a lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Owners' Association, (g) receive written notice of any proposed action that requires the consent of a specified percentage of mortgage holders, and (h) be furnished with a copy of the master insurance policy.

Section 7. Notices. Any notice required or desired to be given under the provisions of this Declaration shall be deemed to have been properly delivered when deposited in the United States mail, postage prepaid, directed to the last known Mortgage Holder or other party entitled to notice, at the last known address for each such party, all as shown on the books and records of the Association at the time such notice is given.

Section 8. Exculpation. It is expressly understood and agreed that nothing contained in this Declaration shall be interpreted or construed as creating any liability whatsoever, directly or indirectly, against Declarant or any of its officers, members, managers, employees, agents, attorneys, heirs, executors, legal representatives, successors or assigns (collectively the Declarant Related Parties) for monetary relief or damages. In particular, and without limiting the generality of the foregoing, if any proceeding shall be brought to enforce the provisions of this Declaration, the party instituting such proceeding shall not be entitled to take any action to procure any money judgment against the Declarant or any related parties.

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Section 9. Conflict with the Act: Severability. Should any of the terms, conditions, provisions, paragraphs, or clauses of this Declaration conflict with any provisions of the Act, the provisions of the Act shall control unless the Act permits the Declaration to override the Act in which event the Declaration shall control. The invalidity of any covenant, restriction, condition, limitation, provision, paragraph or clause of this Declaration, or any part of the same, or the application thereof to any person or circumstance, shall not impair or affect in any manner the validity, enforceability or affect of the rest of this Declaration, or the application of any such covenant, restriction, condition, limitation, provision, paragraph or clause to any other person or circumstance.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has caused this instrument to be executed in its corporate name and its corporate seal to be hereunto affixed, by authority of its Board of Directors, the day and year first above written.

WITNESS:

Stacey R Solis  
Theresa K Whipple

Whipple Development Corporation

Edward M. Terry  
By: Edward M. Terry  
Its: VP

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, Stacey Utheim, do hereby certify that Edward M. Terry, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 10<sup>th</sup> day of March, 2008, 2007.

Stacey Utheim  
Notary Public For South Carolina  
My commission expires: 8/20/13

BYLAWS  
OF  
COKERS COMMONS HOMEOWNERS ASSOCIATION INC.

ARTICLE I

IDENTITY

NAME AND LOCATION. The name of the corporation is Cokers Commons Homeowners Association, Inc. hereinafter referred to as the "Association." The principal office of the corporation shall be located at 1941 Savage Road, Suite 500-D Charleston, South Carolina 29407, but meetings of members and directors may be held at such place or places within Berkeley County, State of South Carolina, as may be designated by the Board of Directors.

ARTICLE II

DEFINITIONS

Section 1. "Association" shall mean and refer to Cokers Commons Homeowners Association, Inc. its successors and assign.

Section 2. "Properties" shall mean and refer to that certain real property described in the Declaration of Covenants, Conditions and Restrictions, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

Section 3. "Common Areas" shall mean all real property owned by the Association for the common use and enjoyment of the Owners.

Section 4. "Lot" shall mean and refer to any plot of land as shown upon the attached site plan, with the exception of the Common. Area, and shall include all improvements thereon. Each plot of land is the area for one (1) residential unit, designed for single-family ownership.

Section 5. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any Lot which is a part of the Properties, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.

Section 6. "Declarant" shall mean and refer to Whipple Development Corporation, its successors and assigns, if such successors or assigns should acquire all of the Declarant's interest in the Properties.

Section 7. "Declaration" shall mean and refer to the Declaration of Covenants, Conditions, and Restrictions applicable to the Properties recorded in the Office of the Register of Deeds of Berkeley County.

Section 8. "Member" shall mean and refer to those persons entitled to membership as provided in the Declaration.

### ARTICLE III

#### MEETING OF MEMBERS

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Section 1. Annual Meetings. The first annual meeting of the Members shall be held within one (1) year from the expiration of Declarant control, and each subsequent regular annual meeting of the Members shall be held within the same month of each year thereafter. Until the period of Declarant control expires as provided in the Declaration, any annual meetings shall not include the election of Directors.

Section 2. Special Meetings. Special meetings of the Members may be called at any time by the President or by the Board of Directors, or upon written request of the Members who are entitled to vote sixty (60%) of all of the votes of the Class A membership.

Section 3. Notice of Meetings. Written notice of each meeting of the Members shall be given by, or at the direction of, the secretary or person authorized to call the meeting, by mailing a copy of such notice, postage prepaid, at least fifteen (15) days before such meeting to each Member entitled to vote thereat, addressed to the Member's address last appearing on the books of the Association, or supplied by such Member to the Association for the purpose of notice. Such notice shall specify the place, day, and hour of the meeting, and, in the case of a special meeting, the purpose of the meeting.

Section 4. Quorum. The presence at the meeting of Members entitled to cast, or of proxies entitled to cast, three-tenth (3/10) of the votes of each class of membership shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Declaration, or these Bylaws. If, however, such quorum shall not be present or represented at any meeting, the Members entitled to vote thereafter shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum as aforesaid shall be present or be represented.

Section 5. Proxies. At all meetings of Members, each Member may vote in person or by proxy. All proxies shall be in writing and filed with the secretary. Every proxy shall be revocable and shall automatically cease upon conveyance by the Member of his or her Lot.

Section 6. First Regular Meeting. The first regular meeting of the Members shall occur within one (1) year of the conversion of the Class B membership to Class A membership or upon the voluntary relinquishment of Declarant's control.

ARTICLE IV

BOARD OF DIRECTORS: SELECTION: TERM OF OFFICE

Section 1. Number. The affairs of this Association shall be managed by a Board of five (5) directors who need not be Members of the Association.

Section 2. Term of Office. At the First Regular Meeting, the Members shall elect three (3) directors for a term of one year and two (2) directors for a term of two (2) years, and at each annual meeting thereafter, the Members shall elect for a term of two (2) years the number of directors whose terms are expiring. The directors appointed by the Declarant shall serve until removed or until the First Regular Meeting.

Section 3. Removal. Any director may be removed by the Board, with or without cause or, by a majority vote of the Members of the Association. In the event of death, resignation, or removal of a director, his or her successor shall be selected by the remaining Members of the Board and shall serve for the unexpired term of his predecessor.

Section 4. Compensation. No director shall receive compensation for any service he or she may render to the Association. However, any director may be reimbursed for his or her actual expenses incurred in the performance of his or her duties.

Section 5. Action Taken Without a Meeting. The directors shall have the right to take any action in the absence of a meeting, which they could take at a meeting by obtaining the written approval of all the directors. Any action so approved shall have the same effect as though taken at a meeting of the directors.

ARTICLE V

NOMINATION AND ELECTION OF DIRECTORS

Section 1. Nomination. After the period of Declarant control, nomination for election to the Board of Directors shall be made by a Nominating Committee or by another procedure approved by the Board of Directors. Nominations may also be made from the floor at the First Regular Meeting or the annual meetings thereafter. The Nominating Committee shall consist of a Chairman, who shall be a member of the Board of Directors, and two or more Members of the Association. The Nominating Committee shall be appointed by the Board of Directors prior to each annual meeting of the Members, to serve from the close of such annual meeting until the close of the next annual meeting and such appointment shall be announced at each annual meeting. The Nominating Committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among Members or non-Members.

Section 2. Election. Election to the Board of Directors shall be by secret written ballot. At such election, the Members or their proxies may cast in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of the Declaration. The persons receiving the largest number of votes shall be elected. Cumulative voting is not permitted.

Section 3. Declarant Rights. Declarant shall be entitled to appoint all Directors until voluntary relinquishment of that right or upon conversion of the Class B membership to Class A membership as provided in the Declaration.

## ARTICLE VI

### MEETINGS OF DIRECTORS

Section 1. Regular Meetings. Regular meetings of the Board of Directors shall be held every three months without notice after Declarant control expires, at such place and hour as may be fixed from time to time by resolution of the Board. Should said meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday. During the period of Declarant control, regular meetings shall be held as determined by the Board of Directors, in its discretion.

Section 2. Special Meetings. Special meetings of the Board of Directors shall be held when called by the President of the Association, or by any two directors, after not less than three (3) days' notice to each director.

Section 3. Quorum. A majority of the number of directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

## ARTICLE VII

### POWERS AND DATES OF THE BOARD OF DIRECTORS

Section 1. Powers. The Board of Directors shall have power to:

(a) adopt and publish rules and regulations governing the use of the Common Area and facilities, the personal conduct of the Members and their guests thereon, and to establish penalties for the infraction thereof,

(b) suspend the voting rights and right to use of the recreational facilities of a Member during any period in which such Member shall be in default in the payment of any assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty (60) days for infraction of published rules and regulations.

(c) exercise for the Association all powers, duties, and authority vested in or delegated to this Association and not reserved to the membership by other provisions of these Bylaws, the Articles of Incorporation, or the Declaration;

(d) declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three (3) consecutive regular meetings of the Board of Directors; and

(e) employ a manager, an independent contractor, or such other employees as they deem necessary, and to prescribe their duties. Provided further, that the Board of Directors shall ratify and approve the management agreement.

Section 2. Duties. It shall be the duty of the Board of Directors to:

(a) cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the Members at the annual meeting of the Members, or at any special meeting when such statement is requested in writing by one-fourth (1/4) of the Class A Members who are entitled to vote;

(b) supervise all officers, agents, and employees of this Association, and to see that their duties are properly performed;

(c) as more fully provided in the Declaration, to:

(1) fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period;

(2) send written notice of each assessment to every Owner subject thereto at least thirty (30) days in advance of each annual assessment period; and

(3) foreclose the lien against any property for which assessments are not paid within thirty (30) days after due date or to bring an action at Law against the owner personally obligated to pay the same.

(d) issue, or to cause an appropriate officer to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid. A reasonable charge may be made by the Board for the issuance of these certificates. If a certificate states an assessment has been paid, such certificate shall be conclusive evidence of such payment;

(e) procure and maintain adequate liability and hazard insurance on property owned by the Association or as required in the Declaration;

(f) cause all officers or employees having fiscal responsibilities to be bonded, as provided in Article XIV hereof;

(g) cause the Common Area to be maintained;

- (h) cause the exterior of the residential units to be maintained;
- (i) perform all other duties and responsibilities provided in the Declaration.

## ARTICLE VIII

### OFFICERS AND THEIR DUTIES

Section 1. Enumeration of Offices. The officers of this Association shall be a president and vice president, who shall, at all times, be members of the Board of Directors; a secretary, a treasurer; and such other officers as the Board may from time to time by resolution create.

Section 2. Election of Officers. The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the Members or the annual appointment of the Directors.

Section 3. Term. The officers of this Association shall be elected annually by the Board, and each shall hold office for one (1) year, unless he or she shall sooner resign, shall be removed, or otherwise disqualified to serve.

Section 4. Special Appointments. The Board may appoint committees as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine. However, all members must be members of the Association.

Section 5. Resignation and Removal. Any officer may be removed from office with or without cause by the Board. Any officer may resign at any time, giving written notice to the Board, the president, or the secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 6. Vacancies. A vacancy in any office may be filled by appointment by the Board. The officer appointed to such vacancy shall serve for the remainder of the term of the officer he or she replaces.

Section 7. Multiple Offices. The offices of secretary and treasurer may be held by the same person. No person shall simultaneously hold more than one of any of the other offices, except in the case of special offices created pursuant to Section 4 of this Article or as determined by the Board of Directors during the period of Declarant's control.

Section 8. Duties. The duties of the officers are as follows:

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A) PRESIDENT

The president shall preside at all meetings of the Board of Directors; shall see that orders and resolutions of the Board are carried out; shall sign all leases, mortgages, deeds and other written instruments; and absent some resolution from the Board of Directors specifying otherwise shall sign all checks and promissory notes.

B) VICE PRESIDENT

The vice president shall act in the place and stead of the president in the event of his or her absence, inability, or refusal to act, and shall exercise and discharge such other duties as may be required of him or her by the Board.

C) SECRETARY

The secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and of the Members; keep the corporate seal of the Association and affix it on all papers requiring said seal; serve notice of meetings of the Board and of the Members; keep appropriate current records showing the Members of the Association, together with their addresses; and shall perform such other duties as required by the Board.

D) TREASURER

The treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as directed by resolution of the Board of Directors; absent some resolution from the Board of Directors specifying otherwise shall sign all checks and promissory notes of the Association; keep proper books of account; cause an annual audit of the Association books to be made by a public accountant at the completion of each fiscal year, and shall prepare an annual budget and a statement of income and expenditures to be presented to the membership at its regular annual meeting and deliver a copy of each to the Members.

ARTICLE IXCOMMITTEES

The Association shall appoint an Architectural Control Committee, as provided in the Declaration, and a Nominating Committee, as provided in these Bylaws. In addition, the Board of Directors shall appoint other committees as deemed appropriate in carrying out its purpose.

ARTICLE XBOOKES AND RECORD

The books, records, and papers of the Association shall, at all times during reasonable business hours, be subject to inspection by any Member. The Declaration, the Articles of Incorporation, and the Bylaws of the Association shall be available for inspection by any Member at the principal office of the Association, where copies may be purchased at reasonable cost.

ARTICLE XIASSIGNMENTS

Section 1. General. As more fully provided in the Declaration, each Member is obligated to pay to the Association monthly and special assessments, which are secured by a continuing lien upon the property against which the assessment is made. Any assessments, which are not paid when due, shall be delinquent. If the assessment is not paid within fifteen (15) days after the due date, a late charge as determined by the Board of Directors shall be added to it and the assessment shall bear interest from the date of delinquency at the rate of ten (10%) percent per annum, and the Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property, and interests, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment. No Owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Common Area or abandonment of his or her Lot.

Section 2. Annual Budget. The Board shall cause to be prepared an estimated annual budget for each fiscal year of the Association. The annual budget shall provide for a reserve for contingencies for the year and a reserve for capital expenditures, in reasonable amounts as determined by the Board, according to the Declaration.

Section 3. Records and Statement of Account. The Board shall cause to be kept detailed and accurate records of the receipts and expenditures affecting (i) the Properties, (ii) the Lots, and (iii) the Common Area, specifying and itemizing the common expenses incurred. Payment vouchers may be approved in such manner as the Board may determine.

Section 4. Discharge of Liens. The Board may cause the Association to discharge any mechanic's lien or other encumbrance, which in the opinion of the Board may constitute a lien against the Properties or the Common Area, other than a lien against only a particular Lot. When less than all the Owners are responsible for the existence of any such lien, the Owners responsible shall be jointly and severally liable for the amount necessary to discharge the same and for all costs and expenses, including attorneys' fees, incurred by reason of such lien.

Section 5. Forbearance. The Association shall have no authority to forbear the payment of assessments by any Owner.

## ARTICLE XII

### CONTRACTUAL POWERS

No contract or other transaction between this corporation and one or more of its Directors or between this corporation and any corporation, firm or association in which one or more of the Directors of this corporation are directors, or are financially interested, is void or voidable because of such. Director or Directors are present at the meeting of the Board or a committee thereof which authorizes or approves the contract or transaction or because his or their votes are counted, if the circumstances specified in either of the following subparagraphs exists:

(a) the fact of the common directorship or financial interest is disclosed or known to the Board or committee and noted in the minutes and the Board or committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such Director or Directors; or

(b) the contract or transaction is just and reasonable as to the Association at the time it is authorized or approved.

Common or interested Directors may be counted in determining the presence of a quorum at a meeting of the Board or a committee thereof, which authorizes, approves or ratifies a contract or transaction.

## ARTICLE XIII

## INDEMNIFICATION

Section 1. General. The Association shall indemnify and hold harmless each of its directors and officers, each member of any committee appointed pursuant to the By-Laws of the Association, and the Board, and Declarant, against all contractual and other liabilities to others arising out of contracts made by or other act of such directors, Board, officers, committee members, or Declarant, on behalf of the Owners, or arising out of their status as directors, Board, officers, committee members, unless any such contract or act is contrary to the provisions of the laws of the State of South Carolina, the Declaration or these By-Laws or shall have been made fraudulently or with gross negligence or criminal intent. It is intended that the foregoing indemnification shall include indemnification against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which any such director, officer, Board, committee member or Declarant, may be involved by virtue of such persons being or having been such directors, officer, Board, committee member or Declarant; provided, however, that such indemnity shall not be operative with respect to (a) any matter as to which such person shall have been finally adjudged in such action, suit or proceeding to be liable for gross negligence or fraud in the performance of his duties as such director, officer, Board, committee member, or Declarant; or (b) any matter settled or compromised, unless, in the opinion of independent counsel selected by or in a manner determined by the Board, there is not reasonable ground for such persons being adjudged liable for gross negligence or fraud in the performance of his duties as such director, Board, officer, committee member or Declarant.

Section 2. Success on Merits. To the extent that the Declarant or a member of the Board of directors or an officer of the Association or a member of any committee appointed pursuant to the By-Laws of the Association has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 1, or in defense of any claim, issue or matter therein, he or she shall be indemnified against expenses (including attorneys' fees) actually and reasonable incurred by him or her in connection therewith.

Section 3. Advance Payment. Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the Association in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Directors in the specific case upon receipt of any undertaking by or on behalf of the person or entity seeking such indemnification or payment in advance to repay such amount unless it shall ultimately be determined that he or she is entitled to be indemnified by the Association as authorized in this Article XIII.

Section 4. Miscellaneous. The Association and the Board shall have the power to raise and the responsibility for raising by special assessment or otherwise, any sums required to discharge its obligations under this article. Every agreement made by the directors, Board, officers, members of such committees, Declarant or by the Managing Agent on behalf of the Owners shall provide that the directors, Board, officers, members of such committees, Declarant or the Managing Agent, as the case may be, are acting only as agents for the Association and shall have no personal liability thereunder. The indemnification provided by this Article XIII shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any statute, agreement,

vote of Members of the Association or disinterested members of the Board of Directors or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office. Such right to indemnification shall continue as to Declarant and any person or entity who has ceased to be Declarant or a member of the Board of Directors, officer of the Association or a member of such committee, and shall inure to the benefit of the heirs, executors, administrators, successors and assigns of Declarant such person or entity.

#### ARTICLE XIV

##### MISCELLANEOUS

Section I. Fidelity Bond. The Board shall require (1) that all officers, employees or other persons who either handle or are responsible for funds held or administered by the Association shall furnish fiduciary insurance coverage which covers the maximum amount of funds that will be in custody of the Association plus the Association reserve funds, the premium cost of which will be paid by the Association and (2) that all management companies who either handle or are responsible for funds held or administered by the Association shall furnish a fidelity bond to the Association which covers the maximum amount of Association funds and the Association reserves that will be in the custody of the management company, the premium cost of which will be paid by the Association, and shall at all times maintain a separate account for each reserve fund, for the total operating funds of the Association managed by the management company and for all other monies of the management company. The management company may hold all operating funds of the Association which it manages in a single operating account but shall at all times maintain records identifying all monies of each Association on such operating account.

Section 2. Applicability of Documents to Lessees of a Lot. The Declaration, By-Laws, and other Rules and Regulations of the Association shall be applicable to any person leasing the Lot and shall be deemed to be incorporated in any lease for any Lot in the Properties.

#### A R T I C L E   X V

##### CORPORATE SEAL

The Association may have a seal in circular form, having within its circumference the words:

COKERS COMMONS HOMEOWNERS ASSOCIATION, INC.

ARTICLE XVI 00010574 Vol: 7288 Pg: 318

AMENDMENTS

Section I. These Bylaws may be amended at a regular or special meeting of the Members by a vote of a majority of a quorum of Members present in person or by proxy, except that the Federal Housing Administration or the Veterans Administration shall have the right to veto amendments while there is Class B membership.

Section 2. In the case of any conflict between the Articles of Incorporation and these Bylaws, the Articles shall control; and in the case of any conflict between the Declaration and these Bylaws or the Articles, the Declaration shall control.

The fiscal year of the Association shall begin on the first day of January and end on the 31st day of December of every year, except that the first fiscal year shall begin on the date of incorporation.

Agent's File Number: 001488.1

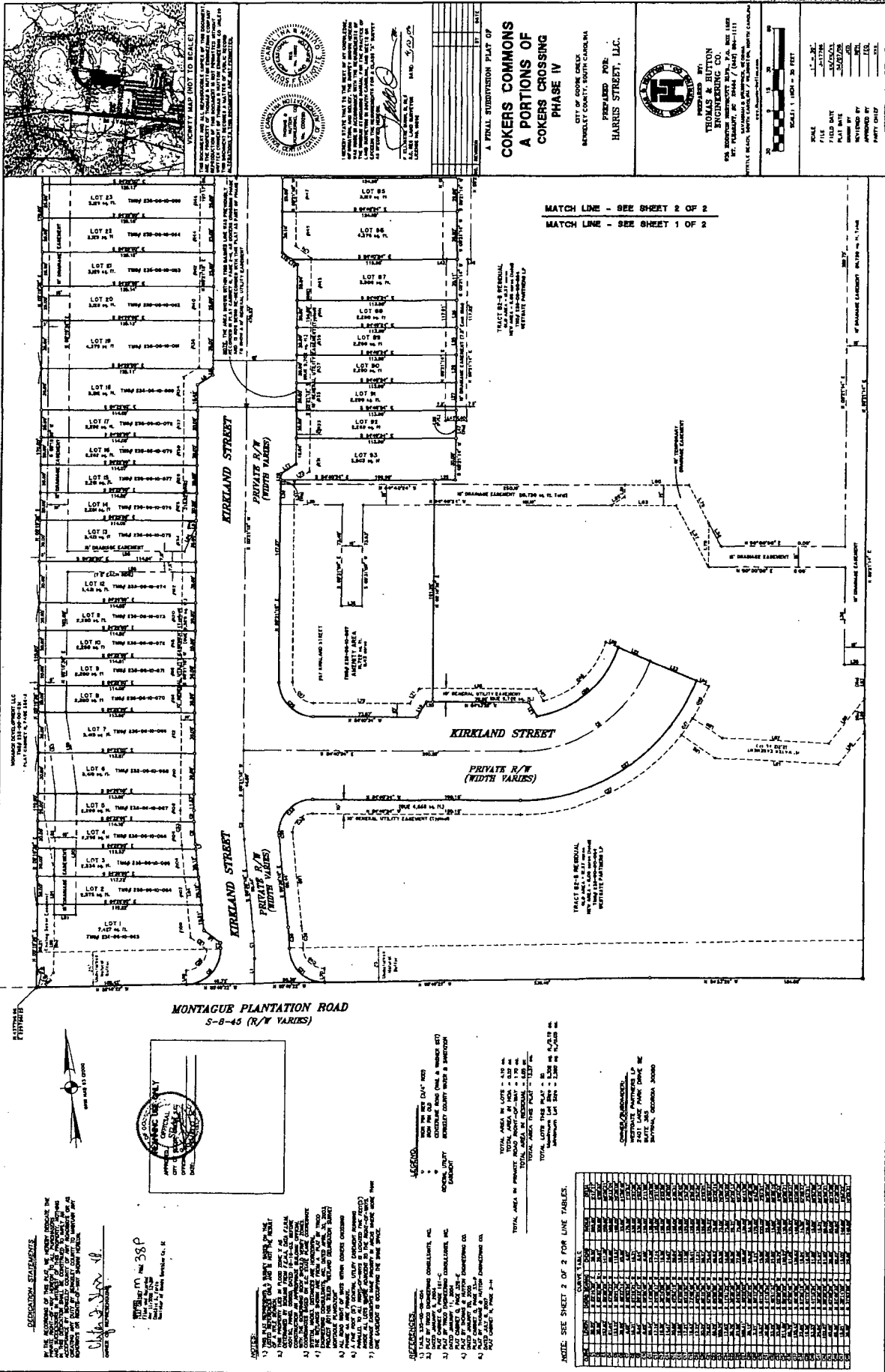
### **Schedule A**

All that certain piece, parcel or lot of land, with buildings and improvements thereon, situate, lying and being in Berkeley County, State of South Carolina, as shown on a Plat entitled, "A FINAL SUBDIVISION PLAT OF COKERS COMMONS A PORTIONS OF COKERS CROSSING PHASE IV CITY OF GOOSE CREEK BERKELEY COUNTY, SOUTH CAROLINA PREPARED FOR HARRIS STREET, LLC" by Thomas & Hutton Engineering Company", dated April 7, 2008 and recorded in the RMC Office for Berkeley County, in Plat Book M at Page 38P. Reference to said plat is hereby craved for a more complete description.

BEING the same property conveyed to the Mortgagor(s) herein by deed of Montague Lands, LLC, dated 06/30/2005, and recorded in the RMC Office for Berkeley County in Book 4829 at Page 85 .

TMS # Being a Portion of 235-00-00-054

Brush Law Firm  
12A Carriage Lane  
Charleston, SC 29407



STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY  
COKERS COMMONS HOMEOWNER'S  
ASSOCIATION, INC.,

Plaintiff,

vs.

PARK INVESTORS, LLC, CCT RESERVE,  
LLC, f/k/a HARRIS STREET, LLC, and  
WHIPPLE DEVELOPMENT  
CORPORATION

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-08-547

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, SC

2016 APR 15 AM 9:35

FILED

**INTRODUCTION**

This action was filed by the Cokers Commons Homeowner's Association, Inc., an existing corporation incorporated under the laws of the State of South Carolina, and authorized to do business in the State of South Carolina. Plaintiff filed a two count complaint seeking: 1) a declaration of its rights in common areas that were never turned over to the Association (per the Covenants and Restrictions' requirements, hereinafter, "CCR's"); and 2) that the pool and common areas (which are owned by one or more of the Defendants) constitutes a blight and a nuisance. In response to the Complaint, Defendants filed "counterclaims" seeking their own declaration of its own rights and a counterclaim for "Indemnity". The CCR's are recorded, public documents. This Court can evaluate the publicly recorded CCR's and the pleadings to determine as a matter of law that Defendant's Indemnification count fails as a matter of law.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App.2004).

A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. Small, 329 S.C. at 461, 494 S.E.2d at 841 (citation omitted) (discussing submission of an issue to the jury in the context of a directed verdict motion). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. "Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." Id. "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation."

### **ARGUMENT**

Defendant Whipple Development Corporation (hereinafter, "Whipple", as the declarant under the Covenants and Restrictions, asserted a cause of action against the HOA for "Indemnity" pursuant to Article XIII of the HOA's By-Laws. It is

longstanding well-recognized law that indemnity is only a remedy involving liability from third parties, not in between the contracting parties themselves. See Smoak v. Carpenter Enterprises, 319 S.C. 222, 460 S.E.2d 381 (1995)(emphasis added). The Smoak case is binding authority in this case and has not been reversed, limited, or abrogated in any manner. The claim for indemnity here is between the declarant and the HOA, not a third party liability that Whipple has become obligated to defend or pay due to the HOA's actions or omissions.

Whipple cites as authority the 2002 Court of Appeals case of Laurens Emergency Medical Specialist, P.A. v. M.S. Bailey & Sons Bankers, 348 S.C. 191, 558 S.E.2d 531 (Ct. App. 2002) as being supportive of its position that parties can can get indemnity from one another. This case was reversed by the South Carolina Supreme Court for the same ground upon which this Court should grant the Association's motion for partial summary judgment in this case. When the Supreme Court performed a close reading of the indemnification provision between the contracting parties in Laurens, it found and noted the following:

**There is no such provision for second party indemnification in the indemnity agreement between EMS and Hospital presently before the Court. Infra, page 2. This Court's decision in *Smoak* indicates that the default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification. 319 S.C. at 224, 460 S.E.2d at 383. In *Smoak*, the Court concluded that the indemnification provision was limited to reimbursement for expenses incurred in third party actions based on the clause itself and on a reading of the entire agreement between the parties. *Id.* In our opinion, the clause at issue in this case is a typical indemnity agreement, much like the clause presented in *Smoak*. The contract between EMS and the Hospital contains reciprocal indemnification provisions; both parties agreed to indemnify each other under the same circumstances. In our view, the**

circumstance EMS and the Hospital contemplated in including an indemnity provision in their contract **was a third party claim** brought against one of them for the wrongful acts of the other. **As such, we find that it cannot be invoked absent a third party claim against the second party, EMS.**

Laurens Emergency Medical Specialist, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375, 377 (2003)(emphasis added).

Like the 2002 Court of Appeals case in Laurens, Whipple interprets its indemnification provision as being permissible as a claim of indemnity between itself and the Association. However, a close reading of the indemnity agreement in this case makes clear it is not an indemnity agreement between the Association and Whipple. It is an indemnity agreement predicated upon liability to third parties.

The provision reads:

### ARTICLE XIII

#### INDEMNIFICATION

Section 1. General. The Association shall indemnify and hold harmless each of its directors and officers, each member of any committee appointed pursuant to the By-Laws of the Association, and the Board, and Declarant, against all contractual and other liabilities to others arising out of contracts made by or other act of such directors, Board, officers, committee members, or Declarant, on behalf of the Owners, or arising out of their status as directors, Board, officers, committee members, unless any such contract or act is contrary to the provisions of the laws of the State of South Carolina, the Declaration or these By-Laws or shall have been made fraudulently or with gross negligence or criminal intent. It is intended that the foregoing indemnification shall include indemnification against all cost and expenses (including, but not limited to, counsel fees, amounts of judgment paid and amounts paid in settlement) reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative, or other, in which any such director, officer, Board, committee member or Declarant, may be involved by virtue of such director, officer, Board, committee member or Declarant. . .

Declaration of the Covenants, Conditions and Restrictions for Cokers Commons, Recorded with the Berkeley County Register of Deeds Office, Book 7288, Page 316.

Obviously, the contract of indemnity here is a third party contract of indemnity only as the language itself states that indemnity is to arise when there is liability, "to others." The plain reading of the provision also reinforces that this provision was not meant to operate between the Association and Declarant itself when it states that the indemnification shall cover, "amounts of judgment paid and amounts in settlement." (i.e., payment to others).

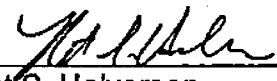
In conclusion, Whipple seeks this Court to interpret the CCR Indemnity provision as one of reimbursement of claims amongst the parties themselves. The second Laurens decision makes clear that *Smoak* is still the law with respect to indemnity agreements and that indemnity agreements cannot lie in between the contracting parties themselves, particularly when there is no such provision for second party indemnification in the indemnity agreement. *Id.* at 378. The indemnity contract here between Whipple and the Association has no such language. In discussing the indemnity agreement in *Smoak*, the Supreme Court in the 2003 Laurens case observed that its interpretation of the indemnity agreement in *Smoak*, "supports the interpretation that the intended purpose of this indemnification clause was protection against third party claims, not reimbursement for claims between the parties themselves." *Id.* at 378.

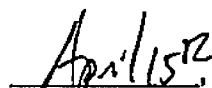
Finally, the Association is not contending that Whipple may not plead in the alternative. It appears to have done so, by claiming in its action for declaratory relief that the CCR's are invalid, and simultaneously arguing that it should be granted indemnity in Count 2 based upon the CCR's they claim are invalid in Count

1. Notwithstanding this fact<sup>1</sup>, it is obvious that if the CCR's are invalid (a conclusion which the Association is not asking this Court for purposes of this motion—that is the relief Whipple ostensibly seeks in Count 1 of its counterclaims), then Whipple cannot have indemnity based upon invalid documents. Assuming arguendo that the CCR's are valid, Whipple cannot get indemnity in this case because there has been no third party claim made upon Whipple for which the Association is or could be held liable. Either way, there is no set of circumstances in which Whipple can get Indemnity from the Association, and for this reason there is no issue of material fact and the Association should be granted partial summary judgment as a matter of law on Whipple's Indemnification count.

WHEREFORE, the Plaintiff prays this Honorable Court inquire into the matters set forth herein and grant the Plaintiff partial summary judgment on Count II of Defendant's Counterclaim.

**HALVERSEN & ASSOCIATES, LLC**

By:   
Brent S. Halversen  
171 Church Street, Suite 330  
Charleston, SC 29401  
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F: 864-326-4884  
Email: [brent@halversenlaw.com](mailto:brent@halversenlaw.com)  
*Attorneys for the Plaintiff*

 April 15<sup>th</sup>, 2016.  
Charleston, South Carolina

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<sup>1</sup> Logically, Whipple could only prevail on Count 1 or Count 2 in this matter but not both given its inconsistent positions.

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2015-CP-08-00547

COKERS COMMONS HOMEOWNER'S )  
ASSOCIATION, INC. )  
Plaintiff, )

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

-VS-

PARK INVESTORS, LLC, )  
CCT RESERVE, LLC, f/k/a HARRIS )  
STREET, LLC and WHIPPLE )  
DEVELOPMENT CORPORATION, )  
Defendants. )

2015 MAY 27 PM 12:43  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, SC

FILED

TO: PLAINTIFF ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE THAT Defendants Park Investors, LLC (hereinafter "Park Investors"); CCT Reserve, LLC, f/k/a Harris Street, LLC (hereinafter "CCT"); and Whipple Development Corporation (hereinafter "Whipple") (collectively the "Defendants"), by and through their attorneys, hereby move this Court pursuant to S.C. R. CIV. PRO. 56 for summary judgment in favor of Defendants and against Plaintiff Cokers Commons Homeowner's Association, Inc. (hereinafter "HOA") as to (a) all causes of action alleged in the Complaint and (b) as to Defendants' Counterclaim against the HOA for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30.

This motion is based on the grounds that no genuine issue as to any material fact exists and because Defendants are entitled to judgment against the HOA as a matter of law for the following reasons:

1. Plaintiff's first cause of action for "specific performance" against Defendants Park Investors and CCT fails as a matter of law because:

a. Plaintiff cannot show any contract between Plaintiff and Defendants Park

Investors or CCT. “The fundamental basis of a suit for specific performance is that there is a contract between the parties.” *Masonic Temple v. Ebert*, 18 S.E.2d 584, 587 (S.C. 1942); *Finklea v. Carolina Farms Co.*, 13 S.E.2d 596, 599 (S.C. 1941). Park Investors and CCT were not parties to the Declaration of Covenants, Conditions and Restrictions for Cokers Commons dated March 10, 2008 and recorded on April 15, 2008 with the Register of Deeds for Berkeley County, South Carolina, at Book 7288, Page 283 (hereinafter referred to as the “C&R”). Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract. *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985). However, non-parties to a contract cannot be ordered to specifically perform the contract. *Yawkey v. Lowndes*, 148 S.E. 554, 560-61 (S.C. 1929) (“Before specific performance can be decreed, it is first necessary to determine whether there is a contract between the parties or not. If there is no contract, then there is nothing to enforce.”); *Pulliam v. Clark*, 2012 WL 1835717, \*7 (D.S.C. 2012) (dismissing claim for specific performance when breach of contract claim had been dismissed on basis that the defendant was not a party to the contract).

b. As part of its claim for specific performance, Plaintiff seeks to have property referred to as an “HOA Open Space Lot” (TMS No. 235-06-12-057) that is owned by CCT transferred to Plaintiff. This property is not and has never been owned by Defendants Park Investors or Whipple. The Complaint alleges that the “HOA Open Space Lot” is part of the common areas of Coker’s Commons that was to be transferred by one or more of the Defendants prior to the first sale of property in Coker’s Commons. However, Plaintiff has admitted in responses to Requests for Admissions and through the deposition testimony of

Freeman Barber that the "HOA Open Space Lot" was never subjected to the C&R and was not identified in the attachments to the C&R as common property that was to be transferred by the Declarant to the C&R. *See* Exhibits 1, 2 & 3 attached hereto. Because the "HOA Open Space Lot" was not part of the C&R or subjected to the C&R, the Defendants did not have an obligation to transfer the lot to the Plaintiff. Without an obligation to transfer the property to the Plaintiff, the Defendants could not have breached any obligation. Consequently, the Defendants cannot be required to convey the "HOA Open Space Lot" because the Plaintiff has no right to the property.

Similarly, the Plaintiff seeks specific performance asking for the transfer of the Amenities Lot to Plaintiff. As discussed above, Park Investors is the owner of the Amenities Lot, which it purchased at a tax sale attended by Freeman Barber. CCT nor Whipple have any ownership in the Amenities Lot. Plaintiff's claim for specific performance related to the Amenities Lot against CCT and Whipple must fail because the entities do not own the Amenities Lot and therefore have no ability to transfer the property to Plaintiff.

c. The C&R are invalid, null, void, and unenforceable as a matter of law because they were purportedly created by an entity that did not own the subject property. The lot owners of Phase IV of the Cokers Commons subdivision and/or their property are not subject to the C&R. The C&R were recorded with the Register of Deeds for Berkeley County on April 15, 2008 by Defendant Whipple. Whipple is named as the "declarant" in the C&R. However, Whipple never owned any property in the Cokers Commons subdivision. At the time the C&R were executed and recorded, Whipple did not own the subject property and did not own an interest in the property. Instead, at that time, the subject property was owned by

Westgate Partners, L.P. (hereinafter "Westgate"). Westgate did not sign the C&R. As a matter of law, Whipple lacked the right, power, or authority to record the C&R upon or affecting the subject property because it did not own the property at the time the C&R were executed and recorded and did not own an interest in the property. *See Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc.*, 175 P.3d 179, 183 (Idaho 2007) ("It is axiomatic that one person cannot unilaterally restrict the use of another's land simply by drafting and recording restrictive covenants allegedly applicable to that land."); *New Falmouth Woods, LLC v. Ballymeade Property Owners Ass'n, Inc.*, 2012 WL 3570868, \*7 (Mass. Land Ct. 2012) ("It is axiomatic that a party cannot unilaterally impose restrictions on land in which that party holds no interest. At the time the 1987 Declaration was executed and recorded, the Declarant held no deeded interest in Lots 9 or 11 on the North Plan (the designated 'Country Club Area'). The Longshank Trustee (the then-record owner of the 'Country Club Area') did not sign the Declaration, and did not otherwise agree in writing to a restriction on said Area. Therefore, as the FWDC had no power to impose a restrictive covenant on the use of North Plan Lots 9 and 11 for the benefit of the Subdivision, the Country Club Provision did not effect an enforceable restriction.");

d. The HOA's claim is barred by the applicable statute of limitations and/or laches. The HOA's Complaint alleges that the C&R required non-party CCT (then known as Harris Street, LLC) to convey the common areas (including amenities area and open space lot) to the HOA before the first lot in the subdivision was conveyed to an individual purchaser, which occurred in 2008. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of

the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA's cause of action. The individual members knew or should have known of those events more than three years prior to the HOA's commencement of this action, as the absence of the transactions has been a matter of public record since 2008 that was capable of being discovered by the HOA and members of Plaintiff prior to the purchase of property in Coker's Commons; thus, the HOA's claim is time-barred as a matter of law.

e. The HOA's claim was discharged by virtue of the Orders and judgments entered by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in the action entitled *In re: CCT Reserve, LLC*, Case No. 12-71670-PWB. As stated above, the HOA's Complaint is based on the allegation that CCT (then known as Harris Street, LLC) was required to convey the common areas to the HOA prior to the conveyance of the first lot to an individual purchaser, which occurred in 2008. On August 31, 2012, CCT filed a Chapter 11 bankruptcy petition in Case No. 12-71670-PWB, said action was ended on July 2, 2013, and CCT was discharged. Under the federal bankruptcy laws, the discharge of CCT in the bankruptcy proceedings bars the HOA's pre-petition claim against CCT.

2. Plaintiff's second cause of action for "declaratory judgment" against the Defendants fails as a matter of law because:

a. The C&R are invalid, null, void, and unenforceable for the reasons stated herein-above. At the time the C&R were executed and recorded, Whipple lacked the right, power, or authority to record the C&R upon or affecting the property known as Phase IV of the Cokers Commons subdivision because it did not own

and was not deeded the property at the time the C&R were executed and recorded and did not possess an interest in the property.

- b. The HOA's claim is barred by the applicable statute of limitations and/or laches for the reasons stated herein-above. The HOA's Complaint seeks a declaration that all property owners in Phase IV of the Cokers Commons subdivision are subject to the C&R and that the C&R are valid and enforceable. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA's cause of action. The individual members knew or should have known more than three years prior to the HOA's commencement of this action that Defendant Whipple (the entity that purported to impose the C&R upon the subject property) was not the owner of the property at that time, thus the HOA's claim is time-barred as a matter of law.

3. Plaintiff's third cause of action for "nuisance" against the Defendants Park Investors and CCT fails as a matter of law because:

- a. The HOA's Complaint alleges that the common areas "have become a blight to the neighborhood, negatively affecting the quality of life of the owners of Cokers Commons," that "[t]he landowner members" of the HOA "have not been able to use or enjoy the pool," and "[t]he Defendants[]" neglect of the Amenities Lot and the HOA open space lot has unreasonably interfered with the Plaintiff's constituent member's use and ownership of their properties as well as their use of the common areas, causing damages." *See* Complaint

¶¶ 13, 23-24. These allegations seek recovery on behalf of the individual members for injuries that the individual members have allegedly suffered. However, Plaintiff lacks the right, power, or authority to assert claims on behalf of the individual members of the HOA and is not a real party in interest under SCRCP 17 with authority to bring the nuisance claim. A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 347-48, 356 S.E.2d 411, 414 (Ct. App. 1987); *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). A corporation's actions taken beyond the scope of its powers are *ultra vires* acts. *Id.* Article XIII.1 of the C&R, which is entitled "Enforcement," states that the "Declarant, Association, or any Owner shall have the right to enforce by proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration." The HOA's nuisance cause of action does not seek to enforce the provisions of the C&R; instead, it seeks to recover money damages against the Defendants for common-law nuisance. Nothing in the C&R or the bylaws authorizes the HOA to bring an action on behalf of the individual members of the HOA for injuries suffered by them due to an alleged common-law nuisance. The HOA's prosecution of its nuisance claim is beyond the scope of its powers and constitutes an *ultra vires* act. *See Rutherford County v. Bond Safeguard Ins. Co.*, 2010 WL 5903828, \*7 (W.D.N.C. 2010) (holding that homeowners' association lacked standing to bring an action on behalf of its members when statute underlying the formation of homeowners' associations did not grant such a power to homeowners' associations).

b. Alternatively, even assuming *arguendo* that the HOA has the authority under the C&R to bring an action on behalf of the individual members of the HOA for injuries suffered by the HOA's members because of an alleged common-law nuisance, which is denied, the HOA still lacks standing to bring such claims in its representative capacity. An organization has standing to bring suit on behalf of its members only when (i) its members would otherwise have standing to sue in their own right, (ii) the interests at stake are germane to the organization's purpose, and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). The HOA cannot meet the third prerequisite for organizational standing—that neither the claim asserted nor the relief requested requires participation of the individual members. This third prerequisite bars the HOA from seeking damages on behalf of members when each member would have to establish individual damages. The HOA's nuisance cause of action seeks recovery of money damages. Damages for nuisance depend on the injuries actually suffered as a result of the nuisance. Any monetary damages owed to the HOA would call for individualized proof and would not necessarily be common to all. The participation of individual members of the HOA would be required in assessing the damage claims because the amount of money damages sought would vary depending upon the particular circumstances of each individual member. The money damages requested will vary from member to member depending upon factors requiring their participation (i.e., each member's

view of or proximity to the allegedly blighted pool area, the number of times or frequency that each member has been prevented from using or enjoying the pool or amenities, the manner in which the alleged nuisance has negatively affected the quality of life of each of the members). Each member of the HOA cannot claim to have suffered from the alleged nuisance in exactly the same way as every other member: thus, the HOA's claim for monetary damages fails the third prong. Accordingly, the HOA does not have standing to seek monetary damages for the alleged nuisance. *See Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 552 S.E.2d 220, 226-27 (N.C. Ct. App. 2001) ("An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof."); *River Birch Associates v. City of Raleigh*, 388 S.E.2d 538, 555 (N.C. 1990) ("[W]here an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association."); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2<sup>nd</sup> Cir. 2004) ("Although the Bhopal organizations argue that they have the ability to pursue their members' damages claims without the participation of the members themselves, we disagree. The claims are that individuals have suffered bodily harm and damage to real property they own. Necessarily, each of those individuals would have to be involved in the proof of his or her claims. The district court did not err in concluding that the organizations lack standing to pursue these claims."); *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 801 F.Supp. 684, 691 (S.D.Fla. 1992) (association lacked standing to seek compensatory damages on behalf of its

members because the participation of individual members of the association would be required in assessing the damage claims because the amount of money damages sought varies, depending upon the particular circumstances of each individual member, and because the monetary relief requested will vary from member to member depending upon factors requiring their participation, i.e., their proximity to the stadium, the amount of noise and light allegedly emitted onto their property, proximity to pedestrian walkways); *United Union of Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (“[N]o federal court has allowed an association standing to seek monetary relief on behalf of its members. The courts have consistently held that claims for monetary relief necessarily require individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test.”); *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012 (6th Cir. 1989) (association lacked standing to obtain compensatory relief on behalf of individual plaintiffs where the diminished value of each plaintiff’s property as a result of the city’s alleged conduct would require individualized proof); *Telecommunications Research v. Allnet Communic. Servs., Inc.*, 806 F.2d 1093 (D.C. Cir. 1986) (nonprofit association lacked standing to pursue claim for money damages on behalf of its members); *Rutherford*, 2010 WL 5903828, \*8.

c. The HOA’s claim is barred by the applicable statute of limitations. The HOA did not commence this action until March 2, 2015. The statute of limitations began to run as of the time that the individual members of the HOA actually knew or reasonably should have known of the events that comprise the elements of the HOA’s cause of action. The individual members knew or should have known of those events more than three years prior

to the HOA's commencement of this action, thus the HOA's claim is time-barred as a matter of law.

4. All of the Plaintiff's claims are barred as a matter of law due to Plaintiff's failure to comply with the dispute resolution and arbitration procedures and requirements of the C&R. Article XII.1 of the C&R, which is entitled "Dispute Resolution and Limitations on Litigation," expressly states that "[t]he [HOA], Declarant, all Persons subject to this Declaration, and any Person not otherwise subject to this Declaration who agrees to submit to this Article (collectively, 'Bound Parties') agree to encourage the amicable resolution of disputes involving the Properties in order to avoid the emotional and financial costs of litigation." That section further states that "each Bound Party covenants and agrees that all claims, grievances or disputes between such Bound Party and any other Bound Party involving the Properties including, without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement of [the C&R], the By-Laws, the Association rules, or the Articles (collectively "Claim"), except for those Claims authorized in Section Two, shall be resolved using the procedures set forth in Section Three in lieu of filing suit in any court or initiating proceedings before any administrative tribunal seeking redress or resolution of such Claim." As part of the "mandatory procedures" set forth in the C&R, Article XII.3 requires the HOA to provide written notice of the claim, to attempt to resolve the claim by good faith negotiation, to submit the claim to mediation if the parties do not resolve the claim through negotiation, and to submit the claim to binding arbitration. Article XII.3(d)(1) also clearly states that if the parties do not resolve the claim "within 15 days of the Termination of Mediation, the Claimant shall have 15 additional days to submit the Claim to arbitration in accordance with the Rules of Arbitration contained in Exhibit '13' or the Claim shall be deemed abandoned, and

Respondent shall be released and discharged from any and all liability to Claimant arising out of such Claim . . . .” It is undisputed that the HOA did not submit its claims to binding arbitration in accordance with the requirements of Article XII.1 of the C&R. Accordingly, as a matter of law, the HOA is deemed to have abandoned the claims and the Defendants are released and discharged from any and all liability to the HOA.

5. Defendants are entitled to judgment as a matter of law against the Plaintiff on the Defendants’ counterclaim for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30, which seeks a judicial declaration that the above-referenced C&R are invalid, null, void, and unenforceable, because the undisputed evidence shows that Defendant Whipple did not own and was not deeded the subject property at the time the C&R were executed and recorded and did not possess an interest in the property, thus it lacked the right, power, or authority to record the C&R upon or affecting the subject property.

For the reasons stated above, summary judgment in favor of Defendants and against the HOA is appropriate. This motion is supported by the pleadings, depositions, affidavits, and other papers on file herein or to be filed in support of this motion, the documents recorded with the Register of Deeds for Berkeley County that are a matter of public record, and as set forth in Defendants’ memorandum of law to be filed in support of this motion.

WHEREFORE, Defendants move this Court to grant summary judgment in favor of the Defendants and against the HOA as to all causes of action alleged in the Complaint and as to Defendants’ Counterclaim for a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30 and to award Defendants such other and further relief as the Court may deem just and proper.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina  
May 25, 2016.

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2015-CP-08-00547

COKERS COMMON HOMEOWNER'S  
ASSOCIATION, INC. )

Plaintiff, )

-vs-

**REQUESTS FOR ADMISSIONS  
TO PLAINTIFF**

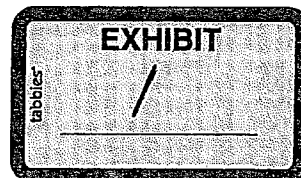
PARK INVESTORS, LLC, )  
CCT RESERVE, LLC, f/k/a HARRIS )  
STREET, LLC and WHIPPLE )  
DEVELOPMENT, INC., )

Defendants. )

**TO: BRENT HALVERSON  
ATTORNEY FOR PLAINTIFF**

The Defendants hereby request that the Plaintiff respond to the following Requests for Admissions within the time provided by the South Carolina Rules of Civil Procedure. These Requests are made in good faith and the subject hereof is genuinely relevant to this case. These Requests shall be deemed to be admitted unless denied by Plaintiff within the time specified by the Rules of Civil Procedure.

Should a denial of the Requests be received and Defendants hereafter prove the genuineness/truth of the matter(s) set forth below, Defendants will apply to the Court for an Order requiring the Plaintiff to pay the reasonable expenses, including cost of depositions, travel expenses, witness fees, and attorneys' fees, incurred in making such proof as set forth under Rules 36 and 37, SCRCP.



### REQUESTS

1. Admit that Cokers Commons Homeowners Association, Inc. was organized with the South Carolina Secretary of State and became effective on June 15, 2007.
2. Admit that the Declaration of Covenants, Conditions & Restrictions that are the subject of this lawsuit were originally filed in Berkeley County on March 14, 2008.
3. Admit that Harris Street, LLC sold the first lot in Cokers Commons subject to the Covenants, Conditions & Restrictions no later than June 6, 2008.
4. Admit that Cokers Commons Homeowners Association, Inc. has been on notice since no later than June 6, 2008, that neither CCT Reserve f/k/a Harris Street, LLC nor Whipple Development, Inc. transferred to Cokers Commons Homeowners Association, Inc. the title to the real properties that are the subject of this lawsuit.
5. Admit that Harris Street, LLC was merged into CCT Reserve, LLC on or about February 4, 2011.
6. Admit that CCT Reserve, LLC filed for bankruptcy protection on August 31, 2012 in the United States Bankruptcy Court for the Northern District of Georgia and that Cokers Commons Homeowners Association, Inc. did not file a claim in the bankruptcy action.
7. Admit that any obligations or debts owed by CCT Reserve f/k/a Harris Street, LLC to Cokers Commons Homeowners Association, Inc. were discharged by the bankruptcy court on July 2, 2013.
8. Admit that no lawsuit was filed by Cokers Commons Homeowners Association, Inc. against CCT Reserve f/k/a Harris Street, LLC or Whipple Development, Inc. until this action was filed on March 2, 2015.

9. Admit that on July 26, 2011, Agnes Rountree of the Berkeley County Building and Codes Department took physical possession of the "Amenity Area" property (Tax Map Number 235-06-10-087) by posting, at one or more conspicuous places of the Amenity Area, a notice that read, at least in material part,: "Seized by person officially charged with the collection of delinquent taxes of Berkeley County to be sold for delinquent taxes."
10. Admit that the posting referenced in Request for Admissions number 9 was open for all owners and members of the Cokers Commons Homeowners Association, Inc. to see.
11. Admit that an advertisement complying with the requirements of SC Code section 12-51-40(d) was published in the Post and Courier on October 20, 2011, October 27, 2011, and November 3, 2011, advertising the Amenity Area property for sale at public auction.
12. Admit that Cokers Commons Homeowners Association, Inc. had an opportunity to participate in the public auction of the Amenity Area property.
13. Admit that Cokers Commons Homeowners Association, Inc. did not participate in the public auction or bid on the Amenity Area property.
14. Admit that Park Investors, LLC was the successful bidder for the Amenity Area property on November 7, 2011.

15. Admit that the owners of the following parcels of real property were not given notice  
of the Plaintiff's intention to file this lawsuit:

|               |               |               |               |               |
|---------------|---------------|---------------|---------------|---------------|
| 235-06-12-001 | 235-06-12-011 | 235-06-12-021 | 235-06-12-031 | 235-06-12-041 |
| 235-06-12-002 | 235-06-12-012 | 235-06-12-022 | 235-06-12-032 | 235-06-12-042 |
| 235-06-12-003 | 235-06-12-013 | 235-06-12-023 | 235-06-12-033 | 235-06-12-043 |
| 235-06-12-004 | 235-06-12-014 | 235-06-12-024 | 235-06-12-034 | 235-06-12-053 |
| 235-06-12-005 | 235-06-12-015 | 235-06-12-025 | 235-06-12-035 | 235-06-12-054 |
| 235-06-12-006 | 235-06-12-016 | 235-06-12-026 | 235-06-12-036 | 235-06-12-055 |
| 235-06-12-007 | 235-06-12-017 | 235-06-12-027 | 235-06-12-037 | 235-06-12-056 |
| 235-06-12-008 | 235-06-12-018 | 235-06-12-028 | 235-06-12-038 | 235-06-12-057 |
| 235-06-12-009 | 235-06-12-019 | 235-06-12-029 | 235-06-12-039 |               |
| 235-06-12-010 | 235-06-12-020 | 235-06-12-030 | 235-06-12-040 |               |

16. Admit that the owners of the following parcels of real property did not vote in favor  
of filing this lawsuit:

|               |               |               |               |               |
|---------------|---------------|---------------|---------------|---------------|
| 235-06-12-001 | 235-06-12-011 | 235-06-12-021 | 235-06-12-031 | 235-06-12-041 |
| 235-06-12-002 | 235-06-12-012 | 235-06-12-022 | 235-06-12-032 | 235-06-12-042 |
| 235-06-12-003 | 235-06-12-013 | 235-06-12-023 | 235-06-12-033 | 235-06-12-043 |
| 235-06-12-004 | 235-06-12-014 | 235-06-12-024 | 235-06-12-034 | 235-06-12-053 |
| 235-06-12-005 | 235-06-12-015 | 235-06-12-025 | 235-06-12-035 | 235-06-12-054 |
| 235-06-12-006 | 235-06-12-016 | 235-06-12-026 | 235-06-12-036 | 235-06-12-055 |
| 235-06-12-007 | 235-06-12-017 | 235-06-12-027 | 235-06-12-037 | 235-06-12-056 |
| 235-06-12-008 | 235-06-12-018 | 235-06-12-028 | 235-06-12-038 | 235-06-12-057 |
| 235-06-12-009 | 235-06-12-019 | 235-06-12-029 | 235-06-12-039 |               |
| 235-06-12-010 | 235-06-12-020 | 235-06-12-030 | 235-06-12-040 |               |

17. Admit that the owners of the following parcels of real property are not members of the Cokers Commons Homeowners Association, Inc. by virtue of their ownership of the following parcels:

|                   |                   |                   |                   |                   |                   |
|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| 235-06-12-<br>001 | 235-06-12-<br>011 | 235-06-12-<br>021 | 235-06-12-<br>031 | 235-06-12-<br>041 | 235-06-12-<br>051 |
| 235-06-12-<br>002 | 235-06-12-<br>012 | 235-06-12-<br>022 | 235-06-12-<br>032 | 235-06-12-<br>042 | 235-06-12-<br>052 |
| 235-06-12-<br>003 | 235-06-12-<br>013 | 235-06-12-<br>023 | 235-06-12-<br>033 | 235-06-12-<br>043 | 235-06-12-<br>053 |
| 235-06-12-<br>004 | 235-06-12-<br>014 | 235-06-12-<br>024 | 235-06-12-<br>034 | 235-06-12-<br>044 | 235-06-12-<br>054 |
| 235-06-12-<br>005 | 235-06-12-<br>015 | 235-06-12-<br>025 | 235-06-12-<br>035 | 235-06-12-<br>045 | 235-06-12-<br>055 |
| 235-06-12-<br>006 | 235-06-12-<br>016 | 235-06-12-<br>026 | 235-06-12-<br>036 | 235-06-12-<br>046 | 235-06-12-<br>056 |
| 235-06-12-<br>007 | 235-06-12-<br>017 | 235-06-12-<br>027 | 235-06-12-<br>037 | 235-06-12-<br>047 | 235-06-12-<br>057 |
| 235-06-12-<br>008 | 235-06-12-<br>018 | 235-06-12-<br>028 | 235-06-12-<br>038 | 235-06-12-<br>048 |                   |
| 235-06-12-<br>009 | 235-06-12-<br>019 | 235-06-12-<br>029 | 235-06-12-<br>039 | 235-06-12-<br>049 |                   |
| 235-06-12-<br>010 | 235-06-12-<br>020 | 235-06-12-<br>030 | 235-06-12-<br>040 | 235-06-12-<br>050 |                   |

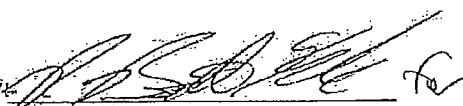
18. Admit that the following parcels of real property are not subject to the Covenants,

Conditions & Restrictions for Cokers Commons:

|                   |                   |                   |                   |                   |                   |
|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| 235-06-12-<br>001 | 235-06-12-<br>011 | 235-06-12-<br>021 | 235-06-12-<br>031 | 235-06-12-<br>041 | 235-06-12-<br>051 |
| 235-06-12-<br>002 | 235-06-12-<br>012 | 235-06-12-<br>022 | 235-06-12-<br>032 | 235-06-12-<br>042 | 235-06-12-<br>052 |
| 235-06-12-<br>003 | 235-06-12-<br>013 | 235-06-12-<br>023 | 235-06-12-<br>033 | 235-06-12-<br>043 | 235-06-12-<br>053 |
| 235-06-12-<br>004 | 235-06-12-<br>014 | 235-06-12-<br>024 | 235-06-12-<br>034 | 235-06-12-<br>044 | 235-06-12-<br>054 |
| 235-06-12-<br>005 | 235-06-12-<br>015 | 235-06-12-<br>025 | 235-06-12-<br>035 | 235-06-12-<br>045 | 235-06-12-<br>055 |
| 235-06-12-<br>006 | 235-06-12-<br>016 | 235-06-12-<br>026 | 235-06-12-<br>036 | 235-06-12-<br>046 | 235-06-12-<br>056 |
| 235-06-12-<br>007 | 235-06-12-<br>017 | 235-06-12-<br>027 | 235-06-12-<br>037 | 235-06-12-<br>047 | 235-06-12-<br>057 |
| 235-06-12-<br>008 | 235-06-12-<br>018 | 235-06-12-<br>028 | 235-06-12-<br>038 | 235-06-12-<br>048 |                   |
| 235-06-12-<br>009 | 235-06-12-<br>019 | 235-06-12-<br>029 | 235-06-12-<br>039 | 235-06-12-<br>049 |                   |
| 235-06-12-<br>010 | 235-06-12-<br>020 | 235-06-12-<br>030 | 235-06-12-<br>040 | 235-06-12-<br>050 |                   |

19. Admit that the Tax Deed to Park Investors, LLC attached hereto as Exhibit A is a true and genuine copy of the tax deed to Park Investors for the real property identified as TMS 235-06-10-087, which is recorded with the Register of Deeds for Berkeley County, South Carolina, in Book R, Volume: 11016, Page 204.
20. Admit that the Declaration of Covenants, Conditions and Restrictions for Cokers Commons attached hereto as Exhibit B is a true and genuine copy of amended Declaration of Covenants, Conditions and Restrictions for Cokers Commons, which is recorded with the Register of Deeds for Berkeley County, South Carolina, in Book R, Volume: 7288, Page 283.
21. Admit that the Berkeley County Property Card attached hereto as Exhibit C for the real property owned by Harris Street, LLC and identified as TMS 235-06-12-057 contains information that is true and consistent with the actual Property Card maintained by the Berkeley County Tax Assessor's Office.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402  
(843) 577-6726 telephone  
(843) 724-8036 facsimile  
[dblanchard@rrhlawfirm.com](mailto:dblanchard@rrhlawfirm.com)  
ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina  
July 13, 2015

Berkeley County  
Cynthia B. Forte  
Register of Deeds  
Moncks Corner 294616120

00023841 Vol:11016 Pg: 204



53 2014 00023841

Instrument Number: 2014- 00023841

As  
Deed

Recorded On: October 14, 2014

Parties: HARRIS STREET LLC  
To

PARK INVESTORS LLC

Recorded By: BERKELEY COUNTY DELINQUENT TAX COLLECTOR

Num Of Pages: 5

Comment:

**\*\* Examined and Charged as Follows: \*\***

Deed 10.00

Recording Charge: 10.00

|          | Tax Amount | Consideration<br>Amount | RS#/CS# |
|----------|------------|-------------------------|---------|
| Deed Tax | 5.55       | 1,400.00                | D 27073 |

Deed County Tax 1.65

Deed State Tax 3.90

Tax Charge: 5.55

RECEIVED

Oct 14, 2014

ASSESSOR  
BERKELEY COUNTY SC  
JANET B. JUROSKO  
AUDITOR BERKELEY COUNTY SC

**\*\* THIS PAGE IS PART OF THE INSTRUMENT \*\***

I hereby certify that the within and foregoing was recorded in the Register of Deeds Office For: Berkeley County, SC  
**File Information:**

**Record and Return To:**

Document Number: 2014- 00023841

Receipt Number: 499512

Recorded Date/Time: October 14, 2014 01:41:25P

Book-Vol/Pg: Bk-R VI-11016 Pg-204

Cashier / Station: O Howell / Cash Station 6

BERKELEY COUNTY DELINQUENT TAX COLLECTOR

1003 HIGHWAY 52

MONCK'S CORNER SC 29461



*Cynthia B. Forte*

Cynthia B Forte - Register of Deeds

10.00  
5.55  
15.55

No Title Search Performed, No Title Opinion Given, No Review of the Restrictions and Covenants

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BERKELEY )

**TAX DEED**

Defaulting Taxpayer(s)  
**Harris Street, LLC**

00023841 Vol:11016 Pg: 205

Name/Mailing Address of Purchaser(s)  
**Park Investors, LLC**  
**P. O. Box 723848**  
**Atlanta, GA 31139**

Doc # 00023841

Property Address:  
**117 Kirkland Street**  
**Goose Creek, SC 29445**

Tax Map Number:  
**235-06-10-087**

WHEREAS, ad valorem property taxes were levied and assessed in the name(s) of the following taxpayer(s) for the calendar year indicated:

**2010 Harris Street, LLC**

WHEREAS, on **April 8, 2011**, pursuant to execution dated **March 17, 2011**, from the Berkeley County Treasurer, and in accordance with S.C. Code Section 12-51-40(a), I mailed a "Notice of Delinquent Property Taxes, Penalties, Assessments, and Costs," by regular first class mail with proper postage affixed, to each of the following persons/entities at the various addresses set forth below:

Name and Address  
**Harris Street, LLC**  
**c/o TOH Associates, LTD**  
**P. O. Box 671048**  
**Marietta, GA 30066**

WHEREAS, on **May 13, 2011**, in accordance with S.C. Code Section 12-51-40(b), I mailed a "Notice of Delinquent Property Taxes, Penalties, Assessments, and Costs," by certified mail, return receipt requested-restricted delivery pursuant to the United States Postal Service "Domestic Mail Manual Section S912" to the following persons/entities at the various addresses set forth with the results indicated below:

Name and Address  
**Harris Street, LLC**  
**c/o TOH Associates, LTD**  
**P. O. Box 671048**  
**Marietta, GA 30066**

Result  
**Returned Unclaimed**

WHEREAS, on **July 26, 2011**, a notice complying with the requirements of S.C. Code Section 12-51-40(c), was posted at one or more conspicuous places on the premises by **Agnes Rountree** of the Berkeley County Building and Codes Department; and

WHEREAS, an advertisement complying with the requirements of S.C. Code Section 12-51-40(d), was published in the **Post and Courier**, a newspaper of general circulation in Berkeley County, on **October 20, 2011, October 27, 2011, and November 3, 2011**, advertising the property for sale at public auction; and

WHEREAS, on **November 7, 2011**, I sold the property for delinquent taxes in accordance with the requirements to the Grantee(s) herein, **Park Investors, LLC**, the successful bidder(s), and the amount of the bid was paid to me as required by S.C. Code Section 12-51-60; and

WHEREAS, on **September 28, 2012**, , in accordance with the requirements of S.C. Code Section 12-51-120, I mailed a notice of the approaching end of the redemption period, by certified mail, return receipt requested-restricted delivery, to each of the following persons/entities at the addresses set forth with the result indicated below:

Name and Address  
**Harris Street, LLC**  
**c/o TOH Associates, LTD**  
**P. O. Box 671048**  
**Marietta, GA 30066**

Result  
**Returned Unclaimed**

WHEREAS, the property was not redeemed in accordance with the requirements of S.C. Code Section 12-51-90; and

NOW THEREFORE, I, Virginia R. Hamilton, Delinquent Tax Collector of Berkeley County, in consideration of the receipt of **\$1,400.00** which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto **Park Investors, LLC**, the following described property:

**SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF BY REFERENCE**

Together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining and subject to easements and restrictions of record.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, its successors and/or assigns forever.

Any reference in this instrument to the singular shall include the plural and vice versa. Any reference to one gender shall include the others. Such words of inheritance shall be applicable as required by the gender of the Grantee.

IN WITNESS WHEREOF, the Grantor has hereunto set her hand and the seal of her office on October 8, 2013, 2014.

Virginia R. Hamilton  
Virginia R. Hamilton  
Delinquent Tax Collector  
Berkeley County, South Carolina

Signed, sealed, and delivered  
in the presence of:

Ginnette Richardson  
J. Moore

STATE OF SOUTH CAROLINA )

COUNTY OF BERKELEY )

ACKNOWLEDGMENT

Personally appeared before me, Virginia R. Hamilton, Delinquent Tax Collector of Berkeley County who acknowledged that she executed the foregoing Tax Deed on October 8, 2013, 2014

Gouvenia Greene  
Notary Public for South Carolina  
My commission expires: 9/9/24

**Exhibit A**  
**Property Description**

All that certain piece, parcel or tract of land, situate, lying and being in the corporate limits of the City of Goose Creek, Berkeley County, South Carolina, containing .43 acre, more or less, and shown as **100 Kirkland Street Amenity Area, Cokers Crossing Phase IV**, on a plat prepared by F. Elliott Quinn, III, RLS, dated July 6, 2007, and recorded in the Office of the Register of Deeds for Berkeley County, S.C., in **Plat Cabinet N, at Page 2-H**; and having such size, shape, forms, metes, bounds, and delineations as are shown on said plat.

BEING a portion of the property conveyed to Harris Street, LLC, by Westgate Partners, L.P., by a deed dated April 14, 2008, and recorded in the Office of the Register of Deeds for Berkeley County, S.C., in **Book 7312, at page 19, et seq.**

**TMS: 235-06-10-087**

**Exhibit B**

Declaration of Covenants, Conditions and Restrictions for  
Cokers Commons

(same document as pages 0042 to 0079)

# Unofficial Berkeley County Property Card



## Summary Information:

TMS: 235-06-12-057  
Owner Information:  
HARRIS STREET LLC  
PO BOX 671048  
MARIETTA, GA 300660135

Council District: C2  
Fire District: F18  
Tax District: T18  
TIS Zone: 9  
Jurisdiction: 1P  
Acres: 0.00  
Lots: 1.0

Neighborhood: S351 - COKERS COMMONS  
Appraiser ID: SH  
Lot: HOA Block: OPEN Section: PH4B  
Zoning: Goose Creek - GC  
Homestead Exempt: No  
Parent TMS: 235-00-00-054  
Notes:

Site addresses:

## Previous Owner History:

## Sales Information:

Last Sale Date: 00000000  
Recording Date: 00000000  
Sale Price: \$.00

Plat Information:  
Deed Book:  
Deed Page:

Sales Validity:  
Validity Other:

## Valuation Information:

Building Market: 0  
Land Market: 23,000

Building Taxable (4% Res): 0  
Building Taxable (6% Other): 0  
Building Taxable (4% Ag): 0  
Building Taxable (6% Ag): 0

Land Taxable (4% Res): 0  
Land Taxable (6% Other): 23,000  
Land Taxable (4% Ag): 0  
Land Taxable (6% Ag): 0

Total Taxable Value: 23,000    Total Assessment: 1,380

## Fee Summary:

| Fee Name                   | Fee Amount |
|----------------------------|------------|
| Goose Creek Sanitation Fee | 0          |

## Building Information:

Building Count: 0  
Residence Count: 0

Yard Item Count: 0  
Mobile Homes on Property: 0



**Image on file:**



No sketches found for this property.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

COKERS COMMON HOMEOWNER'S  
ASSOCIATION, INC.

Plaintiff,

-vs-

PARK INVESTORS, LLC,  
CCT RESERVE, LLC, f/k/a HARRIS  
STREET, LLC and WHIPPLE  
DEVELOPMENT, INC.,

Defendants,

) IN THE COURT OF COMMON PLEAS  
) NINTH JUDICIAL CIRCUIT  
) CASE NO. 2015-CP-08-00547

**CERTIFICATE OF SERVICE**

The undersigned states that on July 14, 2015, she served a copy of Defendants' Requests for Admissions to Plaintiff by hand delivery to the following addresses:

Brent S. Halversen, Esquire  
Halversen & Associates  
171 Church Street, Suite 330  
Charleston, SC 29401

ROSEN, ROSEN & HAGOOD, LLC

By: Suzy Eschenbrenner  
Suzy Eschenbrenner  
Paralegal

Charleston, South Carolina  
July 14, 2015

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2015-CP-08-547

) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2015-CP-08-547

;

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## RESPONSES

1. Admit.
2. Admit the Declaration of Covenants, Conditions and Restrictions was first recorded in Berkeley County on the stated date of March 14, 2008.
3. Denied. Harris Street, LLC sold the first lot in Cokers Commons subject to the Covenants, Conditions and Restrictions on May 30, 2008.
4. Denied.
5. Admit.
6. Admit CCT Reserve, LLC filed for bankruptcy protection on August 31, 2012. Plaintiff further responds and admits it did not file a claim for its contractual beneficial interests in the bankruptcy action due to Defendants failure to disclose its legal interest in TMS Nos. 235-06-10-087 and 235-06-12-057 to the bankruptcy court as it was required to do under federal law. Had Defendant(s) disclosed these assets to the bankruptcy court, Plaintiff would have been given notice of the proceedings such that it could have filed a claim.
7. Denied. See Number 6 above.
8. Admit. The Plaintiff was not made aware it had a claim until 2014.
9. Unknown. The Plaintiff has made a reasonable inquiry and the information known or readily obtainable is insufficient to admit or deny the request.

10. Unknown. The Plaintiff has made a reasonable inquiry and the information known or readily obtainable is insufficient to admit or deny the request.
11. Unknown. The Plaintiff has made a reasonable inquiry and the information known or readily obtainable is insufficient to admit or deny the request.
12. Admit Plaintiff in theory could have participated in the public auction of the amenity area; denied it should have or would have since it should have received the property at no cost.
13. Admit Plaintiff did not participate in the public auction of the amenity area; denied it should have or would have since it should have received the property at no cost.
14. Admit.
15. Admit the stated owners were not given notice of the Plaintiff's intention to file this lawsuit; Denied that the stated owners had the right to receive such notice as the 4-B lots were not subjected to the Covenants, Conditions and Restrictions first recorded on March 14, 2008.
16. Admit the stated owners did not vote in favor of filing this lawsuit; Denied that such owners had a right to vote as the 4-B lots were not subjected to the Covenants, Conditions and Restrictions first recorded on March 14, 2008.
17. Admit.

18. Admit.
19. Admit.
20. Admit that the referenced Exhibit "B" appears to be a copy of the Declaration of Covenants and Restrictions for Cokers Commons that was re-recorded on April 15, 2008.
21. Admit.

**HALVERSEN & ASSOCIATES, LLC**

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

*Brent S. Halversen*  
Brent S. Halversen  
171 Church Street, Suite 330  
Charleston, SC 29401  
T: 843-284-5790  
F: 864-326-4844  
Email: [brent@halversenlaw.com](mailto:brent@halversenlaw.com)  
*Attorneys for the Plaintiff*

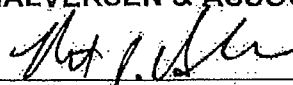
*August 11<sup>th</sup>*, 2015.  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

I certify that I served the foregoing Responses to Defendants' Requests for Admission upon counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 11<sup>th</sup> day of August, 2015.

**HALVERSEN & ASSOCIATES, LLC**

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



Brent S. Halversen  
171 Church Street, Suite 330  
Charleston, SC 29401  
T: 843-284-5790  
F: 864-326-4844  
Email: [brent@halversenlaw.com](mailto:brent@halversenlaw.com)

Charleston, SC  
August 11, 2015

**Exhibit 3**

Deposition Transcript of William Freeman Barber, Jr. taken January 26, 2016

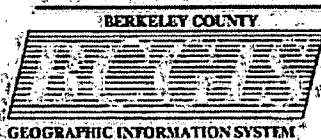
(same document as pages 0159 to 0241)



## Berkeley County GIS Online Mapping

The county of Berkeley and its GIS Department disclaims accountability for this product and makes no warranty express or implied concerning the accuracy thereof. Responsibility for interpretation and application of this product lies with the user.

Friday, January 22, 2016



DEFENDANT'S

EXHIBIT NO. 1  
FOR IDENTIFICATION

DATE: 1-20-16

RPTR: SG



Vote by the Members of the Cokers Commons  
Homeowners & Landowners

Feb 26, 2015

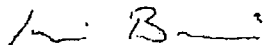
Brent Halversen, Esq  
Halversen & Associates, LLC  
171 Church St Suite 330  
Charleston SC 29401

Dear Mr Halversen,

A vote was taken on Feb 20, 2015 by the current homeowners and landowners in the Cokers Commons Subdivision of Goose Creek SC and the results were to pursue legal action against Park Investors, Whipple Development, Harri's St Properties or any other related entity for failure to deliver and/or maintain the common areas within the subdivision.

Thank you for your help and please let us know if we can be of further assistance.

Yours truly,



Kerine Borrillo  
Verifying Homeowner



Freeman Barber  
Landowner Representative





DEPARTMENT OF PUBLIC WORKS

Steven R. Price  
Director

10 December, 2014

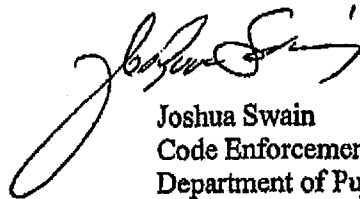
Park Investors LLC  
P.O. Box 723848  
Atlanta, GA 31139

To Whom It May Concern:

I am writing to inform you that the property listed as 117 Kirkland Street, Goose Creek, SC 29445 is in violation of Section 93.145 of the City of Goose Creek Code of Ordinances. Specifically, the pool is not being properly maintained. In accordance with Section 93.161 of the City of Goose Creek Code of Ordinances, the pool must be brought into compliance within thirty (30) days of the date of this letter.

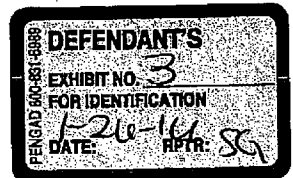
It is requested that you take the required action to bring the property into compliance as directed herein. You have been identified as a responsible party for this property. If the property is not brought into compliance as directed, "the City will cause it to be abated and will charge the costs to the owner, occupant, or person causing, permitting or maintaining the violation". Please call me at 843-824-2200 (Ext 267) at your earliest convenience to discuss your intentions. Your assistance in this matter is greatly appreciated.

Sincerely,



Joshua Swain  
Code Enforcement Officer  
Department of Public Works

Cc: Public Works Director





DEPARTMENT OF PUBLIC WORKS

Steven R. Price  
Director

6 October 2011

CCT Reserve LLC  
P.O. Box 671048  
Marietta, GA 30066

To Whom It May Concern:

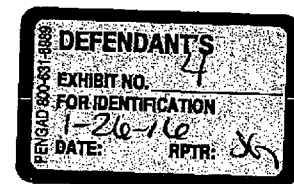
I am writing to inform you that the property listed as 117 Kirkland Street, Goose Creek, SC 29445 is in violation of the City of Goose Creek Code of Ordinances. Specifically, the pool is not being properly maintained. The current condition of the pool constitutes a threat to public health and safety. The pool must be immediately brought into compliance to the extent that the present threat to public health and safety has been eliminated.

It is requested that you take the required action to bring the property into compliance. You have been identified as a responsible party for this property. Please call me at 843-824-2200 (Ext 267) at your earliest convenience to discuss your intentions. Your assistance in this matter is greatly appreciated.

Sincerely,

Joshua Swain  
Code Enforcement Officer  
Department of Public Works

Cc: Public Works Director



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 25<sup>th</sup> day of May, 2016, a true and correct copy of forgoing pleading was placed in an envelope and hand-delivered to:

Brent S. Halversen, Esquire  
Halversen & Associates  
171 Church Street, Suite 330  
Charleston, SC 29401



\_\_\_\_\_  
Attorney for Defendants

FILED  
2016 MAY 27 PM 12:48  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, SC

TSM

|                            |   |                            |
|----------------------------|---|----------------------------|
| STATE OF SOUTH CAROLINA    | ) | THE COURT OF COMMON PLEAS  |
|                            | ) |                            |
| COUNTY OF BERKELEY         | ) | DOCKET NO. 2015-CP-08-0547 |
|                            | ) |                            |
|                            | ) |                            |
| COKERS COMMONS HOMEOWNERS  | ) |                            |
| ASSOCIATION, INC.          | ) |                            |
|                            | ) |                            |
| Plaintiff                  | ) |                            |
|                            | ) |                            |
| vs.                        | ) |                            |
|                            | ) |                            |
| PARK INVESTORS, LLC, et al | ) |                            |
|                            | ) |                            |
| Defendants                 | ) |                            |
|                            | ) |                            |
|                            | ) |                            |
|                            | ) |                            |
|                            | ) | TRANSCRIPT OF RECORD       |

---

April 15, 2016  
Moncks Corner, S. Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

A P P E A R A N C E S:

BRENT S. HALVERSEN, ESQ.  
Attorney for the Plaintiff

DANIEL FRANCIS BLANCHARD, ESQ.  
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M  
Circuit Court Reporter

| INDEX TO PROCEEDINGS              | PAGE |
|-----------------------------------|------|
| PROCEEDINGS                       | 3    |
| MOTION FOR SUMMARY JUDGMENT       |      |
| Remarks by Mr. Halversen          | 4    |
| Remarks by Mr. Blanchard          | 9    |
| Reply by Mr. Halversen            | 23   |
| Response by Mr. Blanchard         | 25   |
| Reply by Mr. Halversen            | 28   |
| CERTIFICATE OF THE COURT REPORTER | 32   |

INDEX TO EXHIBITS  
No exhibits were introduced

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 PROCEEDINGS

2 THE COURT: Who is here representing who? This is  
3 Cokers Commons Homeowners Association versus Park  
4 Investors, right? Who is here representing who?

5 MR. HALVERSEN: I represent Cokers Commons  
6 Homeowners Association.

7 THE COURT: Who is I?

8 MR. HALVERSEN: Brent Halversen for the record,  
9 Your Honor.

10 THE COURT: For the record; I know who you are but  
11 for the record, okay.

12 MR. HALVERSEN: I know.

13 MR. BLANCHARD: Frank Blanchard of Rosen Hagood on  
14 behalf of the defendants.

15 THE COURT: Okay. Motion for summary judgment is  
16 that correct?

17 MR. HALVERSEN: Partial summary judgment. And I  
18 just clocked in a memo this morning. May I approach?

19 THE COURT: Yes, sir.

20 [Whereupon, Mr. Halversen provides documents to the  
21 court]

22 THE COURT: Somebody sent some stuff to the law  
23 clerk earlier, right? It was a whole stack of exhibits.

24 MR. BLANCHARD: It was a memorandum of law, Your  
25 Honor. We sent it yesterday. I didn't -- I emailed it

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 ---

2 THE COURT: --- about 50 pages of exhibits?

3 MR. BLANCHARD: The exhibits were the bulk of it  
4 but the memorandum was like eight pages.

5 THE COURT: You got a copy of the memorandum?

6 MR. BLANCHARD: I do, Your Honor.

7 [Whereupon, Mr. Blanchard provides documents to the  
8 court]

9 THE COURT: All right Mr. Halversen, I'll be glad  
10 to hear you.

11 MR. HALVERSEN: Thank you, Your Honor. Cokers  
12 Commons is a subdivision in Goose Creek. There is some  
13 common areas there, Judge that were never turned over to  
14 the Association. And we have alleged in our complaint  
15 that according to the CCR'S covenants and restrictions  
16 those common areas should have been turned over pursuant  
17 to those terms. This is all background, Your Honor.

18 But we tried negotiating with the developer to do  
19 that. The developers left the common areas in a state of  
20 blight. There is a pool and there is a grassy area. The  
21 pool has been collecting whatever; it's nasty. It's been  
22 cited by the town of Goose Creek for violations of  
23 whatever municipal ordinances pertain to that; I'm not  
24 sure exactly what it was. So we tried negotiating and we  
25 went to the developer but that didn't work over a couple

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 of years so they've come to me and we filed, I did on  
2 their behalf a Dec Action to interpret these documents  
3 and get some relief from the court. It's my  
4 understanding Goose Creek is waiting for this lawsuit to  
5 run its course before they do anything.

6 In response to filing that Dec action the developer  
7 has filed a counterclaim, two counterclaims; one for a  
8 Dec action and another for indemnity. And the indemnity  
9 count is why we're here this morning. The Dec action  
10 they filed is basically seeking alternative relief in the  
11 opposite of what we're asking essentially.

12 THE COURT: Who asked you to indemnity?

13 MR. HALVERSEN: Well, that's why we're here because  
14 Your Honor they're basing their indemnity count on the  
15 covenants and restrictions in one section. And according  
16 to the case law you cannot get indemnity between two  
17 contractual parties. There has to be a third party  
18 claim. And I think we have a disagreement as to the  
19 interpretation of the covenants and restrictions as it  
20 pertains to that ---

21 THE COURT: --- so it's not equitable  
22 indemnification; they're basing it on express  
23 indemnification in the covenants.

24 MR. HALVERSEN: That's right, Your Honor.

25 THE COURT: What's the language in the covenant?

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 MR. HALVERSEN: It's in my memorandum. Its cited  
2 on the operative part is...

3 THE COURT: Whereabouts in your memorandum?

4 MR. HALVERSEN: Its page four of my memorandum and  
5 you really only have to read the ---

6 THE COURT: --- article it looks like 13?

7 MR. HALVERSEN: That's right, Your Honor.

8 THE COURT: Okay.

9 MR. HALVERSEN: In section one you really only have  
10 to read the first sentence. It says the Association  
11 shall indemnify and hold harmless each of its directors,  
12 officers, members of any committee appointed pursuant to  
13 the bylaws of the Association and the board and the  
14 declarant -- and the declarant is the developer, Your  
15 Honor -- against all contractual and other liabilities to  
16 others. And that is the operative part of this. This is  
17 a third party indemnity claim -- indemnity agreement. It  
18 is contemplating claims made by others.

19 Your Honor, there is no claim being made here by  
20 other people. This is strictly a claim made by the  
21 developer slash declarant and the Association. Mr.  
22 Blanchard would argue that well, there is this Court of  
23 Appeals case that says that -- it was actually reversed  
24 but in that Court of Appeals case there was an indemnity  
25 provision between two parties. The Court of Appeals said

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 that's okay, you can do that. The Supreme Court reversed  
2 that case ---

3 THE COURT: --- how can you -- if you've just got  
4 two parties how does indemnification even arise?

5 MR. HALVERSEN: Well, that's my ---

6 THE COURT: --- indemnification is protection  
7 against a third party.

8 MR. HALVERSEN: Exactly, Your Honor, that's why ---

9 THE COURT: --- that's the definition of  
10 indemnification.

11 MR. HALVERSEN: Exactly, Your Honor, and that's why  
12 I'm filing this motion for summary judgment. It's  
13 essentially a motion for judgment on the pleadings as to  
14 respect of this count. And I'm not just filing this to  
15 be pesky on this count. The reason why I'm doing it is  
16 because we're going to have a Dec action. They're going  
17 to assert whatever arguments they are going to make.  
18 It's going to be a judge trial. If there is a  
19 contractual indemnity count and we have to have a jury  
20 trial on this issue where there is no third party claim  
21 it doesn't make any sense and it's going to make things  
22 way more messy than they need to be.

23 THE COURT: Let's back up for the history just a  
24 second if I may. Who is responsible for maintaining you  
25 said the pool and the common grounds now under the I

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 guess the covenants or master deed or whatever they have?

2 MR. HALVERSEN: Well the Association is but it's  
3 not titled in their name and the developer is demanding  
4 money to turn it over and says that we're trespassing.

5 THE COURT: What does the restrictions say? Is it  
6 a master deed or covenants or what is it?

7 MR. HALVERSEN: The covenants and restrictions ---

8 THE COURT: --- when do the covenants and  
9 restrictions say the property's common area will be  
10 turned over to the homeowner's association or does it?

11 MR. HALVERSEN: It does, Your Honor, and that's the  
12 basis of the Dec action. It says when the first lot is  
13 deeded out of the developer to any particular lot owner  
14 and that happened I think in 2007 or '08; something like  
15 that. So that's our case; that's the case we're going to  
16 put on for the Dec action.

17 THE COURT: Okay.

18 MR. HALVERSEN: So essentially we have a  
19 disagreement over interpreting the cases that are cited  
20 in our memorandum and how they apply I believe that they  
21 stand for the proposition that you can only have  
22 indemnity when there is a third party claim not between  
23 two parties. The clause in our indemnity count that we  
24 have with one another is specifically a third party type  
25 indemnity agreement specifically because it says two

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1 others. And the other language in the indemnity count  
2 reinforces that. It says it is intended that the  
3 foregoing indemnification shall include indemnification  
4 against all costs and expenses including but not limited  
5 to counsel fees, amounts of judgment paid, and amounts of  
6 paid in settlement. It is contemplating other people  
7 either making a claim against them or they have to pay  
8 off somebody and then come back to me for indemnity.

9 So it's a third party claim; there are no third  
10 party claims here, Your Honor. The clause is a third  
11 party claim so summary judgment is appropriate on this  
12 count. And then we are going to have a Dec action and  
13 sort out all these issues with respect to who should have  
14 done what and whose responsibility is what and what  
15 somebody may have ---

16 THE COURT: --- that's fine. I was just trying to  
17 get a little background from you. I'll be glad to hear  
18 you.

19 MR. BLANCHARD: Good morning, Your Honor. Thank  
20 you for your time. There are two issues. One is whether  
21 this case involves what is called second party  
22 indemnification and we submit that under the case law  
23 this clause does include second party indemnification.  
24 South Carolina law is not ---

25 THE COURT: --- who is homeowner's association

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1 indemnifying you against?

2 MR. BLANCHARD: Well, the way the provision ---

3 THE COURT: --- I didn't ask you that. I said who  
4 is the association in your interpretation indemnifying  
5 you against? What are they indemnifying you? Either  
6 you've got a cause of action you've got against them or  
7 they've got a cause of action against you. What does  
8 indemnification have to do with it?

9 MR. BLANCHARD: It has to do with the fact that  
10 they, the homeowner's association has brought a cause of  
11 action against the declarant.

12 THE COURT: Well, you counterclaimed against them;  
13 its two parties. Y'all resolved those differences. What  
14 does indemnification have to do with anything?

15 MR. BLANCHARD: Because the contract states that if  
16 the declarant is sued ---

17 THE COURT: --- well then you sue them on contract.

18 MR. BLANCHARD: That's what we've done.

19 THE COURT: Well, but that doesn't have to do  
20 anything to do with indemnification; you sue them on  
21 contract, breach of contract.

22 MR. BLANCHARD: Well, its styled as indemnification  
23 or a hold harmless. Either way we've sued them on that  
24 provision. And what it states is that if the declarant,  
25 our client ---

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1 THE COURT: --- how can you have hold harmless  
2 indemnification unless there is a third party? The  
3 definition of indemnification is I'm going to protect if  
4 Mr. Halversen sues you I agree I will pay for it. That's  
5 indemnification. If you sue me and I counterclaim you  
6 how is indemnification involved in that?

7 MR. BLANCHARD: In the Laurens case, which Mr.  
8 Halversen ---

9 THE COURT: --- I didn't ask you what the case  
10 says. How is it involved in that just the definition of  
11 indemnification?

12 MR. BLANCHARD: Well, the definition is a contract  
13 or insurance by which one person engages to secure  
14 another against an anticipated loss or prevent him from  
15 being indemnified by the legal consequences of an act or  
16 forbearance on the part of one of the parties or of some  
17 third person.

18 THE COURT: So one of the parties; plural.

19 MR. BLANCHARD: One of the parties to the contract.  
20 That's what we're dealing with. We're dealing with a  
21 situation where one of the parties, their client, has  
22 brought a claim against our client, the other party to  
23 the contract, and this contract says that if our client  
24 is sued because of it being a declarant under the  
25 covenants and restrictions then it is entitled to

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1 indemnification from the HOA. And that's what we are  
2 submitting. My second point, Your Honor, and this is  
3 probably the primary point is that this lawsuit we have  
4 alleged in the pleadings is not a lawsuit by the  
5 homeowner's association. What this lawsuit is is an  
6 action brought by another developer who has bought up  
7 several lots in this community and is suing and asserting  
8 damages on behalf of individual homeowners and individual  
9 members in the name of the homeowner's association. So  
10 this is really a third party action being disguised as a  
11 lawsuit ---

12 THE COURT: --- bring that party in and then you  
13 may have some indemnification.

14 MR. BLANCHARD: Well, the indemnification is by the  
15 homeowner's association.

16 THE COURT: I understand; against this other  
17 developer. They need to be in the lawsuit if you're  
18 going to talk about indemnification.

19 MR. BLANCHARD: We can bring them in Your Honor but  
20 the way the indemnification provision works is that they  
21 are saying that if a third party brings a claim against  
22 our client then our client is entitled to indemnification  
23 from the homeowner's association. What we're saying in  
24 this lawsuit is that this lawsuit is not a claim by the  
25 homeowner's association rightfully but is really a claim

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1 being brought by a third party who is not named in the  
2 lawsuit. They are in actuality ---

3 THE COURT: --- if they're not named they're not  
4 being brought by. They may be behind the scenes and your  
5 obligation is to bring them in if you think they are an  
6 essential party.

7 MR. BLANCHARD: Well, we've asserted defenses based  
8 on the contention that the proper party is not in this  
9 case.

10 THE COURT: Well, then bring them in. It's your  
11 responsibility to bring them in if you think they are an  
12 essential party.

13 MR. BLANCHARD: We can make a motion to do that,  
14 Your Honor.

15 THE COURT: I'm not telling you what to do. I'm  
16 just saying I don't buy your argument that there is  
17 somebody else behind the lawsuit and therefore this  
18 indemnification is applicable. I think that's incredible  
19 but go ahead.

20 MR. BLANCHARD: In the cases we've cited the courts  
21 have said that third party indemnification is only one  
22 form an indemnitee may take. And the courts specifically  
23 said that the parties may craft an indemnity clause to  
24 provide for other forms of compensation including one in  
25 which a first party is liable to a second party for a

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1 loss of damage the second party might incur. That's what  
2 we're dealing with in this case. The provision states it  
3 is intended that the foregoing indemnification shall  
4 include indemnification against all costs and expenses  
5 reasonably incurred in connection with the defense of any  
6 claim or action in which such declarant may be involved  
7 by virtue of such declarant being party to the suit.

8 What we're saying in the indemnification cause of  
9 action is that our client was sued by virtue of it being  
10 the declarant under the covenants and restrictions. The  
11 language of this agreement says that in that event or  
12 that type of action our client is entitled to second  
13 party indemnification. We're relying expressly on the  
14 terms of the agreement between the parties. The final  
15 thing that was argued, Your Honor, is ---

16 THE COURT: --- you got a copy of the Laurens case?

17 MR. BLANCHARD: If I don't I can send it to you.

18 MR. HALVERSEN: I have a copy of it.

19 THE COURT: Reading what's in I guess as to Mr.  
20 Halversen's brief the last sentence in Laurens it's says  
21 as such; we find it cannot be invoked absent a third  
22 party claim against the second party EMX.

23 MR. HALVERSEN: Your Honor, he's -- may I?

24 THE COURT: Is this the case that was reversed by  
25 the Supreme Court?

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1 MR. HALVERSEN: The Supreme Court case which I ---

2 THE COURT: --- is this the case that was reversed  
3 by the Supreme Court?

4 MR. HALVERSEN: The case he's citing to is the case  
5 that was reversed ---

6 THE COURT: --- the Laurens case was reversed by  
7 the Supreme Court?

8 MR. HALVERSEN: Yes, Your Honor, the 2002 case.

9 THE COURT: Why did you bother to cite it if it was  
10 reversed?

11 MR. BLANCHARD: I talked about that in my  
12 memorandum, Your Honor.

13 THE COURT: If it's been reversed its bad law.

14 MR. BLANCHARD: No, I...

15 THE COURT: What do you mean? It's not law. It  
16 may be persuasive argument but it's been reversed.

17 MR. BLANCHARD: We're relying on the Supreme Court  
18 case. What I'm saying is that the Court of Appeals held  
19 that there can be second party indemnification. Their  
20 argument ---

21 THE COURT: --- but the Supreme Court said no,  
22 right?

23 MR. BLANCHARD: No, the Supreme Court did not say  
24 that.

25 THE COURT: What did they say?

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1 MR. BLANCHARD: They said under the facts of that  
2 case that the indemnification clause did not constitute  
3 second party indemnification. But they did not foreclose  
4 the fact; they actually recognized it. You can have  
5 second party indemnification. That's what we're saying  
6 exists in this case. We're saying that in this case ---

7 THE COURT: --- is the language in your case a  
8 quote from Laurens Supreme Court case or the Court of  
9 Appeals?

10 MR. HALVERSEN: Supreme Court case, Your Honor, and  
11 I think I can clarify what is going on. He is trying to  
12 say that in the appellate court case that that court said  
13 you can have second party indemnification if it is  
14 carefully crafted and they cited some Texas case ---

15 THE COURT: --- but if it has been reversed its not  
16 good law.

17 MR. HALVERSEN: I think what he is trying to say ---

18 THE COURT: It may be dicta and they didn't reverse  
19 for that reason but it's still not good law. It may be  
20 persuasive dicta.

21 MR. HALVERSEN: I wouldn't disagree with that, Your  
22 Honor, but what the Supreme Court basically said was they  
23 went back and they looked at that provision in the  
24 underlying case and they said you know what? This is a  
25 third party indemnity count; no dice because you can't

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1 get indemnity between the same two people. And you look  
2 at my clause and it's a third party indemnity claim. So  
3 that's why I say I'm citing that Supreme Court case for  
4 the same proposition that I think was used in that case  
5 to say that there is no indemnity; it's right on point.  
6 We have a disagreement over how we're interpreting it and  
7 the indemnity provision. But I think this is clearly an  
8 issue of law and you can clearly rule on it in this  
9 fashion here as a partial summary judgment.

10 THE COURT: Mr. Blanchard, I didn't mean to cut you  
11 off. Go ahead.

12 MR. BLANCHARD: Your Honor, I didn't take it that  
13 way. I just wanted to make it clear what we're citing  
14 the Laurens case for is in their motion they took the  
15 position that South Carolina does not recognize  
16 indemnification except when there is a third party claim.  
17 I don't think that is the law in South Carolina. The law  
18 in South Carolina is that in third party indemnification  
19 is one form of indemnification but there are other forms  
20 as well.

21 THE COURT: I'll agree with your analysis that two  
22 parties can indemnify each other. But that  
23 indemnification goes to a third party to bring an action  
24 against either one; otherwise you resolve it directly  
25 between the parties by lawsuit and counterclaim. There

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1 is no need for indemnification when there is just two  
2 parties. Now if it is an outside claim by somebody else  
3 and they've indemnified each other then it would apply.

4 MR. BLANCHARD: I think that's not the law, Your  
5 Honor, respectfully.

6 THE COURT: That's not the law?

7 MR. BLANCHARD: It is not.

8 THE COURT: Tell me about how the law is different.

9 MR. BLANCHARD: What the Court of Appeals cited  
10 they actually cited Black's Law Dictionary for the  
11 definition of indemnity and the Supreme Court did not  
12 disagree with that definition. It only said that in this  
13 particular case the language that was used did not  
14 provide for second party indemnification. We submit the  
15 language in our case does provide for it. But the  
16 definition that they cite it states -- and it's cited --  
17 this is the case of ---

18 THE COURT: --- as a practical matter what  
19 difference does it make if y'all sued each other? If  
20 you're the only two parties in the lawsuit what  
21 difference does it make ---

22 MR. BLANCHARD: --- there are several parties ---

23 THE COURT: --- as a practical matter?

24 MR. BLANCHARD: Well they've not only sued the  
25 declarant but they've also sued other defendants.

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1           THE COURT:    I understand but it's under the  
2 violation of a contract, okay.  You're not alleging that  
3 these people have a cross claim against you have you?

4           MR. BLANCHARD:  Well, they're the plaintiffs.  
5 We're on opposite sides of the B.

6           THE COURT:  Right.  I mean has Harris Street, LLC  
7 or Whipple Development counterclaimed against Park  
8 Investors, I mean cross-claimed?

9           MR. BLANCHARD:  No.  Here's the -- if you look at  
10 page four ---

11          THE COURT:  --- so what does indemnification have  
12 to do since you've got a lawsuit; you've been sued and I  
13 assume you've counterclaimed.  So what does  
14 indemnification have to do with it?

15          MR. BLANCHARD:  I think the answer, Your Honor ---

16          THE COURT:  --- you're either going to win on the  
17 merits or you lose on the merits of the plaintiff's case  
18 and you're going to win or lose on the merits of your  
19 counterclaim.  What does indemnification have to do with  
20 it?

21          MR. BLANCHARD:  It involves the recovery of the  
22 expenses in defending against the action.

23          THE COURT:  It does what?

24          MR. BLANCHARD:  It involves the recovery of the  
25 expenses in defending against the action; the attorney's

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1 fees and costs.

2 THE COURT: You may be able to get attorney's fees  
3 under the indemnification. I don't know what the  
4 covenant said about attorney's fees.

5 MR. BLANCHARD: It expressly covers that. It says  
6 you're entitled to recover those under the  
7 indemnification provision. Your Honor, page four of my  
8 memorandum, which I think you have in front of you it  
9 gives -- I quoted out the definition of an indemnity  
10 contract and it states a contract between two parties  
11 whereby the one undertakes and agrees to indemnify the  
12 other against loss or damage arising from some  
13 contemplated act on the part of the indemnitor -- that's  
14 one basis -- or from some responsibility assumed by the  
15 indemnitee -- that's the second basis -- or three from  
16 the claim or demand of a third person that is to make  
17 good to him such pecuniary damage as he may suffer.

18 They are arguing that the only time you are entitled  
19 to indemnification is under option three. We're saying  
20 that the other forms of indemnity are options one and two  
21 and we're dealing with option one, which is where two  
22 parties entered into a contract and one of the parties  
23 says I will indemnify you against any claims in which you  
24 are sued on the basis that you are the declarant under  
25 these covenants and restrictions. They have sued our

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1 client on the basis that it is the declarant under the  
2 covenants and restrictions and they are alleging  
3 violations of those restrictions.

4 THE COURT: I tend to agree with your  
5 interpretation where some act, contemplated act, on the  
6 part but I don't think you're talking about a blanket  
7 indemnification. Some contemplated act such as liable  
8 and slander. I don't know. I'm not sure what the  
9 contemplated act is this case but look at the language of  
10 indemnification. It says against all contractual and  
11 other liabilities and others arising out of the contract.

12 MR. BLANCHARD: That's the first part but then you  
13 read the next sentence.

14 THE COURT: Read the second part.

15 MR. BLANCHARD: I think you're on page 32 the  
16 covenants and restrictions correct?

17 THE COURT: Yes.

18 MR. BLANCHARD: Then it says it is intended that  
19 the foregoing indemnification shall include  
20 indemnification against all costs and expenses including  
21 counsel fees reasonably incurred in connection with the  
22 defense of any claim, suit etcetera in which any such  
23 director, officer of board, any member or declarant may  
24 be involved by virtue of such persons being or having  
25 been such directors, officer of board, committee member

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1 or declarant. And then it exempts out claims where the  
2 declarant wasn't guilty of fraud or gross negligence,  
3 which they are not alleging in this case. What we're  
4 saying is that our client is the declarant; they are  
5 being sued in this action because they are or have been  
6 the declarant under the covenants and restrictions and  
7 they are entitled to indemnification against their  
8 expenses in defending against that lawsuit.

9 THE COURT: Okay. Anything else?

10 MR. HALVERSEN: May I briefly respond, Your Honor.

11 THE COURT: Yes, I'm going to see -- if he doesn't  
12 have anything else I'll listen to you.

13 MR. BLANCHARD: Your Honor, I just wanted to  
14 briefly mention that one additional point that they made  
15 in their motion was that Whipple has asserted two  
16 essential positions; one they are asserting that the  
17 covenants and restrictions are not even valid and  
18 enforceable in the first place. We would assert in the  
19 alternative that if they are valid then our client is  
20 entitled to indemnification. Because of that they've  
21 argued that our pleading is improper but we've cited Rule  
22 8(e) which specifically allows parties to assert  
23 inconsistent defenses. So what we've done is we've  
24 asserted one, the covenants and restrictions are not  
25 enforceable against our client but in the alternative if

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1 the court finds they are enforceable then we are entitled  
2 to indemnification. So I just wanted to make that clear.

3 THE COURT: Okay. Yes sir, Mr. Halversen?

4 MR. HALVERSEN: Your Honor, first point he is  
5 talking about he's citing language about that there can  
6 be second party indemnity from the case that was  
7 reversed. There is nothing in the Supreme Court case  
8 that adopts that ---

9 THE COURT: --- that's why I was saying who has a  
10 copy of that case?

11 MR. HALVERSEN: I have a copy of it.

12 THE COURT: Would you please hand it up?

13 [Whereupon, Mr. Halversen provides documents to the  
14 court]

15 MR. HALVERSEN: It was a 2002 case and a 2003 case.  
16 There is nothing in the 2003 case that approves ---

17 THE COURT: --- the 2002 is the appellate court  
18 case right?

19 MR. HALVERSEN: Right. That's the one that got  
20 reversed.

21 THE COURT: And it's been reversed.

22 MR. HALVERSEN: And that's the one he's reading  
23 from, Your Honor.

24 THE COURT: Let me hand that back to you. If it's  
25 been reversed in my opinion it's not law.

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1 MR. HALVERSEN: I agree, Your Honor.

2 THE COURT: There may be some dicta in there that  
3 would be persuasive but it's not binding on this court;  
4 it's been reversed. Let me see what the Supreme Court  
5 case says. That may be persuasive argument but I'm not  
6 saying it's not, okay. Let me read the Supreme Court  
7 Laurens case.

8 [Whereupon, the court reviews documents]

9 THE COURT: Mr. Blanchard if you look on that  
10 Supreme Court case at the footnote number five the court  
11 talks about the particular act second party  
12 indemnification an indemnity agreement between hospitals,  
13 medical practices circumstances they're talking about  
14 embezzlement, the act of embezzlement. I mean I'll agree  
15 there can be a second party indemnification but it's got  
16 to be specific type acts in my opinion in the  
17 indemnification agreement; not just a blanket  
18 indemnification like you would have against a third  
19 party. Maybe I'm wrong but I think that's what the  
20 Supreme Court is saying but let me see what else they  
21 saying.

22 MR. BLANCHARD: Your Honor, I must be looking at a  
23 different opinion because you said there is a footnote  
24 five?

25 THE COURT: Look up in the very beginning number

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1 five on indemnification particular cases and issues,  
2 okay. But let me read the case; that's just in the  
3 beginning.

4 MR. BLANCHARD: No, I was just trying to make sure  
5 I have the same thing you're -- the copy I have does not  
6 have a footnote five.

7 THE COURT: All right.

8 [Whereupon, the court reviews documents]

9 THE COURT: All right Mr. Blanchard, I'll stand  
10 corrected. You can have indemnification between two  
11 parties if the contract says such. And I stand corrected  
12 and thank you very much for clarifying that for me, okay.  
13 However, the issue is interpretation of indemnification  
14 clause is whether it addresses third parties or two  
15 individual parties.

16 In that case my opinion says you've got to very  
17 clearly specify it's between the two parties and what act  
18 is involved or different acts involved or what you're  
19 indemnifying each other over. Now tell me where you  
20 think this indemnification clause indemnifies the two  
21 parties and leaves a third party out please, sir.

22 MR. BLANCHARD: Well we construe that second  
23 sentence that I quoted to you earlier as meaning that  
24 whenever the declarant is sued in an action by virtue ---

25 THE COURT: --- let me see where you are talking

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1 about. It says the declarant against all contractual and  
2 other liabilities or parties arising out of a contract  
3 made by or other act as such directed toward the  
4 officers, committee members or declarant. Now where are  
5 you talking about or declarant on behalf of owners  
6 arising out of their status as directors? What I'm  
7 asking you is show me where it very clearly by contract  
8 the parties have agreed to indemnify each other and not  
9 third parties, actions of third parties I should say.

10 MR. BLANCHARD: Well, it doesn't say that we're not  
11 -- let me see if I can phrase this right...

12 THE COURT: Doesn't the case, this Laurens case  
13 sort of stand for the proposition that it's got to be  
14 very clear when you indemnify each other, second parties?

15 MR. BLANCHARD: I think it says it has to be  
16 explicit.

17 THE COURT: Right. I'm asking you where it is  
18 explicit in this indemnification.

19 MR. BLANCHARD: We interpret this provision that  
20 says that ---

21 THE COURT: --- I didn't say you interpreted it.  
22 Tell me where it explicitly says that two parties can  
23 indemnify each other?

24 MR. BLANCHARD: Well it says that the HOA  
25 indemnifies the declarant, who is our client, against all

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1 costs and expenses reasonably incurred in connection with  
2 the defense of any claim in which the declarant may be  
3 involved by virtue of it being the declarant. That's  
4 what the HOA agrees to do; it agrees to indemnify our  
5 client the declarant for any of those claims that I just  
6 mentioned.

7 MR. HALVERSEN: Your Honor, may I?

8 THE COURT: I will in a second. I'm not going to  
9 -- I'll listen to you.

10 MR. HALVERSEN: Okay.

11 THE COURT: I'm going to make sure I understand  
12 where he's telling me this contract very clearly shows  
13 the indemnification between the two parties.

14 MR. BLANCHARD: That provision is what we're  
15 relying on, Your Honor. And I don't want to -- I meant  
16 to hand it to Your Honor earlier and I just wanted the  
17 record to be clear we are submitting the deposition of  
18 Mr. William Barber which was taken on January 26, 2016.  
19 It goes to this other issue which I've argued to you that  
20 this lawsuit really is a lawsuit by a third party and not  
21 the HOA. Mr. Barber's deposition indicates that the  
22 damages and the things they were ---

23 THE COURT: --- I'm not even going to consider that  
24 because I've got to look at the named parties. There may  
25 be somebody behind driving the lawsuit and I don't know

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1 that but the named parties are the named parties and I'm  
2 going to go by the named parties, okay.

3 MR. BLANCHARD: Well, to me what they're doing is  
4 they are circumventing the indemnification ---

5 THE COURT: --- I'm not arguing that. You may be  
6 right but I don't think you can make that argument  
7 because we've got the named parties. The named parties  
8 are as you said the plaintiff is Cokers Commons  
9 Homeowners Association, Incorporated; that's the party.

10 Now if there is somebody else behind that that's  
11 fine. I don't know that but that's the named parties,  
12 okay. So I just don't buy that argument at all, okay. I  
13 reject that argument. It's very thought provoking on  
14 your behalf and it shows a lot of initiative and I  
15 appreciate the argument but I reject it okay. I think  
16 it's an interpretation of an indemnification agreement  
17 period, okay. Anything else?

18 MR. BLANCHARD: You've ruled on that Your Honor, so  
19 I don't want to argue with your ruling.

20 THE COURT: Okay. Thank you very much. All  
21 right Mr. Halversen, tell me about the interpretation of  
22 indemnification where it specifically indemnifies the two  
23 parties.

24 MR. HALVERSEN: It doesn't Your Honor, and what Mr.  
25 Blanchard left out when he was reading it is the most

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1 important part; it's the first sentence. It says the  
2 Association shall indemnify and hold harmless each of its  
3 directors and officers, each member of any committee  
4 appointed pursuant to the bylaws of the Association and  
5 the board and the declarant against all contractual and  
6 other liabilities to others arising out of contracts made  
7 by duh, duh, duh, duh, duh. It's talking, specifically  
8 talking about two others; other people getting if they  
9 incur some kind of liability to others not themselves.

10 And then later on in the section it's underlined in  
11 my brief on page four it says it is intending that the  
12 foregoing indemnification shall include indemnification  
13 against all costs, expenses. Mr. Blanchard just read  
14 that part to you. But it is intended that the foregoing  
15 indemnification it's pointing back to the indemnification  
16 that is outlined in the first sentence to others. Not  
17 only does it not say it's between us it specifically says  
18 it's with other people, third parties. That's it, Your  
19 Honor.

20 THE COURT: All right. I'm going to find the  
21 indemnification agreement does not expressly apply to  
22 second party indemnification between each other and it is  
23 as to third parties and that's the court's finding. Mr.  
24 Halversen if you will type me up a proposed order please.

25 MR. HALVERSEN: I will, Your Honor.

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
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April 15, 2016

1 THE COURT: Based upon the court's interpretation  
2 of what is required in the contract I think it has to be  
3 clear and unambiguous that that's what the parties agree  
4 to under the Supreme Court Laurens case. Here's your  
5 case back.

6 [Whereupon, the court provides documents to Mr.  
7 Halversen]

8 THE COURT: If you will type me up a proposed order  
9 please sir.

10 MR. HALVERSEN: Thank you, Your Honor.

11 THE COURT: Thank you very much. Let me say this  
12 Mr. Blanchard. If in fact someone else is brought into  
13 the lawsuit and that changes the propensity of  
14 indemnification and you want to revisit that I'm going to  
15 put that in the order, okay.

16 MR. BLANCHARD: I was going to ask about that, Your  
17 Honor.

18 THE COURT: If you file some type of motion to  
19 interplead or bring in some other parties and we've got a  
20 third party involved and you want to revisit it the  
21 indemnification as to third parties that's fine. All I'm  
22 doing is granting it as to these two main parties; the  
23 plaintiff and defendant.

24 MR. BLANCHARD: I understand, Your Honor.

25 THE COURT: I want to make that clear Mr. Halversen

Cokers Commons HOA, Inc. v Park Investors, LLC, et al  
Motion for Summary Judgment  
April 15, 2016

1 in the order okay so you can't come in later if he brings  
2 somebody else in and say well, the Judge has already  
3 ruled on that because I'm not. I rejected this argument  
4 about somebody else behind the lawsuit.

5 MR. HALVERSEN: I understand, Your Honor.

6 THE COURT: Okay.

7 MR. BLANCHARD: Just to clarify, Your Honor, I  
8 thought we had already done that because what we did is  
9 we asserted a declaratory judgment counterclaim which --  
10 is alleging that this lawsuit is really not being brought  
11 by the HOA but by third parties.

12 THE COURT: I personally think you need to make  
13 them parties if you're going to list that but that's my  
14 opinion okay; otherwise they're not a party.

15 MR. BLANCHARD: I understand, Your Honor.

16 THE COURT: Maybe I'm wrong on that but that's my  
17 opinion. And you've got means of doing that; you know  
18 that.

19 MR. BLANCHARD: Yes, sir.

20 THE COURT: Okay. Thank y'all very much.

21 MR. BLANCHARD: Thank you for your time, Your  
22 Honor.

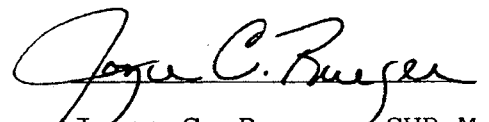
23 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*  
24  
25

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official  
Circuit Court Reporter for the Ninth Judicial Circuit of  
the State of South Carolina, do hereby certify that the  
foregoing is a true, accurate, and complete Transcript of  
Record of the proceedings had and evidence introduced in  
the trial of the captioned case, relative to appeal, in  
the Court of Common Pleas for Berkeley County, South  
Carolina on the 15th day of April, 2016.

I do further certify that I am neither of kin,  
counsel, nor interest to any party hereto.

June 11, 2016

  
Joyce C. Rueger, CVR-M  
Court Reporter

IN THE COURT OF COMMON PLEAS  
FOR THE STATE OF SOUTH CAROLINA  
BERKELEY COUNTY

DEPOSITION OF WILLIAM FREEMAN BARBER, JR.

COKERS COMMONS HOMEOWNER'S  
ASSOCIATION, INC.,

Plaintiff,

vs. CASE NO. 2015-CP-08-547

PARK INVESTORS, LLC, CCT RESERVE,  
LLC, f/k/a HARRIS STREET, LLC, and  
WHIPPLE DEVELOPMENT CORPORATION,

Defendants.

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DEPONENT: WILLIAM FREEMAN BARBER, JR.

DATE: January 26, 2016

TIME: 11:05 a.m. - 12:51 p.m.

LOCATION: HALVERSEN & ASSOCIATES, LLC  
171 Church Street  
Suite 330  
Charleston, SC 29401

REPORTED BY: SARAH GACIOCH

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A P P E A R A N C E S

FOR THE PLAINTIFF:

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I N D E X

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1 WILLIAM FREEMAN BARBER, JR., having been  
2 first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. KELLY:

5 Q. Mr. Barber, we met a few moments ago. My  
6 name is Britt Kelly. I represent the defendants in  
7 this lawsuit. I'm going to ask you some questions  
8 today. I hope not to be particularly long, but  
9 maybe a couple hours. If at any point you need a  
10 break, just let me know, and we'll take a break.  
11 All right?

12 A. Okay.

13 Q. Have you given a deposition before?

14 A. Yes, I have.

15 Q. How many times?

16 A. Probably half a dozen.

17 Q. All right.

18 A. Pretty experienced at it, unfortunately.

19 Q. So you probably know all these rules, but if  
20 you would, please let me finish my question before  
21 you respond; is that okay?

22 A. Yes.

23 Q. If you don't understand a question of mine,  
24 please ask me to repeat or rephrase it, and I'll do  
25 so; do you understand that?

1       **A. Yes.**

2       Q. Now that the deposition has started, you're  
3 not permitted to consult with your counsel or to  
4 discuss the substance of testimony. So if you have  
5 any questions, they need to be directed to me.

6       **A. Yes, okay.**

7       Q. If I do ask you a question that you think may  
8 call for you to reveal the attorney-client privilege  
9 and you feel like you need to consult with your  
10 attorney, you're free to do that, okay?

11       **A. Okay, thanks.**

12       Q. Just let us know for the record, and we'll  
13 deal with that otherwise.

14       **A. Okay.**

15       Q. All right. Tell me about the other  
16 depositions you've given. What types of matters  
17 have those related to?

18       **A. Oh, in the real estate business, you know,**  
19 **most of it's related to all the stuff that happened,**  
20 **the downturns and foreclosures and things like that.**

21       Q. Okay. Have you ever been a plaintiff in a  
22 lawsuit before? You ever bring any lawsuit?

23       **A. Yes.**

24       Q. All right. How many times?

25       **A. One that I can recall.**

1 Q. What was the nature of that suit?

2 A. It was a malpractice suit.

3 Q. All right. Attorney malpractice?

4 A. Yes.

5 Q. Is that here locally?

6 A. Yes, it was.

7 Q. Did you actually bring a lawsuit?

8 A. Yes.

9 Q. Who was the defendant?

10 A. Woody Law Firm.

11 Q. How long ago was that suit brought?

12 A. That's 2008, 2009.

13 Q. What was the general nature of the  
14 allegations in that lawsuit?

15 A. You know, as they all are, extremely  
16 detailed. Generally Mr. Woody was representing me  
17 and another person at the same time, and we had a  
18 conflict, and he was brought into it.

19 Q. Was the representation related to the  
20 development of real estate?

21 A. Yes, it was.

22 Q. When was the transaction that gave rise to  
23 the lawsuit taking place?

24 A. It never took place.

25 Q. When were you dealing with Mr. Woody about

1 potentially engaging that real estate transaction?

2 A. From 2004 up until the time of the lawsuit.

3 Q. What property was it concerning?

4 A. It was a piece of property, actually close to  
5 the one we're discussing today, called Brickhope  
6 Plantation.

7 Q. Were you looking to buy or sell?

8 A. I was the owner. I was trying to sell.

9 Q. And who was the other individual that was  
10 looking at possibly buying the property?

11 A. Joe Bartone.

12 Q. Had the Brickhope Plantation property already  
13 been subdivided?

14 A. Yes.

15 Q. How many lots?

16 A. Well, it was a large subdivision, so it was  
17 actually into phases, and the phases were subdivided  
18 into lots. So the whole subdivision was about 1500  
19 lots.

20 Q. How many phases?

21 A. Three.

22 Q. Was Brickhope Plantation the greater POA  
23 where all the phases were within that?

24 A. There were different POA's within each phase.  
25 They actually had their individual -- they were

1     **individual owners as it was phased out.**

2     Q.   Okay.  Was there one like father or mother  
3     POA that oversaw the rest of them?

4     **A.   No.**

5     Q.   All right.  Any other lawsuits where you've  
6     been the plaintiff?

7     **A.   That's the only one I can think of on the top**  
8     **of my head.  As I mentioned, I've been involved in**  
9     **quite a bit of stuff since everything kind of**  
10    **turned.**

11    Q.   Sure.  Is the lawsuit against the Woody Law  
12    Firm still pending?

13    **A.   No.  It's been settled.**

14    Q.   Did you give a deposition in that case?

15    **A.   Yes, I did.**

16    Q.   Who represented you?

17    **A.   Thomas Pendarvis.**

18    Q.   Who represented the Woody Law Firm?

19    **A.   What was his name?  Cook.  Was it Dolly Cook?**  
20    **Something like that.**

21    Q.   Dallas Cook?

22    **A.   Dallas Cook, thanks.**

23    Q.   All right.  Tell me, by way of background, a  
24    little bit about you.  Did you grow up here in  
25    Charleston?

1       **A. I grew up in Charlotte and built houses and**  
2       **involved in real estate up there for a while until I**  
3       **moved here in the early 2000s.**

4       Q. Okay. Did you finish high school in  
5       Charlotte?

6       **A. I did.**

7       Q. And did you go on to college?

8       **A. I did.**

9       Q. Where did you go to college?

10      **A. University of Georgia.**

11      Q. When did you finish at UGA?

12      **A. March of '93, back when they had quarters.**

13      Q. Okay. When you finished at UGA, did you go  
14      on to additional education, or did you join the work  
15      force?

16      **A. Work force.**

17      Q. And that was in construction?

18      **A. Yes.**

19      Q. And was that in Georgia?

20      **A. Actually, it was a couple little stops in**  
21      **between, but construction was close after North**  
22      **Carolina, Charlotte.**

23      Q. At what point did you move to Charleston?

24      **A. 2003, full-time.**

25      Q. Did you have some business interest in

1 Charleston prior to 2003?

2 **A. Yes, I did.**

3 Q. When did that start?

4 **A. 2001.**

5 Q. What type of work?

6 **A. It was to set up that Brickhope Plantation.**

7 Q. Up until 2001, were you developing property  
8 in addition to building homes?

9 **A. Yes.**

10 Q. Was that the case shortly after you left  
11 Georgia until you came to Charleston?

12 **A. Primarily building houses and then got into**  
13 **development a little bit later in the game.**

14 Q. Do you still build houses?

15 **A. Yes.**

16 Q. What's the company you work under for that  
17 work?

18 **A. Work for Southwind Homes.**

19 Q. Is that a company you own?

20 **A. No.**

21 Q. Do you have any ownership interest in it?

22 **A. No.**

23 Q. Who's the owner of that company?

24 **A. Chris Phillips and my wife.**

25 Q. What's your wife's name?

1       **A. Margaret Barber.**

2       Q. How long have you worked with Southwind  
3 Homes?

4       **A. Maybe 18 months or so.**

5       Q. What is your position with Southwind?

6       **A. Director of operations.**

7       Q. How many employees do you have under you?

8       **A. There are two project managers that, I guess,**  
9 **you could consider under me.**

10      Q. In addition to the two project managers, does  
11 the company have superintendants?

12      **A. No.**

13      Q. So between you and the two project managers  
14 and the owners, does that round up the company?

15      **A. That's it, yes.**

16      Q. Where does Southwind have projects going  
17 today?

18      **A. Primarily in Goose Creek, Berkeley County,**  
19 **and one on James Island.**

20      Q. When you came to Charleston roughly 2001 and  
21 started the Brickhope Plantation work, how were you  
22 employed at that time?

23      **A. I was a partner in a home building company at**  
24 **the time.**

25      Q. What was that company?

1       **A.   Sea Town Homes.**

2       Q.   Does Sea Town Homes still exist?

3       **A.   No, it does not.**

4       Q.   When did it stop?

5       **A.   2008.**

6       Q.   Is Sea Town Homes a developer and builder?

7       **A.   No.   Just a home builder, and I was involved**  
8       **in some development entities.**

9       Q.   What were those development entities?

10       **A.   Liberty Village, LLC was the big one, and**  
11       **then there was also Midfree, Inc.**

12       Q.   Midfree?

13       **A.   M-I-D-F-R-E-E, the middle, Freeman.**

14       Q.   Are Liberty Village, LLC, and Midfree, Inc.  
15       still in business?

16       **A.   I'm not sure about Liberty Village; it's**  
17       **since traded ownership.   Midfree still is.**

18       Q.   Did you have ownership in Liberty Village,  
19       LLC?

20       **A.   I did, yes.**

21       Q.   When did it start operating?

22       **A.   Early 2000s.**

23       Q.   And what about Midfree, Inc.?

24       **A.   Same, around the same time.**

25       Q.   And you have ownership in that one too?

1       **A. I still do, yes.**

2       Q. And am I correct that those companies found  
3 property they wanted to purchase and purchased lots,  
4 built them, and sold them?

5       **A. Built lots, as compared to homes, yes.**

6       Q. So prepared the lots for someone else to --

7       **A. Developed them, yes.**

8       Q. What was your job with Liberty Village and  
9 Midfree, Inc.?

10       **A. I was the -- I was a member. I was president**  
11 **of Midfree, member of Liberty Village.**

12       Q. In addition to being the owner, did you have  
13 responsibilities each day or each week?

14       **A. Yeah. I managed daily operations.**

15       Q. What was involved in managing the daily  
16 operations?

17       **A. Well, they teach a semester on developing**  
18 **land at --**

19       Q. Well, how many people work for you, I guess?

20       **A. Nine.**

21       Q. So kind of run through for me, if you would,  
22 how did you -- not looking for trade secrets here,  
23 but once you got an idea of where you wanted to  
24 acquire land, how did you go from there?

25       **A. Well, the big issues were zoning and finding**

1 out entitlements and utilities and wetlands,  
2 endangered species, things along those lines. The  
3 diligence that you do, the feasibility that you do  
4 prior to purchasing a piece of property.

5 Q. Okay. Would you research the title?

6 A. No.

7 Q. Would you hire somebody to research the  
8 title?

9 A. Yes.

10 Q. What types of people did you typically hire  
11 to research the title?

12 A. Real estate attorneys.

13 Q. Did you ever hire an abstractor directly?

14 A. No.

15 Q. So, for example, with Brickhope Plantation,  
16 is there an attorney in Charleston or Charlotte you  
17 would have hired to look at the property?

18 A. Someone in Charleston did that one.

19 Q. Okay. Do you remember who that was?

20 A. Lisa Wolff Herbert.

21 Q. Are there certain attorneys you've gone to  
22 more frequently than others over the years for real  
23 estate?

24 A. Yes.

25 Q. Who are they?

1       **A. Wooddy exclusively for a long time, now**  
2       **Weeks.**

3       Q. Where is Mr. Week's office?

4       **A. He's got several in Charleston area.**  
5       **Primarily use the one in Goose Creek.**

6       Q. Since you've been back -- or since you've  
7       been in the home business and development business,  
8       have you ever gone back to school to acquire any  
9       further education?

10       **A. Licenses and things like that, but nothing as**  
11       **far as degrees.**

12       Q. Sure. What type of licenses do you own?

13       **A. I've got a general contractor's license, a**  
14       **real estate license.**

15       Q. Tell me about the real estate license. What  
16       did you do to obtain that license?

17       **A. I took classes in North Carolina.**

18       Q. Are you licensed in South Carolina too?

19       **A. No, I'm not.**

20       Q. How many classes did you take in North  
21       Carolina for your real estate license?

22       **A. I think it was a couple weeks worth, maybe a**  
23       **month.**

24       Q. What were the nature of -- what types of  
25       classes were you taking?

1       A. I mean, it was after hours, a couple hours a  
2       night kind of thing. Go through the basics of what  
3       a real estate agent does, I suppose. I remember a  
4       lot of them had to do with escrows and things like  
5       that. It's been a long -- quite a while since I've  
6       done it.

7       Q. Sure. Between 2008 and when you started  
8       employment with Southwind Homes, were you employed?

9       A. Self-employed.

10      Q. What company did you work with at the time?

11      A. Still managing Liberty Village and Midfree  
12      and Sea Town. Even though they, you know, quit  
13      building stuff like that, there was obviously still  
14      a lot of work to be done.

15      Q. Any other companies you worked with since  
16      being in Charleston?

17      A. No.

18      Q. Any other projects, other than Brickhope  
19      Plantation, that involved real property that you've  
20      been involved in developing in Charleston?

21      A. Yes, a good bit.

22      Q. How many, roughly?

23      A. Maybe 15 or 20.

24      Q. Can you just gave me a couple of the larger  
25      ones?

1       **A.   Phillips Park in Mt. Pleasant.**

2       Q.   Is that off Rifle Range?

3       **A.   Yes.   Did one in Seabrook.**

4       Q.   How many homes in Seabrook?

5       **A.   36.**

6       Q.   The ones in Seabrook, did you just prepare  
7   the land, or did you build homes as well?

8       **A.   Bought finished lots, built homes.**

9       Q.   What company built the homes?

10      **A.   Sea Town.**

11      Q.   Phillips Park, did you acquire the raw land  
12   and then develop it out?

13      **A.   Developed it and then built some of the  
14   houses and sold the rest of the lots.**

15      Q.   Is Phillips Park all one parcel?

16      **A.   It was by the time we got it.   Another  
17   developer had it prior to us.**

18      Q.   What about Seabrook, is that all one parcel?

19      **A.   No.   We bought 36 finished lots.**

20      Q.   That's right, you told me that, sorry.   Any  
21   other projects that come to mind that are that size,  
22   30 or more lots?

23      **A.   Hundred -- we're talking about 2008 range and  
24   prior?**

25      Q.   Yes, sir.

1       **A. Yeah. Nothing else jumps out at me. There**  
2       **was a lot of end fill things where we picked up**  
3       **scattered lots.**

4       Q. And just so I'm making sure I have the right  
5       Freeman Barber, do you live in Sullivan's Island?

6       **A. I used to.**

7       Q. Okay. There's an address, 3202 Jasper  
8       Boulevard?

9       **A. That's my former address.**

10      Q. Okay. Where do you live currently?

11      **A. In Mount Pleasant.**

12      Q. What's the address?

13      **A. 1615 Charlotte G Circle.**

14      Q. And what's the zip?

15      **A. 29464.**

16      Q. Do you have any family in Berkeley County  
17      with the last name other than Barber?

18      **A. No.**

19      Q. Involved in any civic organizations or  
20      community organizations in Berkeley County?

21      **A. No.**

22      Q. Since you've been in Charleston developing  
23      and building property, have there been a couple of  
24      people you partner with more than others?

25      **A. I've had different partners. I have a**

1 partner in Sea Town. Obviously my wife's partner  
2 who I work for now.

3 Q. Who's the partner in Sea Town?

4 A. Kurt Rogers.

5 Q. And you told me you sold Liberty -- you sold  
6 your interest in Liberty Village, LLC?

7 A. I did.

8 Q. Who's that sold to?

9 A. Woody as a results of that lawsuit. He was  
10 the actual purchaser.

11 Q. Okay. Did you have a partner in Liberty  
12 Village, LLC before that?

13 A. A few different partners, yeah.

14 Q. Who?

15 A. First one named Granger Gilbert.

16 Q. All right.

17 A. Second was Judson Stringfellow.

18 Q. What about Midfree, any partners in that?

19 A. No.

20 Q. All right. Kirkland Holdings, LLC, the  
21 Secretary of State page says it was formed on  
22 February 21st, 2014.

23 A. Uh-huh.

24 Q. Does that sound correct?

25 A. That sounds right. It's essentially a single

1     **use entity.**

2         Q.   Was it solely owned real estate out in Cokers  
3   Commons?

4         **A.   Yes.**

5         Q.   47 lots?

6         **A.   Yes.**

7         Q.   Where did the name come from?

8         **A.   It's the name of the street, subdivision.**

9         Q.   All right, and it says the registered agent  
10   is Margaret Barber?

11        **A.   Yes.**

12        Q.   That's your wife?

13        **A.   Yes.**

14        Q.   Are you a member of the LLC?

15        **A.   No.**

16        Q.   Who's the member of the LLC?

17        **A.   She's the sole member.**

18        Q.   Do you have a position within the company  
19   Kirkland Holdings, LLC?

20        **A.   I'm the director of operations.**

21        Q.   Do y'all have any employees?

22        **A.   No.**

23        Q.   It looks like some of the lots in Kirkland  
24   Holdings are owned by Southwind Home Builders, LLC?

25        **A.   Uh-huh.**

1 Q. Just for the record, can you say yes or no?

2 A. Oh, yes, I'm sorry. I know better than that.

3 Q. No worries. I'm showing like 12 lots, does  
4 that sound about right?

5 A. That sounds correct, yes.

6 Q. What's the circumstance in which Southwind  
7 Home Builders, LLC became the owners of those 12  
8 lots?

9 A. Kirkland Holdings was just set up as the  
10 original land holding entity with the intention of  
11 selling the lots to Southwind Homes or Southwind  
12 Home Builders.

13 Q. So the intention was for all the lots that  
14 became titled in Kirkland Holdings, LLC to  
15 eventually go to Southwind Home Builders?

16 A. I'm not sure I can answer that with a yes or  
17 no.

18 Q. That's fine.

19 A. I think it's generally the plan, but  
20 certainly subject to change.

21 Q. Gotcha. The lots that are currently owned by  
22 Southwind Home Builders, LLC, did they take title  
23 shortly after Kirkland Holdings, LLC took title, or  
24 was it more recently?

25 A. It's been recently. I think it was in the

1     **last month or two.**

2         Q.   And is Southwind Home Builders, LLC building  
3     on those lots --

4         **A.   Yes.**

5         Q.   -- today?   How many of the lots are under  
6     construction by Southwind currently?

7         **A.   Six.**

8         Q.   Are there model plans for the homes; for  
9     example, A, B -- you know, floor plans A, B, C, and  
10    D, something like that?

11        **A.   Exactly, yes.**

12        Q.   How many different types of homes?

13        **A.   Four.**

14        Q.   Is there a plan in place once these six are  
15    built and hopefully sold to build the other six?

16        **A.   Yes.**

17        Q.   Is the idea to keep going as long as you're  
18    getting them sold?

19        **A.   Yes, and really what dictates it is**  
20    **construction-wise.**

21        Q.   What's the reason for only doing six at a  
22    time?

23        **A.   Limits of the land.**

24        Q.   All right.   Tell me what you know about the  
25    name Cokers Commons, how that came to exist?

1       **A. I don't know anything about it, just stumbled**  
2       **across it one day, if you will.**

3       Q. When you see the name "Cokers Commons," what  
4       property does that make you think of is part of the  
5       greater Cokers Commons area?

6       **A. The subdivision, the town owned subdivision.**  
7       **I know there's a Cokers Crossing too, but in the**  
8       **development business you got to learn to**  
9       **differentiate that.**

10      Q. Okay. How many lots are there in Cokers  
11      Commons?

12      **A. I do not know. I can guess.**

13      Q. That's all right. Does Cokers Commons have  
14      an HOA?

15      **A. Yes, it does.**

16      Q. All right. Do you know when that was formed?

17      **A. Around 2008 or 2009.**

18      Q. All right. That was before Kirkland  
19      Holdings, LLC took any title --

20      **A. Yes.**

21      Q. -- to property in Cokers Commons?

22      **A. Yes. I'm sorry, I didn't let you finish**  
23      **there.**

24      Q. No problem. Who are the members of the  
25      Cokers Commons Homeowners' Association?

1       A.   There are 12 homeowners.

2       Q.   All right.

3       A.   And then Kirkland Holdings and Southwind Home  
4   Builders.

5       Q.   Who are the 12 homeowners?

6       A.   I don't know them by name, off of memory, but  
7   I certainty could come up with it if you need me to.

8       Q.   Are there certain homeowners you interact  
9   with more than others?

10      A.   By the nature of their employment, there's  
11   some that I see more than others.

12      Q.   By the nature of the homeowner's employment?

13      A.   Right.

14      Q.   That they may be there during the day?

15      A.   Exactly.

16      Q.   Okay.

17      A.   There are ones that it seems like every time  
18   I pull in the subdivision they come walking out to  
19   talk, some more than others.

20      Q.   Who are those folks you see more frequently?

21      A.   I apologize. I'm bad with names. I could  
22   tell you where they live. I can tell you what they  
23   look like. If you gave me their name, I could tell  
24   you yes or no.

25      Q.   If I deem it important, we may come back to

1 that.

2 **A. Kerine Borrillo obviously is one I speak to a**  
3 **lot. I know her name, because we have had some**  
4 **professional engagements too.**

5 Q. Do you keep a list of people who are part of  
6 the homeowners' association?

7 **A. No.**

8 Q. It's my understanding there's a phase 4-A and  
9 a phase 4-B related to the Cokers Commons kind of  
10 circle?

11 **A. That's what I understand as well, yes.**

12 Q. Does that make sense?

13 **A. Yes.**

14 Q. Is it your understanding that only the lots  
15 in 4-A are part of the homeowners' association for  
16 Cokers Commons?

17 **A. Yes. It is my understanding.**

18 Q. Do you know any of the owners in Cokers  
19 Commons who live there since 2011?

20 **A. It's my understanding that all the current**  
21 **owners are the original owners.**

22 Q. Does the HOA have annual meetings?

23 **A. No.**

24 Q. Were you aware of any meetings that took  
25 place prior to the time Kirkland Holdings or

1 Southwind purchased lots in Cokers Commons?

2 A. I'm not aware of any, no.

3 Q. Why are there no annual meetings at Cokers  
4 Commons?

5 A. Given the situation out there right now, it  
6 really serves no function, other than what we're  
7 currently doing. Nothing else to discuss.

8 Q. Okay. Is there a Board of Directors for --

9 A. No.

10 Q. Has there been any discussion about forming a  
11 Board of Directors?

12 A. Yes. I believe there has been a discussion.  
13 Kind of the same answer there: until there's  
14 something to talk about, there's nothing to talk  
15 about.

16 Q. Other than what you have reviewed in real  
17 estate documents that relate to Cokers Commons, do  
18 you know anything about how the association was  
19 formed?

20 A. Only what I've been told by some of the  
21 homeowners, I may have picked up in passing  
22 conversation.

23 Q. Can you relate that to me, please?

24 A. It was my understanding at one point Mr.  
25 Terry, or one of his entities at least, was

1     **operating the HOA, and the homeowners were paying**  
2     **into it, and it was maintaining the common areas.**

3         Q.   What were they paying into; do you recall  
4     those discussions?

5         A.   I'm not aware of a monthly amount or anything  
6     like that.

7         Q.   Do you recall who you were talking to or  
8     which owners were relaying that to you?

9         A.   Not specifically, no.

10        Q.   Do those discussions -- have they taken place  
11   more recently, or is that around the time you were  
12   purchasing the lot?

13        A.   Around the time I was purchasing the lots.

14        Q.   Individually do you consider yourself to be a  
15   member of the Cokers Commons Homeowners'  
16   Association?

17        A.   As an individual, no.   As an employee of the  
18   company, yes.

19        Q.   Is there a common property in the HOA today  
20   that is maintained by the association?

21        A.   Kirkland Holdings has kind of taken it on its  
22   own to maintain all the property on behalf of the  
23   association.

24        Q.   Excluding -- we're going to talk about it a  
25   lot more here in a minute, the amenity area and kind

1 of the open space area, are you familiar if I use  
2 those terms, the lots I'm talking about?

3 **A. The little paths and the entrance, is that...**

4 Q. Yeah.

5 MR. KELLY: Let me mark this.

6

7 (DEFENDANT'S EXHIBIT NO. 1

8 WAS MARKED FOR IDENTIFICATION)

9

10 Q. Mr. Barber, I'm going to hand you what's been  
11 marked as Exhibit 1. What seems to be an issue in  
12 this lawsuit. Maybe I'm going to find out there's  
13 more at issue than I'm going to currently ask you  
14 about, but what we've been talking about a lot  
15 through exchanging discovery at this point, looking  
16 at the pleadings, this pool area that ends with the  
17 numbers 87 on Exhibit 1; do you see that?

18 **A. Yes.**

19 Q. I'll just refer to that as pool area or  
20 amenity area, if that's okay with you.

21 **A. Yes.**

22 Q. Do y'all refer to it any other way?

23 **A. No. That's pool, yeah. Amenity is a little**  
24 **more vague, considering there are other common**  
25 **areas.**

1 Q. Okay.

2 A. But pool is good for me.

3 Q. Okay. I'll just call it pool area then.

4 A. Okay.

5 Q. That was going to be my next question, is  
6 there anything there, other than the pool and gate?

7 A. There's a Post Office kiosk and parking area.

8 Q. Okay.

9 A. Couple of them.

10 Q. Is the Post Office kiosk part being used?

11 A. Yes.

12 Q. What about the one next door, this kind of  
13 big parcel next to it ends in 57; do you see that?

14 A. Yes, I do.

15 Q. I'm going to refer to that as the open space  
16 area.

17 A. Okay.

18 Q. Do y'all have a way in which you refer to  
19 that lot?

20 A. No.

21 Q. Are there other common areas or areas that  
22 you deem to be common to the homeowners' association  
23 at Cokers Commons depicted on Exhibit 1?

24 A. Yes.

25 Q. All right. Can you circle those for me?

1       **A. An entrance area here and here, and there's**  
2       **also a walking path that I believe was designed to**  
3       **join those two neighborhoods.**

4       **Q. I see.**

5       **A. There, there, and there.**

6       **Q. This one over here you circled is a walking**  
7       **path?**

8       **A. I believe that's what it's intended to be.**

9       **Q. Okay. What about this one down here at the**  
10       **entrance?**

11       **A. Right, an entrance monument.**

12       **Q. Does the HOA currently maintain the entrance**  
13       **monument?**

14       **A. Kirkland Holdings is maintaining it on behalf**  
15       **of the HOA.**

16       **Q. And what was the other one you circled next**  
17       **to it?**

18       **A. An entrance monument on that side as well.**

19       **Q. And Kirkland Holdings, on behalf of the HOA,**  
20       **addresses or maintains that monument?**

21       **A. Yes.**

22       **Q. What about the area you felt was intended to**  
23       **be a walking path, is it maintained in any fashion**  
24       **by Kirkland Holdings or HOA?**

25       **A. No, it's not.**

1 Q. Just in case our markings don't show up real  
2 well on this exhibit, the entrance monuments are up  
3 here close to the Montague Plantation Road and  
4 Kirkland Street intersection?

5 A. Yes.

6 MR. HALVERSEN: Want to try a different  
7 pen?

8 MR. KELLY: Yes.

9 A. No. It's not working.

10 Q. Where does the obligation of the association  
11 to maintain the monuments come from?

12 A. I don't know how to answer that question.  
13 Could you rephrase for me?

14 Q. Sure. What is the reason that the  
15 association, or Kirkland Holdings on behalf of the  
16 association, maintains the monuments?

17 A. Mainly it's to prevent nuisance.

18 Q. What are the monuments made of?

19 A. They're brick and wood fence looking --  
20 country fence looking.

21 Q. Have you reviewed the master deed for Cokers  
22 Commons?

23 A. I don't recall.

24 Q. When did you first learn of Cokers Commons?

25 A. A few months to several months before the

1     **purchase date.**

2         Q.   How did you learn about it?

3         A.   **A realtor called me, real estate agent.**

4         Q.   Who was that real estate agent?

5         A.   **Sean Litton.**

6         Q.   Can you spell the last name?

7         A.   **L-I-T-T-O-N. He's S-H-E-A-N. Excuse me,**  
8     **S-E-A-N.**

9         Q.   Who's he with?

10        A.   **Peninsula Company.**

11        Q.   And what did Mr. Litton tell you about the  
12   property at Cokers Commons?

13        A.   **He said it was a piece of property and asked**  
14   **what the case was, stuff we were doing at the time,**  
15   **and an opportunity to buy some land.**

16        Q.   So after getting that call from him, did you  
17   go out there and look at it?

18        A.   **Yes.**

19        Q.   How much times did you spend on the property?

20        A.   **In minutes? Yeah, I couldn't recall.**

21        Q.   You just kind of drive through?

22        A.   **I probably got out and walked around. That's**  
23   **typically what I do.**

24        Q.   Were you alone?

25        A.   **I don't recall.**

1 Q. Tell me a little bit about how you went from  
2 getting that phone call, going out there and looking  
3 at it, to then buying the property?

4 A. Well, given my experience with Liberty  
5 Village and Brickhope Plantation, I knew the area.  
6 I also knew what some of the other builders were  
7 doing in the area, and I knew they were having  
8 success, so I thought it would be a good opportunity  
9 for a home building company.

10 Q. Who was the closing attorney for the purchase  
11 of that 47 lots?

12 A. I believe it was Weeks.

13 Q. Am I correct you bought the lots from Crescom  
14 or Community First Bank at the time?

15 A. Yes. Kirkland bought them from Crescom.

16 Q. Kirkland bought the lots from Crescom?

17 A. Correct.

18 Q. And who chose Mr. Weeks as a closing agent?

19 A. I did.

20 Q. Did Crescom have their own lawyers involved?

21 A. Yes, they did.

22 Q. Who were their lawyers?

23 A. Charlie Alton.

24 Q. Prior to purchasing the lots, or prior to  
25 Kirkland Holdings purchasing the lots in Cokers

1 Commons, had you or Kirkland Holdings ever had any  
2 dealings with Park Investors, CCT Reserve, Harris  
3 Street, or Whipple Development?

4 A. No.

5 Q. Had you had any dealings with Ted Terry?

6 A. No.

7 Q. What about a fellow named Daniel Key?

8 A. No. Not that I can recall at least.

9 Q. Can you give me a summary of the due  
10 diligence Kirkland Holdings did or you did on behalf  
11 of Kirkland Holdings or perhaps on behalf of another  
12 contemplated entity before purchasing the lots from  
13 Crescom?

14 A. Yes. And I'll speak in more general terms,  
15 because I don't remember specifically, but I know  
16 there were a number of things we had going on, but  
17 typically there would be some soil expiration tests  
18 that would go on, some marketing studies, things of  
19 that nature, and you know, density and utilities and  
20 things like that were already handled in this  
21 situation. So that wouldn't be one of them in this  
22 particular case, which is something that's a little  
23 different than how it used to be done. That's about  
24 the extent of it, I guess.

25 Q. From the outset, when you first got that call

1 from Mr. Litton, did you know at that time or did  
2 you have -- let me back up, when you got that call  
3 from Mr. Litton and you started contemplating the  
4 idea of maybe getting those lots, was it always  
5 going to be through a company that your wife owned,  
6 or did you look at maybe doing it with a partner?

7 **A. I can't recall, but it would not be unusual**  
8 **to look at doing it with a partner.**

9 Q. Did you talk to anyone else about the  
10 possibility of doing a deal with them?

11 **A. Most likely.**

12 Q. Do you remember who you talked to?

13 **A. Not specifically.**

14 Q. Would you e-mail anyone about it?

15 **A. Possibly.**

16 Q. What type of e-mail system do you have?

17 **A. I use Apple, Mac.**

18 Q. Were you using that back in 2014?

19 **A. Yes, I was.**

20 Q. Do you keep e-mail you send and receive  
21 related to projects?

22 **A. Apple automatically deletes all e-mail after**  
23 **30 days.**

24 Q. Even if you put it in a folder or something?

25 **A. I don't know about that.**

1       Q.   Would you create a folder for each project  
2   you do?

3       A.   No.

4       Q.   So you don't have a recollection of looking  
5   to do a deal with someone else and that kind of  
6   falling through on Cokers Commons?

7       A.   Nothing specifically, but it certainly would  
8   not be unusual if that were the case.

9       Q.   Did you talk with anyone else who had looked  
10   at the deal prior to you and passed on it?

11      A.   Not that I can recall. I do have a  
12   recollection of another guy calling me, and I can't  
13   recall who he was. I didn't know him, but somebody  
14   else called me and told me they were interested in  
15   buying it, and then it actually became a source of  
16   contention during the purchase process.

17      Q.   Why was that?

18      A.   Because we had it under contract, and he was  
19   undermining the terms of that contract.

20      Q.   Gotcha. So he wasn't looking to partner up  
21   with you necessarily, he was looking to get --

22      A.   Yes. That's what I remember about that now.

23      Q.   All right. Did you personally review --  
24   well, before I ask you that, did you go online and  
25   look at the property, kind of what we have here as

1 Exhibit 1, and kind of see what's out there?

2 A. Once again, in general terms I typically  
3 explored the GIS, yes.

4 Q. Based on your work with the Brickhope  
5 Plantation, did you have a familiarity with the real  
6 estate records systems in Berkeley County?

7 A. I know the Berkeley County GIS very well,  
8 yes.

9 Q. Are you able to go on their system and kind  
10 of click on this and see who the owner of a certain  
11 piece of property is?

12 A. Yes.

13 Q. That's something you've done in the past?

14 A. Yes.

15 Q. That's something you've done before 2014?

16 A. Yes.

17 Q. Is that something you did in relationship to  
18 the purchase of Cokers Commons lots?

19 A. I can't recall. I may have explored who  
20 owned -- I would think that they at least explored  
21 who owned the rest of the lots that were attached to  
22 it, but I don't specifically remember, no.

23 Q. The 47 lots, as I understand it, are kind of  
24 up this side of Exhibit 1 and then right through  
25 here and through here?

1       **A. Excluding the 12 current owners, yes, up the**  
2       **left side mainly and the island, as they call it.**

3       **Q. Right, but none of these lots over here on**  
4       **the right side?**

5       **A. No.**

6       **Q. Okay. Did you look to determine who owned**  
7       **these lots?**

8       **A. I don't specifically remember doing it, but**  
9       **I'm sure I did. I know they're owned by several**  
10       **different entities now, so I did it at some point.**

11       **Q. I guess that's my curiosity was, did you have**  
12       **interest when you were buying these and maybe buying**  
13       **all of them to complete the loop?**

14       **A. Not particularly.**

15       **Q. As part of your due diligence in purchasing**  
16       **these, I assume you found out that an entity that**  
17       **was trying to develop some of the lots went through**  
18       **bankruptcy?**

19       **A. I know that now. I don't recall when I**  
20       **discovered that.**

21       **Q. You were buying from Crescom?**

22       **A. Correct. Kirkland was.**

23       **Q. So I assume you knew that the bank took them**  
24       **through some process?**

25       **A. I found that very late in the diligence, yes.**

1 Q. How did you learn it late?

2 A. Through the course of the diligence obviously  
3 some things came up that -- as they typically do,  
4 but I would say they were not in the normal course  
5 of a transaction, and at that point Crescom, the guy  
6 we were dealing with over there through Mr. Litton,  
7 you know, they told us that they had foreclosed on  
8 these lots from someone.

9 Q. Who was the Crescom point of contact?

10 A. Jamin Hujik, J-A-M-I-N, H-U-J-I-K.

11 Q. Quite a name.

12 A. Yeah, quite a guy.

13 Q. What was his position?

14 A. I don't know. Special license manager, I  
15 assume.

16 Q. What were the issues that came up that were  
17 out of the ordinary for this type of deal?

18 A. We discovered at that point that the  
19 homeowners' association was not in control of the  
20 pool and the other common areas.

21 Q. And on Exhibit 1, the one ending here in 87  
22 is the pool, obviously, right?

23 A. Yes.

24 Q. And then one of the other common areas that  
25 you discovered, the HOA did not control this open

1 area ending in 57?

2 A. Not really concerned about that one at that  
3 time.

4 Q. Tell me about why weren't you concerned about  
5 that one?

6 A. It wasn't -- didn't have a direct effect on  
7 anything we were purchasing.

8 Q. Is that because it's not part of the  
9 association?

10 A. Not necessarily. Just more because you can  
11 build and sell a house with a vacant lot sitting  
12 beside it.

13 Q. And this walking path we think was intending  
14 to connect two neighborhoods, is that one of the  
15 common areas that had not been conveyed?

16 A. I understand it hasn't been conveyed now. I  
17 don't believe it's part of the association at this  
18 time too, so it may not need to be conveyed.

19 Q. Is that one of the things that came up during  
20 the due diligence that you learned?

21 A. Mainly the entrance and the pool.

22 Q. Okay.

23 A. But yeah, at some point I realized that those  
24 weren't part -- weren't conveyed either.

25 Q. And the entrance, I understood there are two

1 monuments you circled?

2 A. Yes. One on each side of the road.

3 Q. Was it, you understand that both of them had  
4 not been conveyed?

5 A. Correct.

6 Q. How did that come up?

7 A. I can't recall the exact details. You know,  
8 I would assume in general terms, again, that at some  
9 point, you know, Kirkland started to look at what it  
10 would take to get the pool operational again. We  
11 assumed that the homeowners or somebody had just let  
12 it turn into what it is now, and around -- I guess  
13 around that time we were informed that it was --  
14 somehow we learned it, I don't remember how, but we  
15 did, it was not in control of the HOA.

16 Q. Did you, as part of the due diligence  
17 process, learn anything about delinquent taxes owed  
18 on the pool parcel?

19 A. Yes, I did. There was a notice placed on the  
20 front of the property.

21 Q. That was prior to the time you closed?

22 A. I can't recall where it fell in the puzzle.

23 Q. Okay. What did the notice say?

24 A. Well, just that taxes were due and the sale  
25 date was coming up, and the date and location was on

1     **the sign.**

2         Q.   What was the condition of the pool at that  
3     time?

4         A.   **It was defunct and a nuisance.**

5         Q.   Did you make any inquiries about the sell  
6     date?

7         A.   **Yeah. I attended the sale.**

8         Q.   You did?

9         A.   **Yeah.**

10        Q.   Where was the sale?

11        A.   **Berkeley County. It's not the court house  
12   but wherever the community offices are out there.**

13        Q.   How many people were there? Well, let me  
14   back up. Were they selling multiple properties that  
15   day?

16        A.   **Yes.**

17        Q.   Were you there for another piece of property,  
18   or were you interested in bidding on the pool?

19        A.   **Mainly just to see -- just to witness what  
20   was going to happen with it, but no other  
21   properties, no.**

22        Q.   How many people were there for the entire  
23   sale process?

24        A.   **Several hundred. It's quite a show.**

25        Q.   Were you present when the pool parcel came up

1 to be auctioned off?

2 **A. I was.**

3 Q. How many people bid on that parcel?

4 **A. Two that I recall.**

5 Q. Do you remember who they were?

6 **A. I don't know the other gentleman, but I knew**  
7 **one was Mr. Terry.**

8 Q. Was the other gentleman that bid standing in  
9 close proximity to Mr. Terry?

10 **A. No.**

11 Q. Do you remember what he looked like?

12 **A. No.**

13 Q. Did they seem to be bidding against each  
14 other?

15 **A. Yes.**

16 Q. How did they describe the property they were  
17 going to sell? Was it just by TIS number?

18 **A. I think that's it.**

19 Q. Did you bid on it?

20 **A. No.**

21 Q. Why not?

22 **A. I don't know. I mean, I don't have any**  
23 **experience with the process. I didn't know what I**  
24 **was doing. I just wanted to see what was going to**  
25 **happen.**

1 Q. What was the sales price?

2 A. I don't recall.

3 Q. There's another piece of property conveyed at  
4 that same tax auction that day, I think it was this  
5 property up here.

6 A. Oh, is that right? Okay.

7 Q. I'm assuming that based on some documents  
8 I've seen.

9 A. All right.

10 Q. Do you have any knowledge of that?

11 A. It seems to me something funny went down as  
12 far as the other guy was concerned. I think that he  
13 thought he was getting all the property when he made  
14 that bid, because I remember he got really upset  
15 when Mr. Terry outbid him on the rest of it. There  
16 was more than one auction on this at the same time.

17 Q. All right.

18 A. That's what I recall went down.

19 Q. Gotcha.

20 A. I'm assuming he blew his budget on the first  
21 piece.

22 Q. Okay. There's a company called Park  
23 Investors that's the current owner of the pool  
24 parcel, do you understand that they took that  
25 through a delinquent tax sale?

1       **A. I did not know that.**

2       Q. As we sit here today, you don't know that  
3       Park Investors holds title to the pool?

4       **A. I do. I just wasn't aware they had taken it**  
5       **through the tax sale, as you just mentioned.**

6       Q. I gotcha. Thank you for clarification. When  
7       did you learn that Park Investors owned that pool  
8       parcel?

9       **A. It was, I want to say, sometime after**  
10       **Kirkland closed the property, because I remember**  
11       **Harris Street owned it at one point.**

12       Q. But the time you closed the property, you  
13       knew that the pool parcel was owned by Harris Street  
14       or another entity?

15       **A. Right. Yeah. It was Harris or Whipple;**  
16       **those are the only two I've ever known.**

17       Q. Have you gone online and pulled up the  
18       covenants and restrictions for Cokers Commons?

19       **A. No. I have not.**

20       Q. Has someone provided you a copy that you've  
21       looked through?

22       **A. Yes.**

23       Q. Before, and I guess as part of the due  
24       diligence period or at least prior to the time,  
25       Kirkland Holdings closed on those 47 lots, did you

1 have any meetings with homeowners?

2 A. I don't specifically recall, but I would say  
3 most likely, yes.

4 Q. What types of things are you typically  
5 interested in when you talk to homeowners of a  
6 subdivision like this that you're going to buy lots  
7 on?

8 A. You know, what's going on in the subdivision;  
9 what they want to see; how happy they are there; and  
10 if they're planning on selling anytime soon. Things  
11 like that may affect marketability.

12 Q. Prior to closing, did you gain a sense of how  
13 happy or unhappy people in there were with the  
14 development?

15 A. First time I drove in the subdivision I did.

16 Q. Was that through conversations with people?

17 A. Well, more of what I witnessed.

18 Q. What did you witness?

19 A. The place was completely overgrown and  
20 unmaintained, a bunch of crime, broken grass,  
21 needles, things like that in the street. It was  
22 pretty rough.

23 Q. I want to make sure I understand, does that  
24 relate to the all the lots you're buying and these  
25 areas that you thought were going to be conveyed to

1 HOA?

2 A. Yes.

3 Q. Does that tend to be a product of the  
4 property being under foreclosure?

5 A. No. I would say, a lot of what we saw during  
6 those times were not like that.

7 Q. Do the banks typically maintain areas while  
8 properties are being foreclosed upon?

9 A. I wouldn't use the word "typical," but it  
10 certainly happened and did happen.

11 Q. Anything that you recall the owners telling  
12 you about their unhappiness prior to closing the  
13 development?

14 A. I specifically remember one homeowner, I  
15 can't recall her name, but she was -- she was a  
16 watchdog; she still is to this day. She saw me  
17 walking around and started asking me a lot of  
18 questions. Who are you? What are you doing? And  
19 she was very confrontational. And I was trying to  
20 get a feel from her about what was going on, put one  
21 and one together.

22 Q. Did any of the homeowners during your due  
23 diligence period convey to you or relay to you that  
24 they were upset that the pool area was not a common  
25 area?

1       **A. No.**

2       Q. Did any of them express to you they were  
3 upset that they didn't have access to the HOA in the  
4 neighborhood?

5       **A. No. Not that they were upset about that, no.**

6       Q. Did any of the homeowners express any  
7 problems or issues with this open space with the  
8 number 57 at the end?

9       **A. Well, there were problems and issues with**  
10 **about every parcel in there, except for the ones**  
11 **that were owned by them.**

12       Q. So the one ending in 57 was not any different  
13 than the 47 you were going to buy?

14       **A. Correct.**

15       Q. So prior to the time Kirkland Holdings  
16 purchased the lot and after the time Kirkland  
17 Holdings purchased the lot, the homeowners have not  
18 had access to the pool parcel; is that correct?

19       **A. I wouldn't say that, no. I mean, they can**  
20 **access it.**

21       Q. All right. Tell me how or in what way they  
22 access it?

23       **A. Walk across it and park on the parking**  
24 **spaces. From this GIS it's hard to tell exactly**  
25 **where the boundaries of the property are, the**

1     **mailbox kiosk, things like that.**

2     Q.   So there's the mailbox kiosk, the parking  
3     lot, and the pool itself?

4     **A.   In that one parcel, yes.**

5     Q.   And the pool is fenced it?

6     **A.   The actual pool itself is, yes.**

7     Q.   Have people had access to the actual pool  
8     itself since the time it was constructed, as far as  
9     you know?

10    **A.   I don't know, no. Obviously there was a long**  
11    **time, it was there before I was involved.**

12    Q.   Since Kirkland Holdings took ownership of  
13    those lots, has anyone accessed the pool area, as  
14    far as you know?

15    **A.   As far as the homeowners or anybody else?**

16    Q.   The homeowners.

17    **A.   I'm not aware.**

18    Q.   Is the pool itself locked off to the  
19    homeowners?

20    **A.   It is at this time, yes.**

21    Q.   And there's an allegation in this case about  
22    nuisance related to the pool, can you describe that  
23    for me?

24    **A.   Have you seen it?**

25    Q.   No. I have not.

1       A. I mean, it's -- it's completely grown over.  
2       It's filled in. There's frogs. It's noisy. It  
3       looks like a bass pond. It's gross.

4       Q. Did it look like that when Kirkland Holdings  
5       took possession or ownership of those 47 lots?

6       A. Yes. As best I recall, it's looked like that  
7       as long as I've ever seen it.

8       Q. What about the walking path? What were the  
9       conditions like back then when you were looking to  
10      buy the property, and what are they like now?

11      A. Similar, except for seasonal growth.  
12      Obviously in the summer they are a lot more grown up  
13      than they are in the winter time.

14      Q. Has the HOA, Kirkland Holdings, cut that back  
15      at all?

16      A. No.

17      Q. What about this open area that ends in 57?

18      A. Yes. Kirkland has mowed that property.

19      Q. How often?

20      A. As-needed during the summer, spring, summer,  
21      fall. We have also mowed the entire island, even  
22      though we don't own those lots.

23      Q. By "island," you mean the interior part here?

24      A. Yes. The main reason we did that was because  
25      of the crime. People were parking back there where

1    they couldn't be seen.  So we cut it all down so the  
2    homeowners would have a view across.

3       Q.  I see, because these lots aren't developed  
4    here?

5       A.  Right.  They are developed, not built on yet.

6       Q.  What kind of crime?  You mentioned crime a  
7    couple times.

8       A.  Yeah.  There was some bad stuff going on out  
9    there, whether it be teenagers or worse.  There was  
10   some drug use and things like that.  People building  
11   fires and vagrancy.

12      Q.  Did Mr. Week's firm do a title search as part  
13   of you purchasing the property?

14      A.  Yes.

15      Q.  Did you hire anyone else to look at it as  
16   well?

17      A.  I can't recall.

18      Q.  Okay.  No title abstract on this occasion?

19      A.  No.  I didn't hire an abstractor.

20      Q.  Mr. Hujik was with Crescom?

21      A.  Yes.

22      Q.  They were represented by Charlie Alton, you  
23   said?

24      A.  Yes.

25      Q.  Did you have any interaction with Mr. Alton?

1       **A. Not directly, no.**

2       Q. Did someone interact with Mr. Alton on your  
3       behalf?

4       **A. Yes, Mr. Week's.**

5       Q. Just Mr. Week's?

6       **A. Yes.**

7       Q. What about Mr. Hujik, did you deal with him  
8       directly?

9       **A. No.**

10      Q. Just Mr. Litton?

11      **A. Correct.**

12      Q. Did anyone from Crescom or did you have any  
13      conversations with anyone at Crescom about the pool  
14      area?

15      **A. Not directly, no.**

16      Q. What about indirectly?

17      **A. Yes. Through Mr. Litton.**

18      Q. Okay. Tell me about what Crescom related  
19      through -- well, what Mr. Litton relayed to you that  
20      he learned through Crescom?

21      **A. I can't remember the specific conversation,**  
22      **but I could tell you the gist of it. At some point**  
23      **we discovered that Crescom had not foreclosed on the**  
24      **pool parcel or the other parcels at the time they**  
25      **did the foreclosure of the 47 lots.**

1 Q. And Crescom was aware of that?

2 A. At that point, yes, they were. I believe we  
3 made them aware of it.

4 Q. Did they indicate to you they were upset  
5 about that, or were going to take any action about  
6 that?

7 A. No. I understand they still have some sort  
8 of legal proceedings against Mr. Terry now, but I  
9 don't know the involvement of them.

10 Q. Did you purchase title or Kirkland Holdings  
11 purchase title insurance for the property?

12 A. Yes.

13 Q. Have any claims filed with the title  
14 insurance?

15 A. Not on our behalf.

16 Q. Endorsements or exceptions included as part  
17 of that title insurance indicating that there was no  
18 ownership of the pool area?

19 A. I don't understand it well enough to really  
20 answer the question, but I would assume that there  
21 would not be, because Kirkland Holdings was not  
22 purchasing the pool, so it wouldn't cover our title.

23 Q. I probably don't understand it well enough to  
24 ask the question, but do you have a copy of the  
25 title insurance for the property that was purchased?

1       A. Not that I'm aware of, but I'm sure I could  
2 find one.

3       Q. In advance of the purchase?

4       A. Yes.

5       Q. What bank did you use?

6       A. It's a lender, Rapid Fund Corps.

7       Q. Do you remember what entity issued the title  
8 insurance?

9       A. I'm sure it was Mr. Week's office, whatever  
10 the name of the title company is.

11               MR. HALVERSEN: Stewart?

12               BY THE WITNESS: Rings a bell.

13 BY MR. KELLY:

14       Q. So you have no gripe with Crescom for selling  
15 you the 47 lots; is that a fair statement?

16       A. No. I have very much gripe with Crescom.

17       Q. Explain that to me.

18       A. I mean, at the time we discovered what was  
19 going on, technically our diligence had expired, and  
20 our deposit had gone hard, and I approached Crescom  
21 through my representative and said, I need them to  
22 help fix this problem.

23       Q. And they refused?

24       A. Yes.

25       Q. Did you file suit against Crescom?

1       **A. I don't believe it got that far, no.**

2       **Q. Made claims against them?**

3       **A. We did.**

4       **Q. Did you do that on your behalf or hire a**  
5 **lawyer to help with that?**

6       **A. Mr. Weeks helped with that.**

7       **Q. How did that resolve?**

8       **A. It didn't. We just kind of -- interestingly**  
9 **enough, that other fellow got involved with the**  
10 **contract and tightened things up for us, if that**  
11 **makes sense to you. We were kind of backed into a**  
12 **corner and decided to proceed, to close it.**

13       **Q. The dispute with Crescom, did it involve**  
14 **Crescom giving you money or making any sort of**  
15 **financial concessions to you?**

16       **A. I want to say we renegotiated the contract,**  
17 **maybe a little cheaper price. We also did not want**  
18 **the nine lots in phase 4-B, and as part of that, we**  
19 **agreed to take those nine.**

20       **Q. Why didn't you want them originally?**

21       **A. Their utilities weren't complete in that**  
22 **section, which we discovered during due diligence.**

23       **Q. To resolve the issue with Crescom, y'all took**  
24 **nine additional lots and then they lowered the price**  
25 **for everything?**

1       **A. Yes.**

2       Q. Anything else that you can recall?

3       **A. I think that was kind of the nuts and bolts**  
4       **of it.**

5       Q. What was the purchase price anyways for those  
6       -- all the lots?

7       **A. I don't recall. I know it would be real easy**  
8       **to find.**

9       Q. Sure. What's your recollection of the  
10       difference between what the price was going to be  
11       and what it ended up being?

12       **A. I don't recall that either. It wasn't a**  
13       **major concession on their part. It wasn't -- wasn't**  
14       **anything big.**

15       Q. You developers have a different idea of  
16       what's big than us lawyers do. What are we thinking  
17       about in terms of size? I mean, more than  
18       \$50,000.00? More than \$100,000.00?

19       **A. Percentage-wise; is that fair?**

20       Q. That's fine.

21       **A. I would say, if I had to guess, maybe 15, 20**  
22       **percent, something like that.**

23       Q. There should be some contract document  
24       somewhere we could find if we needed to.

25       **A. Yeah. There should be.**

1 Q. Okay. That's not something you still have?

2 A. Well, I mean, no. I've gotten pretty good at  
3 purging, but when that first contract was no good,  
4 no need to keep it around, so...

5 Q. Okay.

6 A. Properties closed, the price is what it is.  
7 I didn't imagine something like that would ever be  
8 needed for anything.

9 Q. The nine lots that you first didn't want to  
10 take, have y'all fixed them now so they got utility  
11 service?

12 A. No.

13 Q. Do you plan to do that as part of the build  
14 out?

15 A. No. No plans to do that.

16 Q. Do you need to take a break?

17 A. I'm good, thanks.

18

19 (DEFENDANT'S EXHIBIT NO. 2

20 WAS MARKED FOR IDENTIFICATION)

21

22 Q. I'll give you a second to take a look at it  
23 and make sure you're familiar with it.

24 What we've marked as Exhibit 2 is a letter  
25 dated February 26, 2015 to Mr. Halversen, and it's

1 signed by -- is that Kerine Borrillo?

2 **A. Kerine.**

3 Q. Kerine Borrillo?

4 **A. Borrillo.**

5 Q. Borrillo, okay, and Freeman Barber?

6 **A. Yes.**

7 Q. And it indicates that a vote was taken on  
8 February 20, 2015 by the current homeowners and land  
9 owners in Cokers Commons?

10 **A. That's what it says, yes.**

11 Q. Okay. Was there a meeting in which  
12 homeowners appeared to vote on whether or not suit  
13 would be brought against Park Investors, Whipple  
14 Development, and Harris Street Properties?

15 **A. Yes, there was.**

16 Q. How many people showed up?

17 **A. The 12 homeowners, myself, there may have  
18 been some other families members as well.**

19 Q. All 12 homeowners?

20 **A. Yes. Everybody was there.**

21 Q. That rarely happens.

22 **A. Well, smaller group and certainly peaked  
23 interest. We're not discussing whether to put a new  
24 net on the basketball court that day.**

25 Q. Okay. How was the meeting advertised; in

1 other words, how did people learn it was going to  
2 take place?

3 A. Kerine and I coordinated it. I told her I  
4 wanted to meet with some people, and she said they  
5 wanted to meet with me as well. So she -- pretty  
6 tight community after everything they've been  
7 through, and they talk a good bit. So she  
8 communicated with them and scheduled it.

9 Q. Okay. And were the homeowners just these  
10 folks over here on this side of Exhibit 1 where you  
11 bought the majority of the lots?

12 A. Correct. The adjoining lots, yeah.

13 Q. Were any of the homeowners on the right side  
14 of Exhibit 1 here notified?

15 A. Well, there are no homeowners over there, but  
16 no, there are not.

17 Q. I'm probably using the wrong word.

18 A. Land owners.

19 Q. Land owners?

20 A. Yeah.

21 Q. Why were they not?

22 A. They're not members of the homeowners'  
23 association.

24 Q. Does that include the people on this side of  
25 the island?

1       **A. Yes, it does.**

2       Q. How long did this make -- how long after the  
3 time Kirkland holdings purchased the lots was there  
4 before this meeting took place?

5       **A. I can't tell you. I know you can track down**  
6 **the dates from real estate records and when it was**  
7 **purchased and when that February date was, but I**  
8 **can't tell you when the purchase was.**

9       Q. I guess I was curious about, was there a time  
10 after Kirkland Holdings purchased the lots and  
11 before this meeting took place where other  
12 homeowners' association meetings were happening?

13       **A. There were what I would describe as some**  
14 **informal meetings, some discussions literally in the**  
15 **street about what could happen, what was going to**  
16 **happen, things of that nature.**

17       Q. And were those discussions you remember not  
18 related to other matters?

19       **A. No.**

20       Q. There seems to be a Casey Elie or Casey Eli  
21 that owns property out there; do you know that  
22 person?

23       **A. Doesn't ring a bell, but I believe you.**

24       Q. Are most of the people that are owners also  
25 the occupants of the homes?

1       **A. There's one rental owner that I'm aware of.**  
2       **A guy that owns it lives somewhere else and rents it**  
3       **out. I think everybody else is an owner that lives**  
4       **there.**

5       **Q. Do you recall any conversations with**  
6       **Stephanie LeFrance?**

7       **A. No.**

8       **Q. How about Renna Davis?**

9       **A. I recognize her name. I don't recall any**  
10       **specific conversations with them.**

11       **Q. What about Benjamin Trembeck?**

12       **A. No.**

13       **Q. James Matthew Ward?**

14       **A. Yeah. I talk to Matt a good bit.**

15       **Q. Okay. Tell me about Mr. Ward.**

16       **A. Mr. Ward's home is currently for sale.**

17       **Q. Okay.**

18       **A. And he has called me several times wanting to**  
19       **know what was going to happen with the future of the**  
20       **HOA.**

21       **Q. And is that what you guys have talked about**  
22       **almost exclusivity?**

23       **A. Yes.**

24       **Q. What about Rosalie Smith?**

25       **A. I know Rosa as well.**

1 Q. Tell me about Ms. Smith. How do you know  
2 her?

3 A. A resident of the neighborhood. She's  
4 frequently there.

5 Q. Does she express concerns to you at any point  
6 about the pool not having been conveyed?

7 A. You know, to pick on the semantics of the  
8 question, I'm not sure anybody there are aware that  
9 the pool was conveyed until I made them aware of it.

10 Q. You got right down to it. I was going to ask  
11 you that.

12 A. Okay.

13 Q. So you don't recall any conversations with  
14 any homeowner indicating to you that they were not  
15 aware that the pool had not been conveyed to them?

16 A. That's right.

17 Q. Okay. I want to ask you the rest of these  
18 owners just so I can get a sense of who's more  
19 active out there than others or your sense of it.  
20 There's a Cindy Garvey?

21 A. Yeah. She's home a good bit too.

22 Q. How about Megan Elizabeth Stone?

23 A. No.

24 Q. Sabrina Fellers?

25 A. I've had some conversations with Sabrina too.

1     **You know, just when you tell me their name I can**  
2     **either picture their face or not.**

3         **Q. I understand, sure. But nothing stands out**  
4     **about your conversations with her?**

5         **A. No.**

6         **Q. Natalie Lanther?**

7         **A. No.**

8         **Q. John Morgan?**

9         **A. No.**

10        **Q. What was the purpose of bringing this**  
11     **lawsuit?**

12        **A. Well, the real purpose, you know, is to get**  
13     **the nuisance cleaned up. The homeowners aren't as**  
14     **concerned about it as Kirkland and Southwind Home**  
15     **Builders are, but there needs to be some sort of**  
16     **organization of the homeowners' association as well.**  
17     **That seems to not be taking place right now.**

18        **Q. Why is Kirkland concerned about it?**

19        **A. It's a majority land owner out there.**

20        **Q. What about Southwind?**

21        **A. Southwind as well, because it will obviously**  
22     **have home buyers that are going to be concerned**  
23     **about it in the future.**

24        **Q. Are you aware of any sales Southwind or**  
25     **Kirkland had lost because of the pool condition?**

1       **A. No. Nothing's been advertised for sale at**  
2       **this point.**

3       Q. I may have asked you this already. If I did,  
4       I apologize. Did any current homeowners in Kirkland  
5       Commons pay assessment or any kind of dues?

6       **A. Not that I'm aware of.**

7       Q. How's this lawsuit being funded?

8       **A. Kirkland Holdings.**

9       Q. And no assessment to the owners to chip in?

10      **A. No.**

11      Q. Are you paying on an hourly basis?

12      **A. My attorney?**

13      Q. Yes.

14      **A. I'm not aware.**

15      Q. Okay.

16      **A. I get bills, and I pay him.**

17               MR. HALVERSEN: I'm going to object to  
18       the -- you know, any more questions beyond the fact  
19       that I've been retained to represent them regarding  
20       specifics of that representation, as it could be a  
21       communication, attorney-client privilege.

22               MR. KELLY: I have no intention of  
23       asking about any communication between you and Mr.  
24       Barber, you and the association. I simply want to  
25       ask, and I think I'm entitled to know, what the fee

1 agreement, arrangement is.

2 Q. Are you paying by the hour, flat fee,  
3 contingency fee?

4 MR. HALVERSEN: I'll object. I just  
5 don't think that, that's in any way relevant, and I  
6 don't want to in any way waive any kind of  
7 attorney-client privilege by allowing him to answer  
8 that, but off the record I'll tell you what the  
9 answer is.

10 MR. KELLY: Why don't we do this. I  
11 mean, if you want to instruct him not to answer,  
12 that's fine, and then we can agree that you don't  
13 have to file a motion. At the time if it becomes  
14 something that we feel like we are entitled to, we  
15 can revisit and address it, if necessary. Rather  
16 than getting an answer from Mr. Barber, we can  
17 probably do a supplementary discovery response or  
18 something like that if we still can't reach an  
19 agreement on it.

20 MR. HALVERSEN: Yeah. I'm just  
21 sensitive to any kind of questions that are going to  
22 the nature of the representation, because I think it  
23 inherently is a communication between the  
24 association and myself, so -- but I'm willing to  
25 look at it again.

1                   MR. KELLY: That's fine. I was  
2 attempting to make a concession so you didn't have  
3 to instruct him not to answer and file a motion,  
4 because I think that's what the rule requires if  
5 he's not going to answer. So what I'm suggesting is  
6 let's just not have to go through the process and  
7 agree to revisit it later on.

8                   MR. HALVERSEN: That's fine. That's  
9 fine.

10                  MR. KELLY: I understand your  
11 sensitivity to it.

12                  MR. HALVERSEN: That's fine.

13 BY MR. KELLY:

14       Q. All right. After Exhibit 2, the vote that  
15 took place, I may not have read it clearly enough,  
16 did all homeowners vote in favor of the lawsuit?

17       **A. Yes.**

18       Q. Has Kirkland Holdings or Southwind Home  
19 Builders gone into the pool parcel for purposes of  
20 attempting to address or make repairs to the pool?

21       **A. No. Well, address, I mean mowing it.**

22       Q. Yeah. Let me just limit it to, have you gone  
23 inside the gate, anyone from Kirkland or Southwind  
24 Home Builders?

25       **A. I have been inside the gate, yes.**

1 Q. Was the gate locked at the time you went in?

2 A. No.

3 Q. How did you gain access, just opening the  
4 gate and walking through it?

5 A. It was actually open, and I walked in and  
6 looked around.

7 Q. Why was it open that day?

8 A. I'm sorry, how long?

9 Q. Why was it open on that day?

10 A. Oh, I don't know.

11 Q. Has it always been open?

12 A. No. It's been locked since.

13 Q. How long ago was that when you went in?

14 A. I want to say, about the time the tax notice  
15 went up. It was my assumption whoever put the  
16 notice up locked the gate.

17 Q. Have these homeowners who we're talking about  
18 ever indicated to you that they used the pool prior  
19 to the time the delinquent sales tax took place?

20 A. No.

21 Q. Tax sales, okay. And you told me you mowed  
22 the open space and some of the other lots?

23 A. All of them.

24 Q. How often?

25 A. Just as-needed, just seasonal.

1 Q. Have you told me all reasons that you believe  
2 the owners of those properties have neglected and  
3 allowed them to become a blight to the neighborhood?

4 A. Excuse me, can you...

5 Q. Sure. Within the lawsuit there's an  
6 allegation that those properties, the amenity area  
7 or the pool area and the open space have been  
8 abandoned, neglected, and have become a blight to  
9 the neighborhood. I know you've given me some  
10 examples already. I just want to see if there are  
11 other things that you believe constitute a neglected  
12 property that have become a blight to the  
13 neighborhood?

14 A. I think that speaks for itself. If you saw  
15 it, you'd know.

16 Q. Seeing it?

17 A. Yeah. You could imagine, I'm sure you've  
18 seen a pool that hadn't been operated before, what  
19 it does quickly.

20 Q. All right. Has any of the property of  
21 Kirkland Holdings been damaged by the -- what's been  
22 termed as a nuisance with the pool?

23 A. I don't know, and I think that's really going  
24 to be up to marketing perception. As Southwind  
25 Homes Builders makes its sales efforts, I think

1    **we'll find out real quick.**

2       Q.   What about these homes that are already  
3   constructed, other than Cokers Commons, have they  
4   been damaged in any way by the perceived nuisance,  
5   the pool and parcel?

6       A.   **It's my opinion that they have, yes.**

7       Q.   In what way?

8       A.   **Quiet enjoyment. I think the pool, as well**  
9   **as the entire subdivision, has made it very**  
10  **challenging on these people and what they've had to**  
11  **endure on a daily basis, having to come home and**  
12  **look at it, and essentially be in a bad situation.**

13      Q.   To be clear, we're not talking about odor or  
14 anything in the neighboring pool area?

15      A.   **Oh, yeah.**

16      Q.   There is an odor?

17      A.   **Well, in the summer there is. It's bad.**

18   **There's noise.**

19      Q.   What's the noise?

20      A.   **The frogs.**

21      Q.   Okay. Any other noise?

22      A.   **Mosquitos. No, no other -- no stereotypes or**  
23  **anything like that.**

24      Q.   The frogs, mosquitos, and odors in the  
25 summer?

1       **A. Yeah.**

2       Q. Anything else that effects the quiet use and  
3 enjoyment of the property?

4       **A. The visual aspects of it as well. Even**  
5 **though we're mowing, it still looks like a pretty**  
6 **rough place.**

7       Q. Don't worry, we're not going through all of  
8 these.

9       **A. Okay.**

10

11                   (DEFENDANT'S EXHIBIT NO. 3  
12                   WAS MARKED FOR IDENTIFICATION)

13

14       Q. I'm going to hand you what's been marked as  
15 Exhibit 3, which is produced as part of Plaintiff's  
16 discovery response in this case.

17       **A. Okay.**

18       Q. Do you know Joshua Swain?

19       **A. I have spoken to Mr. Swain before.**

20       Q. All right. How did you get in contact with  
21 them?

22       **A. Well, being a developer and home builder in**  
23 **Goose Creek, I've had some run ins, for lack of a**  
24 **better term, regarding the pool at Cokers Commons.**  
25 **I believe someone at Town Hall put me in touch with**

1     **him.**

2         Q.   Do you remember who put you in touch with  
3     him?

4         A.   **No.   I have several relationships over there,**  
5     **people that I've dealt with over the years.**

6         Q.   Mr. -- okay. That answers my question. Were  
7     you just reaching out in general to the folks at  
8     Goose Creek about the pool?

9         A.   **Yes.**

10        Q.   When in relationship to the time you closed  
11   on the -- Kirkland Holdings closed on the lots did  
12   you start reaching out to the Town, the City, about  
13   the pool?

14        A.   **I can't remember the time frames, when and**  
15   **where compared to closing, stuff like that, but I**  
16   **reached out to them. I'm still reaching out to**  
17   **them.**

18        Q.   When you first got in contact with them, did  
19   he indicate to you that he'd been working on the  
20   pool issue?

21        A.   **Yes. He was certainly aware of it and knew**  
22   **that it was a problem already, and as with most**  
23   **government agencies, don't give you a whole lot of**  
24   **answers.**

25        Q.   Okay. Has anything been done by the City

1     since the time Kirkland Holdings or Southwind owned  
2     the lots out there in Cokers Commons to address the  
3     pool?

4           A.   Once again, can't specifically recall within  
5     the reference of property that's purchased, but yes,  
6     they have done something to it since I've known of  
7     the problem.

8           Q.   What was done?

9           A.   They built some sort of cover, something like  
10    that.

11          Q.   Okay.

12          A.   Framed it up, and put it over it, I assume to  
13    prevent someone from falling in.

14          Q.   Is the cover there now?

15          A.   No.

16          Q.   What happened?

17          A.   A storm came through, blew it off, so it's on  
18    the side of the pool.

19          Q.   There was a document produced as part of  
20    Plaintiff's discovery that related to kind of a tarp  
21    or something like that from a hardware store?

22          A.   It was a little more substantial than that,  
23    but yeah.

24          Q.   Would that be it though?

25          A.   Yeah.

1 Q. Is that why that was --

2 A. I'm sure that was the gist of the  
3 conversation, yes.

4 Q. Is there anything else that the City has done  
5 that you're aware of to correct the pool issue?

6 A. I believe I was informed that they had placed  
7 some liens on the property, something along those  
8 lines. Find the entities that hold title, something  
9 about that picked up in passing conversation about  
10 it.

11 Q. Sure. Nothing else physically that would  
12 have gone to address the perceived nuisance?

13 A. That one effort was pretty substantial at the  
14 time. That's the only one I'm aware of.

15 Q. How long did that last, the structure they  
16 built?

17 A. Few weeks. Well, technically it still lasts,  
18 but it's just not doing its job anymore.

19 Q. When's the last time you were in contact with  
20 Mr. Swain?

21 A. I can't recall.

22

23 (DEFENDANT'S EXHIBIT NO. 4

24 WAS MARKED FOR IDENTIFICATION)

25

1 Q. Exhibit 4 is another letter from Mr. Swain.  
2 This time it's CCT Reserve. Have you seen that  
3 document before?

4 A. I believe so, but can't specifically remember  
5 when and where.

6 Q. This is another one that was produced by  
7 plaintiff, the homeowners' in the case. It's a date  
8 of October 2011.

9 A. Yes.

10 Q. That was well before Kirkland Holdings took  
11 ownership of any of the lots?

12 A. I believe so, yes.

13 Q. And this letter, Exhibit 4, is Mr. Swain  
14 attempting to get CCT Reserve to address the issues  
15 with the pool?

16 A. Correct.

17 Q. All right. How did you come into possession  
18 of that letter?

19 A. I believe the first time I saw it was in your  
20 discovery.

21 Q. Okay. Did you talk to any of the homeowners  
22 about how long this issue with the pool had been  
23 going on?

24 A. I'm sure I did, but I don't remember a  
25 specific answer on that.

1 Q. Did you get the sense or the understanding  
2 that the homeowners reached out to Mr. Swain, or did  
3 Mr. Swain just happen to drive through the  
4 neighborhood and see --

5 A. Didn't get a sense of it. My guess, Mr.  
6 Swain came across it on his own.

7 Q. Was there someone at the time Kirkland  
8 Holdings bought those lots that was kind of the de  
9 facto head of the homeowners' association?

10 A. No. It was a sensitive subject that I can  
11 elaborate on, but no, there was not.

12 Q. Okay. How did -- Ms. Borrillo seems to be  
13 the person you're going to the majority of the time  
14 now?

15 A. She was at the time, yes.

16 Q. Is she still out there?

17 A. She still lives there, yes.

18 Q. How did she get to be the person that was  
19 most involved on Kirkland Holding's behalf at that  
20 time?

21 A. Well, as I mentioned, I had a relationship  
22 with Ms. Borrillo, other than the subdivision, so  
23 that's kind of where things took off between me and  
24 her.

25 Q. Have any members of the association not been

1   able to use their own lots and homes because of the  
2   lack of care and upkeep of the pool area?

3       **A. To use their homes, no.**

4       Q. Has the alleged lack of care and upkeep of  
5   the pool area interfered with the use of any HOA  
6   member's property?

7       **A. No.**

8       Q. Is your perception of the harm that's being  
9   done as a matter of market value of the property?

10       **A. That's a large part of it, but I mean,**  
11   **everyday quiet enjoyments is the big part of it.**

12               MR. KELLY: All right. Give me about  
13   five minutes.

14

15               (OFF THE RECORD DISCUSSION)

16

17       Q. I want to make sure you feel like you've had  
18   a chance to tell me everything you wanted to tell me  
19   about Cokers Commons in this lawsuit. Is there  
20   anything we haven't talked about that you felt you  
21   would like to relay or convey?

22       **A. How much time do you have? I'm glad you**  
23   **asked me that question, because there's a lot I**  
24   **could say about it, but I mean, I really think it's**  
25   **a very unfortunate situation. The way that he's**

1 chosen to handle it is not necessary, and I'll be  
2 extremely interested to hear what his angle is  
3 tomorrow when I finally find out after 2 years, or  
4 however long it's been, of discussions with him and  
5 everyone else involved why he's doing what he's  
6 doing. It's been extremely traumatic for these  
7 people out there, and it's damaged their lives, and  
8 their comfort and their ability to sleep at night,  
9 I'm sure. I mean, my opinion is it's completely  
10 avoidable. Being in the -- I'll just say that.

11 Q. Have you had conversations with Mr. Terry or  
12 Mr. Dan Mckie or anyone else related to the  
13 defendant entities since Kirkland Holdings took  
14 possession of the property?

15 A. I have had some conversation with Mr. Terry.  
16 I don't recall speaking to Mr. Mckie, and I've  
17 talked to Mr. Terry's son several times as well.

18 Q. Have you ever spoken to Mr. Terry's son about  
19 Cokers Commons?

20 A. Yes.

21 Q. And you said "several times"?

22 A. Yes.

23 Q. Did you reach out to him, or did Mr. Terry's  
24 son reach out to you?

25 A. He reached out to me.

- 1 Q. Why's that?
- 2 A. He wanted to purchase the property.
- 3 Q. He wanted to purchase your lots?
- 4 A. Kirkland's lots, yeah.
- 5 Q. Okay, sorry.
- 6 A. Yes.
- 7 Q. How long was that?
- 8 A. Recently, within the last several weeks.
- 9 Q. Did he make an offer for the lots?
- 10 A. Not specifically. Not a formal offer, no,
- 11 but we definitely discussed some prices and things
- 12 like that.
- 13 Q. Okay. Were you interested in that?
- 14 A. I was very interested in it, yes.
- 15 Q. Just couldn't come to terms?
- 16 A. Yes.
- 17 Q. Have each of the conversations you had with,
- 18 we'll call him Teddy Terry, Mr. Terry's son --
- 19 A. Sure.
- 20 Q. -- been about his inquiry into purchasing the
- 21 lots?
- 22 A. Yes. I mean, you know, everything's been
- 23 related to the subdivision, not playing golf or
- 24 anything like that.
- 25 Q. Right.

1       **A. Yeah.**

2       Q. I guess that's my question. Have you had any  
3       conversations with him about the perceived nuisance  
4       of the pool?

5       **A. Yes.**

6       Q. Tell me about those conversations.

7       **A. You know, hey, look, we're all out trying to**  
8       **do a job here. Let's work together and get this**  
9       **thing clean up; not only for these people but for**  
10       **our benefit as well. He mentioned something along**  
11       **the lines of saying, well, you know, sell these**  
12       **things to me at a discount, and I'll take care of my**  
13       **dad. I'll get the situation revolved with him. I**  
14       **said, okay, great, whatever, and then he came back**  
15       **and said he couldn't do it.**

16       Q. He couldn't do the deal or that he couldn't  
17       take care of his dad?

18       **A. Couldn't take care of his dad.**

19       Q. How many lots was he looking to buy?

20       **A. 47.**

21       Q. Is that prior to the time the construction  
22       company started building?

23       **A. Yes.**

24       Q. How many times have you talked to Ted Terry,  
25       Sr., about Cokers Commons since Kirkland Holdings

1 took possession of the lots?

2 A. Once again, can't really recall if it was  
3 before possession or after, but from the time the  
4 contract was signed, maybe three, four.

5 Q. All right. What are those conversations  
6 related to?

7 A. You know, the initial conversation was, you  
8 know, can we look into conveying this pool to the  
9 HOA or getting it cleaned up, and a couple  
10 conversations along those lines, and at one point he  
11 actually inquired about purchasing the lots as well.

12 Q. How did he respond when you asked about  
13 cleaning up the pool and lots?

14 A. To quote him he said, don't count on me, Bo.

15 Q. What did he offer you to purchase the lots?

16 A. I can't remember. You know, one point we  
17 actually considered just selling our contract to  
18 him, you know, because once again, we were pinched  
19 by the time we got down to it, and I want to say, I  
20 discussed those terms with him, and he said they  
21 weren't acceptable to him, and that was that.

22 Q. Did you ever offer to purchase the pool area  
23 and the walkway or anything else that you thought  
24 should have been conveyed to the association?

25 A. I didn't offer to purchase it. He offered to

1     sell it to the HOA for a very high price, and --

2     Q.   He -- I'm sorry.

3     A.   I'll let you ask the questions.

4     Q.   He gave you a price?

5     A.   He did.

6     Q.   What's was the price?

7     A.   \$250,000.00, I think.  I mean, I know what it  
8     costs to construct a pool, and it's not fair market  
9     value.  He also alluded in the conversation that  
10    Kirkland, or whatever entity I was representing, you  
11    know, would not succeed without his help, and that's  
12    the way he planned on keeping it.

13    Q.   Anything else from those conversations with  
14    Mr. Terry that you recall that relates to the upkeep  
15    of the subdivision or buying, selling property?

16    A.   Didn't really discuss upkeep of the  
17    subdivision.  You know, more so the thing that  
18    jumped out to me in those documents is that he was  
19    to convey it prior to the sale of the first --  
20    that's what I asked him to do, and he still got an  
21    interest in there.  So I think it would make sense  
22    for him to see the pool cleaned up as well, but  
23    whatever motives he's got, he didn't see it that  
24    way.

25    Q.   You said he's still got an interest in there,

1     what do you mean by that?

2           **A.   The entities that own those lots, I'm**  
3     **assuming those are him.**

4           Q.   Okay.   On this side of Exhibit 1?

5           **A.   Yeah.   The one in B.**

6                   MR. KELLY:   All right.   I think those  
7     are all my questions.   Thank you for your time and  
8     patience.

9  
10                   (The reading and signing of the  
11                   deposition by the witness is waived)

12

13

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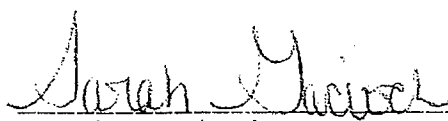
1 STATE OF SOUTH CAROLINA )  
2 )  
3 COUNTY OF CHARLESTON )

4 I, Sarah Gacioch, Certified Shorthand  
5 Reporter and Notary Public for the State of  
6 South Carolina at Large, do hereby certify that  
7 the witness in the foregoing deposition was by  
8 me duly sworn to testify to the truth, the whole  
9 truth and nothing but the truth in the  
10 within-entitled cause; that said deposition was  
11 taken at the time and location therein stated;  
12 that the testimony of the witness and all  
13 objections made at the time of the examination  
14 were recorded stenographically by me and were  
15 thereafter transcribed by computer-aided  
16 transcription; that the foregoing is a full,  
17 complete and true record of the testimony of the  
18 witness and of all objections made at the time  
19 of the examination; and that the witness was  
20 given an opportunity to read and correct said  
21 deposition and to subscribe the same.

22 Should the signature of the witness not be  
23 affixed to the deposition, the witness shall not  
24 have availed himself/herself of the opportunity  
25 to sign or the signature has been waived.

I further certify that I am neither related  
to nor counsel for any party to the cause  
pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my  
official seal this 4 day of February, 2016,  
at Charleston, Charleston County, South  
Carolina.

  
\_\_\_\_\_  
Sarah Gacioch  
My Commission Expires:  
October 15, 2025

Berkeley County  
Cynthia B. Forte  
Register of Deeds  
Moncks Corner 294616120

00007710 Vol:10699 Pg: 151



53 2014 00007710

Instrument Number: 2014- 00007710

Recorded On: April 14, 2014

As  
Deed

Parties: CRESCOM BANK

To

KIRKLAND HOLDINGS LLC

Billable Pages: 2

Recorded By: WEEKS AND IRVINE

Num Of Pages: 7

Comment:

**\*\* Examined and Charged as Follows: \*\***

Deed 12.00

Recording Charge: 12.00

|          | Tax Amount | Consideration<br>Amount | RS#/CS# |
|----------|------------|-------------------------|---------|
| Deed Tax | 1,291.30   | 349,000.00              | D 22776 |

Deed County Tax 383.90

Deed State Tax 907.40

Tax Charge: 1,291.30

RECEIVED

Apr 14, 2014

ASSESSOR  
BERKELEY COUNTY SC  
JANET B. JUROSKO  
AUDITOR BERKELEY COUNTY SC

**\*\* THIS PAGE IS PART OF THE INSTRUMENT \*\***

I hereby certify that the within and foregoing was recorded in the Register of Deeds Office For: Berkeley County, SC

**File Information:****Record and Return To:**

Document Number: 2014- 00007710

WEEKS AND IRVINE

Receipt Number: 475285

8086-B RIVERS AVENUE

Recorded Date/Time: April 14, 2014 10:30:18A

NORTH CHARLESTON SC 29406

Book-Vol/Pg: Bk-R VI-10699 Pg-151

Cashier / Station: H Sexton / Cash Station 2



*Cynthia B. Forte*

Cynthia B Forte - Register of Deeds

0242

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

## LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS: That CRESCOM BANK, ("Grantor") in the state aforesaid, in consideration of the sum of THREE HUNDRED FORTY-NINE THOUSAND & 00/100 Dollars (\$349,000.00), to the Grantor in hand paid at and before the sealing of these presents by KIRKLAND HOLDINGS, LLC, a South Carolina Limited Liability Company, ("Grantee"), the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said Grantee, its successors and assigns, the following described real property, to wit:

SEE EXHIBIT "A" ATTACHED HERETO

Grantee's Address: PO Box 94, Sullivan's Island, SC 29451

TOGETHER with all and Singular the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, its successors and assigns forever, the herein described property.

AND the said Grantor hereby binds itself and its successors and assigns to warrant and forever defend all and singular the said premises unto the said Grantee, its successors and assigns, against itself and its successors and assigns lawfully claiming, or to claim the same, or any part thereof.

WITNESS the Grantor's hand and seal this 3 day of April, 2014.

Signed, Sealed and Delivered  
in the Presence of:

CRESCOM BANK

Rachel Meyer  
Megh Barry

[Signature]  
By: Jamin M. Hujik  
Its: Executive Vice President

STATE OF SOUTH CAROLINA    )  
                                          )  
COUNTY OF CHARLESTON        )

**ACKNOWLEDGMENT**

BEFORE me personally appeared Jamin M. Hujik, well known to be the Executive Vice President of CresCom Bank and who executed the foregoing instrument, and he acknowledged to and before me, an officer duly authorized in the state and county aforesaid to take acknowledgments, that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal this   3   day of April, 2014.

Rachel Meyers  
Notary Public for South Carolina  
My Commission Expires: 01-18-2021

## EXHIBIT A

ALL those certain lots, pieces or parcels of land, together with any improvements thereon, situate, lying and being in the City of Goose Creek, County of Berkeley, State of South Carolina, being known and designated as **LOTS 1-12, PHASE IV, COKERS COMMONS**, as shown on that certain plat of Thomas & Hutton Engineering Co., entitled, "FINAL SUBDIVISION PLAT OF A PORTION OF COKERS CROSSING PHASE IV, PREPARED FOR WHIPPLE DEVELOPMENT CORPORATION," dated July 6, 2007, and recorded in the ROD Office for Berkeley County in Plat Cabinet N, at Page 2-H on July 6, 2008. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TMS No.'s:

|                      |                       |
|----------------------|-----------------------|
| LOT 1: 235-06-10-063 | LOT 7: 235-06-10-069  |
| LOT 2: 235-06-10-064 | LOT 8: 235-06-10-070  |
| LOT 3: 235-06-10-065 | LOT 9: 235-06-10-071  |
| LOT 4: 235-06-10-066 | LOT 10: 235-06-10-072 |
| LOT 5: 235-06-10-067 | LOT 11: 235-06-10-073 |
| LOT 6: 235-06-10-068 | LOT 12: 235-06-10-074 |

**ALSO:**

ALL those certain lots, pieces, or parcels of land, together with any improvements thereon, situate, lying and being in the City of Goose Creek, County of Berkeley, State of South Carolina, being known and designated as **LOTS 25-37 AND 81-91, PHASE IV, COKERS COMMONS**, as shown on that certain plat of Thomas & Hutton Engineering Co., entitled, "A FINAL SUBDIVISION PLAT OF COKERS COMMONS, A PORTIONS OF COKERS CROSSING PHASE IV, CITY OF GOOSE CREEK, BERKELEY COUNTY, SOUTH CAROLINA, PREPARED FOR HARRIS STREET, LLC," dated April 7, 2008 and recorded in the ROD Office for Berkeley County in Plat Cabinet M, at Page 39P on April 11, 2008. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TMS No.'s:

|                       |                       |
|-----------------------|-----------------------|
| LOT 25: 235-06-10-088 | LOT 81: 235-06-10-101 |
| LOT 26: 235-06-10-089 | LOT 82: 235-06-10-102 |
| LOT 27: 235-06-10-090 | LOT 83: 235-06-10-103 |
| LOT 28: 235-06-10-091 | LOT 84: 235-06-10-104 |
| LOT 29: 235-06-10-092 | LOT 85: 235-06-10-105 |

LOT 30: 235-06-10-093  
LOT 31: 235-06-10-094  
LOT 32: 235-06-10-095  
LOT 33: 235-06-10-096  
LOT 34: 235-06-10-097  
LOT 35: 235-06-10-098  
LOT 36: 235-06-10-099  
LOT 37: 235-06-10-100

LOT 86: 235-06-10-106  
LOT 87: 235-06-10-107  
LOT 88: 235-06-10-108  
LOT 89: 235-06-10-109  
LOT 90: 235-06-10-110  
LOT 91: 235-06-10-111

**ALSO:**

ALL those certain lots, pieces or parcels of land, together with any improvements thereon, situate, lying and being in the City of Goose Creek, County of Berkeley, State of South Carolina, being known and designated as **LOTS 92 AND 93, PHASE IV, COKERS COMMONS**, as shown on that certain plat of Thomas & Hutton Engineering Co., entitled "A FINAL SUBDIVISION PLAT OF COKERS COMMONS A PORTIONS OF COKERS CROSSING PHASE IV, CITY OF GOOSE CREEK, BERKELEY COUNTY, SOUTH CAROLINA, PREPARED FOR HARRIS STREET, LLC," dated April 7, 2008 and recorded in the ROD Office for Berkeley County in Plat Cabinet M, at Page 38P on April 11, 2008. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TMS No.'s:

LOT 92: 235-06-10-112

LOT 93: 235-06-10-113

**ALSO:**

ALL those certain lots, pieces or parcels of land, together with any improvements thereon, situate, lying and being in the City of Goose Creek, County of Berkeley, State of South Carolina, being known and designated as **LOTS 94-102, PHASE 4B, COKERS COMMONS**, as shown on that certain plat of Thomas & Hutton Engineering Co., entitled "A FINAL SUBDIVISION PLAT OF COKERS COMMONS PHASE 4B A PORTION OF COKERS CROSSING PHASE IV, CITY OF GOOSE CREEK, BERKELEY COUNTY, SOUTH CAROLINA, PREPARED FOR HARRIS STREET, LLC," dated August 5, 2008 and recorded in the ROD Office for Berkeley County in Plat Cabinet M, at Page 300-P on September 24, 2008. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TMS No.'s:

LOT 94: 235-06-12-044

LOT 99: 235-06-12-049

LOT 95: 235-06-12-045

LOT 100: 235-06-12-050

LOT 96: 235-06-12-046

LOT 101: 235-06-12-051

LOT 97: 235-06-12-047

LOT 102: 235-06-12-052

LOT 98: 235-06-12-048

THIS CONVEYANCE IS SUBJECT to any and all applicable easements, restrictions, conditions; rights-of-ways and setbacks affecting the above described properties as recorded in the ROD Office for Berkeley County and as may be shown on the above-referenced plats.

BEING the same properties conveyed to CresCom Bank by deed of CCT Reserve, LLC, dated June 6, 2013 and recorded in the ROD for Berkeley County in Book 10181 at Page 251 on June 13, 2013.

STATE OF SOUTH CAROLINA  
COUNTY OF \_\_\_\_\_

## AFFIDAVIT

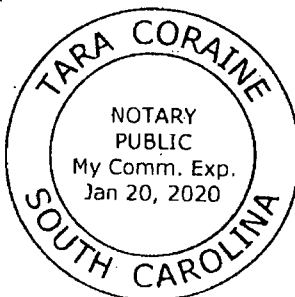
PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred by **CRESKOM BANK** to **KIRKLAND HOLDINGS, LLC, a South Carolina Limited Liability Company**, on April 4, 2014.
3. Check one of the following: **The DEED is check one**
  - (a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
  - (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
  - (c) \_\_\_\_\_ EXEMPT from the deed recording fee because (exemption# \_\_\_\_\_). (Explanation if required) \_\_\_\_\_  
(If exempt, please skip items 4-6, and go to item 7 of this affidavit.)
4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
  - (a) x The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$349,000.00
  - (b) \_\_\_\_\_ The fee is computed on the fair market value of the realty which is \$ \_\_\_\_\_.
  - (c) \_\_\_\_\_ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ \_\_\_\_\_.
5. Check YES \_\_\_\_\_ or NO X to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$ \_\_\_\_\_.
6. The DEED Recording Fee is computed as follows:
  - (a) \$349,000.00 the amount listed in item 4 above
  - (b) 0.00 the amount listed in item 5 above (no amount place zero)
  - (c) \$349,000.00 Subtract Line 6(b) from Line 6(a) and place the result.
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Legal Representative.
8. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

[Signature]  
 Grantor, Grantee, or Legal Representative  
 connected with this transaction

Sworn to before me this 4  
 day of April, 2014.

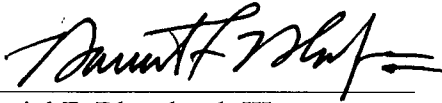
[Signature]  
 Notary Public for South Carolina  
 My Commission Expires: 1-20-20



CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402  
(843) 577-6726

ATTORNEYS FOR APPELLANT

March 3, 2017.

**RECEIVED**

MAR 06 2017

SC Court of Appeals