THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED
JUL 23 2013
SC Court of Appeals

Case No: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill,

Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood, and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, ... Respondents,

v.

Shipyard Village Council of Co-Owners, Inc., ... Appellant.

Shipyard Village Council of Co-Owners, Inc., ... Third-Party Plaintiff,

v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, ... Third-Party Defendants.

RECORD ON APPEAL
Volume II of V

R. Wayne Byrd
Carlyle R. Cromer
2411 North Oak Street, Suite 301 (29577)
Post Office Box 2116
Myrtle Beach, South Carolina 29578
(843) 213-5500

Attorneys for Appellant

Howell V. Bellamy, Jr.
Howell V. Bellamy, III
Bellamy Law Firm
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400

Attorneys for Respondents

Requested By: kcc 10/05/2009

Instrument 2009000027185 Book 54 Page 173

CERTIFIED A TRUE AND CORRECT COPY
Wanda J. Gravatte
REGISTER OF DEEDS
GEORGETOWN COUNTY, S.C.

STATE OF SOUTH CAROLINA)
) CORRECTION AND CLARIFICATION OF
) AMENDMENT TO THE MASTER DEED OF
COUNTY OF GEORGETOWN) SHIPYARD VILLAGE HORIZONTAL
) PROPERTY REGIME
) (Amendment filed in Deed Book 235, page 5)

WHEREAS, the Master Deed for Shipyard Village Horizontal Property Regime (hereinafter the "Master Deed") was filed with the Register of Deeds for Georgetown County, South Carolina, on July 9, 1982 in Deed Book 201 at page 880; and

WHEREAS, the Master Deed has been amended by the filing of a First Amendment in the Register of Deeds for Georgetown County in Deed Book 891 at Page 001 (said First Amendment was re-recorded in Deed Book 907 at Page 127 and re-recorded in Deed Book 942 at Page 001), and by the filing of a Second Amendment in the Register of Deeds for Georgetown County in Deed Book 910 at Page 25 (said Second Amendment was re-recorded in Deed Book 942 at Page 46); and

WHEREAS, the Master Deed has also been amended by the filing of a third Amendment in the Register of Deeds for Georgetown County in Deed Book 235, page 5, which Amendment amended various portions of the Master Deed and the First and Second Amendments thereto; and

WHEREAS, the text of the Amendment recorded in Deed Book 235 at page 5 inadvertently omitted a portion of the Amendment that was approved by the Co-Owners; and

WHEREAS, the Shipyard Village Council of Co-Owners, Inc., by and through its Board of Directors, now desires to correct and clarify that Amendment filed in Deed Book 235 at page 5 in order to reflect the Amendment that was approved by Co-Owners, and to place this Correction and Clarification on the public record;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the purpose of the Amendment filed in Deed Book 235 at page 5 of the Georgetown County Register of Deeds amending the Master Deed for Shipyard Village Horizontal Property Regime is to define the windows and sliding glass doors and appurtenances thereto (excluding screens) as Limited Common Elements of the Regime. As a result of that Amendment filed in Deed Book 235, page 5 of the Georgetown County Register of

Instrument 200700027185 Bk Page 235 174

Deeds and of this Correction and Clarification, the following sections of the Master Deed for Shipyard Village Horizontal Property Regime now read as follows:

Article III, Section 3.6(c) of the Master Deed, as amended by that Amendment filed in Deed Book 235 at page 5, now reads as follows:

Section 3.6. Boundaries of Units in Phase I.

(c) Each Unit shall also encompass and include the following: (i) the doors (including screen doors but excluding sliding glass doors) opening into the Unit and onto any balcony reserved to the use of a Unit, including the frames, casings, hinges, handles and other fixtures which are part of the doors; (ii) window screens; (iii) the plumbing, wiring and mechanical vents which exclusively serve the Unit; (iv) the appliances, air conditioning and heating units (including the condenser and all piping, wiring and attachments), hot water heaters, lavatories, bath tubs, toilets, carpeting, floor covering, trim finished surface of ceilings and walls, insulation and other fixtures and furnishings which are within or serve the Unit when delivered to the initial Co-Owner; (v) all appurtenances which are integral and exclusive to the Unit, including but not limited to lamps attached to the exterior of the Unit, and water and sewer pipes within the Unit exclusively serving the Unit.

ARTICLE III, Section 3.7(b) of the Master Deed, as amended by that Amendment filed in Deed Book 235 at page 5, now reads as follows:

3.7 (b) Limited Common Elements. The Limited Common Elements shall include those special elements designated in each Phase as for the exclusive use of a specific Unit. The Limited Common Elements are more specifically designated in Exhibits A and B and include ground floor storage rooms, covered parking and decks. The Limited Common Elements shall also include the window glasses, frames and casings which are part of the window openings; and the sliding glass doors, including the glasses, frames and other fixtures which are part of the sliding glass doors, but shall not include the screens.

ARTICLE II, Section 5(c) of both the First and Second Amendments to the Master Deed, as amended by that Amendment filed in Deed Book 235 at page 5, now reads as follows:

c. Each Unit shall also encompass and include, and each Owner shall be responsible for maintenance and repair of the following whether located within or without the boundaries described in (a) and (b) above: (i) the doorways (excluding the sliding glass doors), vents and other non-structural elements in the walls, floor, and ceilings of the Unit which are regarded as enclosures of space; (ii) the doors (excluding the sliding glass doors but including screen doors) opening into the Unit and any storage area integral to the Unit, including the frames, casings, hinges, handles and other fixtures which are part of the doors; (iii) the window screens; (iv) the plumbing, wiring, and mechanical vents that exclusively serve the Unit; (v) the appliances, air conditioning, and

heating units (including the condenser and all piping, wiring and attachments), hot water heaters, lavatories, bath tubs, toilets, carpeting, floor covering, trim finished surface of ceilings and walls, wiring, insulation, and other fixtures, furnishings, and building materials which are part of the Unit when delivered to the initial Owner and which exclusively serve the Unit; and (vi) all appurtenances which are integral and exclusive to the Unit, including but not limited to lamps attached to the exterior of the Unit, and water and sewer pipes within the Unit exclusively serving the Unit.

ARTICLE III, Section 2 of both the First and Second Amendments to the Master Deed, as amended by that Amendment filed in Deed Book 235 at page 5, is amended so that the following sentence is inserted prior to the existing final sentence:

> The Limited Common Elements shall also include the window glasses, frames, and casings which are part of the window openings; and the sliding glass doors, including glass, frames and other fixtures which are part of the sliding glass doors , but shall not include any screens.

The purpose and intent of the Council of Co-Owners in amending these provisions is to make the windows and sliding glass doors and appurtenances thereto (excluding screens) part of the Limited Common Elements of the Regime. Any other provisions of the Master Deed and Amendments thereto which are otherwise inconsistent with this purpose and intent are hereby amended so that such provisions are consistent with this purpose and intent. All other provisions of the Master Deed and Amendments thereto are unchanged and shall remain in full force and effect.

IN WITNESS WHEREOF, the President and Secretary of the Shipyard Village Council of Co-Owners, Inc., have caused this Correction and Clarification of Amendment to be transcribed.

SIGNED, SEALED, and DELIVERED IN THE PRESENCE OF:

WITNESSES:

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

By: Jack C. Eblin

Jack C. Eblin
Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

ACKNOWLEDGEMENT
(S.C. CODE ANN. §30-5-30(B)(C)

I, the undersigned Notary Public for South Carolina, do hereby certify that Shipyard Village Council of Co-Owners, Inc. by Jack C. Eblin, its President, appeared before me this day and acknowledged the due execution of the foregoing instrument as its act and deed.

Witness my hand and official seal this 7th day of November, 2007.

Notary Public for South Carolina
My Commission Expires: 2/21/2017

Instrument 200700027185 Bk Page 177

WITNESSES:

1st Witness Signature

2d Witness Signature

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

By: James C. Poag, Jr.
James C. Poag, Jr.
Its: Secretary

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

ACKNOWLEDGEMENT
(S.C. CODE ANN. §30-5-30(B)(C)

I, the undersigned Notary Public for South Carolina, do hereby certify that Shipyard Village Council of Co-Owners, Inc. by James C. Poag, Jr., its Secretary, appeared before me this day and acknowledged the due execution of the foregoing instrument as its act and deed.

Witness my hand and official seal this 12th day of November, 2007.

Notary Public for South Carolina
My Commission Expires: 7/12/12.

Requested By: kcc 10/05/2009

Instrument	Book	Page
200700027185	754	178

64856 Patrick

200700027185
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE
11-14-2007 At 02:09 pm.
AMENDMENT 11.00
STATE TAX .00
COUNTY TAX .00
Book 754 Page 173 - 178
Wanda F. Prevatte

2009-CP-22-01655

EXHIBIT NO. "C"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

The State of South Carolina

EXECUTIVE DEPARTMENT

CERTIFICATE OF INCORPORATION

BY THE SECRETARY OF STATE

WHEREAS, Robert G. Jones, Highland Condominiums, Greenville, SC
William H. Miller, III, 302 Helen Rd., Greenville, SC

two or more of the officers or agents appointed to supervise or manage the affairs of

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

which has been duly and regularly organized, did on the 7th day of July, A. D. 1982, file with Secretary of State a written declaration setting forth:

That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the State, a newspaper published in the County of Georgetown, has been given that the aforesaid Declaration would be filed.

AND WHEREAS, *Said Declarants and Petitioners* further declared and affirmed:

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

THIRD: The place at which it proposes to have its headquarters or be located is U.S. Hwy 17
Pawleys Island, SC

FOURTH: The purpose of the said proposed Corporation is

FIFTH: The names and residences of all Managers, Trustees, Directors or other officers are as follows:

A. Foster McKissick	245 McDaniel Ave., Greenville, SC	Director
Robert G. Jones	Highland Condominiums, Greenville, SC	Director
William H. Miller, III	302 Helen Rd., Greenville, SC	Director

SIXTH: That they desire to be incorporated: in perpetuity

NOW, THEREFORE, I, *JOHN T. CAMPBELL*, Secretary of State, by virtue of the authority in me vested, by Chapter 31, Title 33, Code of 1976 and Acts amendatory thereto, do hereby declare the said organization to be a body politic and corporate, with all the rights, powers, privileges and immunities, and subject to all the limitations and liabilities, conferred by said Chapter 31, Title 33, Code of 1976 and Acts amendatory thereto.

GIVEN under my hand and the seal of the State, at Columbia, this 7th day of July in the year of our Lord one thousand nine hundred and 82 and in the two hundred and seventh year of the Independence of the United States of America.

The State of South Carolina

EXECUTIVE DEPARTMENT

CERTIFICATE OF INCORPORATION
BY THE SECRETARY OF STATE

WHEREAS, Robert G. Jones, Highland Condominiums, Greenville, SC
William B. Miller, III, 302 Helen Rd., Greenville, SC

two or more of the officers or agents appointed to supervise or manage the affairs of

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

which has been duly and regularly organized, did on the 7th day of July, A. D. 1982, file with Secretary of State a written declaration setting forth:

That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the State, a newspaper published in the County of Georgetown, has been given that the aforesaid Declaration would be filed.

AND WHEREAS, *Said Declarants and Petitioners* further declared and affirmed:

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

THIRD: The place at which it proposes to have its headquarters or be located is U.S. Hwy 17
Pawleys Island, SC

FOURTH: The purpose of the said proposed Corporation is

FOURTH. The purpose of the said proposed corporation is to provide for the acquisition, construction, management, maintenance and care of the common elements of Shipyard Village Horizontal Property Regime at Litchfield-By-The-Sea, South Carolina; to administer the property constituted into the Shipyard Village Horizontal Property Regime; and to have all powers generally authorized under the South Carolina Business Corporation Act, including but not limited to the power to borrow money and mortgage its property. No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, officers, directors or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered, to make payment and distribution in furtherance of the above described purposes, to make expenditures for the acquisition, construction, management, maintenance, and care of the property of the Shipyard Village Horizontal Property Regime, and to rebate to the members excess membership dues, fees or assessments. Notwithstanding any of the above provisions, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 528 of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law). To the end of qualifying as an exempt corporation under Section 528 of the Internal Revenue Code, sixty percent (60%) or more of the gross income of the corporation for any taxable year shall consist solely of amounts received as membership dues, fees, or assessments from co-owners of units in Shipyard Village Horizontal Property Regime and ninety percent (90%) or more of the expenditures of the corporation for any taxable year shall be expenditures for the acquisition, construction, management, maintenance, and care of the property constituted into the Shipyard Village Horizontal Property Regime. It is the intention of the petitioners that this corporation shall qualify as a Homeowners Association under Section 528 of the Internal Revenue Code of 1954 and, therefore, notwithstanding any of the above provisions, the corporation shall be empowered to do all acts necessary to qualify the corporation as a Homeowners Association pursuant to Section 528 of the Internal Revenue Code of 1954, as amended at the date of this Declaration and Petition of Incorporation and as said section may be amended in the future.

82 and in the two hundred and seventh year of the Independence of the United States of America.

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of the Certificate of Incorporation of SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.,

recorded in records of the Secretary of State, Corporations Division, Eleemosynary File No. 17471,

now on deposit with South Carolina Department of Archives and History

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT THIS SEVENTH MARCH 2012.

Paul Begley
Reference Services

South Carolina Secretary of State
Corporation Details

0511

Corporation Information

Corporation Name: SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

Name Type:	ELE	**Status:**	GDS	**Profit/Non-Profit:**	N	**Domestic/Foreign:**	D
Corp EMail:							
Agent Name:	K.A. DIEHL & ASSOCIATES INC.					**Original Filing**	07/07/1982
Address1:	11740 HEY 17 BYPASS S.					**Effective Date:**	07/07/1982
Address2:						**Expiration Date:**	
City:	MURRELLS INLET			**State:**	SC	**Dissolved Date:**	
Zip	29576	**Incorporated State:**	SC			**Termination Date**	
Agent EMail:						**LLP Renewal Date:**	
						Tax Year End:	

Corporation Comment: 1 COPY

Filing Information

File ID	Filing Date	Filing Type	Description	Comment	Associated Name	Microfilm ID
04-10012631	07/07/1982			ELEE		17471
96-011917BC	05/13/1996			CH AGT FR/HDQRTRS		
02-028986CC	05/24/2002			CH AGT/ADD FR-E J EWING		
090304-0203	03/02/2009	AGT	NOTICE OF CHANGE OF	CHG AGT & ADD FROM KELLIE A		

Associated Names Information

Associated Name	Associated Type	Corporation Name	Name Type	Status	Expiration Date
SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.	INC	SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.	ELE	GDS	

Effective Date: 04/27/2010 08:31:14

APR 30 2010

CERTIFIED TO BE A TRUE AND CORRECT COPY AS TAKEN FROM AND COMPARED WITH THE ORIGINAL ON FILE IN THIS OFFICE

APR 27 2010

SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES

Jim Miles
SECRETARY OF STATE
FILED
MAY 13 1996
AM
7 8 9 10 11 12 1 2 3 4 5 PM

NOTICE OF CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OR BOTH OF A NONPROFIT CORPORATION

Pursuant to §§33-31-502 and 33-31-1508 of the 1976 South Carolina Code, as amended, the undersigned corporation submits the following information.

1. The name of the corporation is Shipyard Village Council of Co-Owners, Inc.

2. The corporation is (complete either a or b, whichever is applicable):

   a. a domestic nonprofit corporation incorporated in South Carolina on July 7, 1982; or

   b. a foreign nonprofit corporation incorporated in _____ on _____, and authorized to do business in South Carolina on _____.

3. The street address of the current registered office in South Carolina is Highway 17 North, Pawleys Island, South Carolina 29585.

4. If the current registered office is to be changed, the street address to which its registered office is to be changed is _____ in the city of _____, in the state of South Carolina ____.

5. The name of the present registered agent is Headquarters.

6. If the current registered agent is to be changed, the name of the successor registered agent is E.J. Ewing.

*I hereby consent to the appointment as registered agent of the corporation:

E. J. Ewing
(Signature of New Registered Agent)

*Pursuant to §§33-9-102(5) and 33-19-108(5), the written consent of the registered agent may be attached to this form.

7. The street address of the registered office and of the office of the registered agent, as changed, will be identical.

Dated this 16 day of May, 1996.

Shipyard Village Council of Co-Owners, Inc.
(Name of Corporation)

By: James B. Moore, Jr.

James B. Moore, Jr., Attorney
Type or Print Name and Title

FILING INSTRUCTIONS

1. Two copies of this form, the original and either a duplicate original or a conformed copy, must be filed.

2. Filing Fees (payable to the Secretary of State) at the time of the filing of this document) - $10.00

Approved by
Secretary of State Jim Miles
3/95

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM THE ORIGINAL ON FILE IN THIS OFFICE

2010

SECRETARY OF STATE OF SOUTH CAROLINA

FILED

MAY 24 2002

Jim Miles
SECRETARY OF STATE

3

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

NOTICE OF CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OR BOTH OF A SOUTH CAROLINA OR FOREIGN CORPORATION

TYPE OR PRINT CLEARLY IN BLACK INK

Pursuant to Sections 33-5-102 and 33-15-108 of the 1976 South Carolina Code of Laws, as amended, the undersigned corporation submits the following information.

1 The name of the corporation is Village Court of Co-Owners T, K

2 The corporation is (complete either a or b, whichever is applicable):

a a domestic corporation incorporated in South Carolina on _____; or

b. a foreign corporation incorporated in _____ (State) on _____ (Date), and authorized to do business in South Carolina on _____ (Date)

3 The street address of the present registered office in South Carolina is _____ (Street & Number) in the city of _____, South Carolina _____ (Zip Code).

4 If the current registered office is to be changed, the street address to which its registered office is to be changed is _____ (Street Address) in the city of _____ South Carolina _____ (Zip Code)

5. The name of the present registered agent is _____

6 If the current registered agent is to be changed, the name of the successor registered agent is _____

* I hereby consent to the appointment as registered agent of the corporation:

_____
Signature of New Registered Agent

7 The address of the registered office and the address of the business office of the registered agent, as changed, will be identical.

8 Unless a delayed date is specified, this will be effective upon acceptance for filing by the Secretary of State (See Section 33-1-230(b) of the 1976 South Carolina Code of Laws, as amended) _____.

*Pursuant to Sections 33-5-102(5) and 33-5-108(5) of the 1976 South Carolina Code of Laws, as amended, the written consent of the registered agent may be attached to this form.

Name of Corporation

Date _____

Name of Corporation

Signature

Type or Print Name and Title

FILING INSTRUCTIONS

1 Two copies of this form, the original and either a duplicate original or a conformed copy must be filed.

2 Filing Fee (payable to the Secretary of State at the time of filing this document) – $10.00

3 Pursuant to Section 33-5-102(b) of the 1976 South Carolina Code of Laws, as amended, the registered agent can file this when the only change is the street address of the registered office. In this situation, the following statement should be typed on the form above the registered agent's signature: "The corporation has been notified of this change." In this case the filing fee is $2.00

Return to: Secretary of State
P O Box 11350
Columbia, SC 29211

[illegible] NOTICE OF CHG OF REG OFFICE OF AGT.doc

Form Revised by South Carolina
Secretary of State, January 2000

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

APR 2 7 2010

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

NOTICE OF CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OR BOTH OF A NONPROFIT CORPORATION

1 COPY

TYPE OR PRINT CLEARLY WITH BLACK INK

Pursuant to Sections 33-31-502 and 33-31-1508 of the 1976 South Carolina Code of Laws, as amended, the undersigned corporation submits the following information

1 The name of the corporation is Shipyard Village Council of Co-Owners, Inc.

2 The corporation is (complete either "a" or "b", whichever is applicable)

(a) A domestic nonprofit corporation incorporated in South Carolina on 7/7/1982 or

b A foreign nonprofit corporation incorporated in _____ (State) on _____ (Date) and authorized to do business in South Carolina on _____ (Date)

3 The street address of the current registered office in South Carolina is

8 Moose Path Murrells Inlet, SC. 29576
Street Address City State Zip Code

4 If the current registered office is to be changed, the street address to which its registered office is to be changed is

11740 Hwy 17 Bypass S Murrells Inlet SC 29576
Street Address City State Zip Code

5 The name of the current registered agent is Kellie A Diehl

6 If the current registered agent is to be changed, the name of the successor registered agent is K A. Diehl & Associates, Inc.

*I hereby consent to the appointment as registered agent of the corporation

Allison Roberts
Signature of New Registered Agent

7 The street addresses of the registered office and of the office of the registered agent, as changed will be identical

*Pursuant to Sections 33-31-502(5) and 33-31-1508(5) of the 1976 South Carolina Code of Laws as amended, the written consent of the registered agent may be attached to this form

090304-0203 FILED 03/02/2009
SHIPYARD VILLAGE COUNCIL OF CO-OWNERS INC
Filing Fee $10 00 ORIG

Mark Hammond South Carolina Secretary of State

Shipyard Village Council of Co. Owners Inc
~~K.A. Diehl + Associates Inc~~
Name of Corporation

Date 2/24/09

Alison Roberts
Signature

Alison Roberts, ~~Assistant~~ Association manager
Type or Print Name and Title

843 452-2204

FILING INSTRUCTIONS

1 Two copies of this form the original and either a duplicate original or a conformed copy must be filed

2 Filing Fee (payable to the Secretary of State at the time of filing this document) $10 00

Return to Secretary of State
P O Box 11350
Columbia SC 29211

NP NOTICE OF CHG OF REG OFFICE OR REG AGT DOC

Form Revised by South Carolina
Secretary of State January 2000

2009-CP-22-01655

EXHIBIT NO. "D"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

Jim Poag

From: Kellie Diehl [kadiehl@sccoast.net]
Sent: Tuesday, September 18, 2007 9:18 AM
To: JJeblin@aol.com; tshirt@carolina.rr.com; tmcassidy@optonline.net; Gumless@aol.com; DBRAY@SBAAL.com; gagagrace@juno.com; wdcarter@verizon.net; 'Richard Bennett'
Subject: update

Hello all:

1. Richard is working on leaks in A & B from the recent rains. Please understand that many, many of these units were leaking previously and because windows were the owner's responsibility, the issue was thrown back at the owners who most ended up doing nothing and now that this is the assoc. responsibility, owners are impatient – especially Karen Davis, who handles many multiple owner units – we know she is being hit from all sides and wants a resolution but she must be patient and go through the process. If anyone wants more specifics on this, please call Richard. Most of you were not on the board to remember but I tried to bring this up after I was here for a while and I got my hand slapped big time by Bobby Warner and some board members because this was an owner responsibility. (Bobby Warner only did cosmetic stucco repairs to these buildings for 20 + years and kept pushing back to the owners – who clearly could not handle and needed help.
2. Owner's Rep: Richard is in touch with Eddie Porter and is setting up times to meet with him. It is my understanding that it is up to Eddie how and who to move forward with – current architect & contractor under review by Eddie – Anyone from the Board can call Richard and be a part of these meetings. ....Email from Eddie with some dates to follow – RICHARD – PLEASE UPDATE THE BOARD AFTER THESE MEETINGS..... Some one from the Board should be Eddie's contact (along with Richard for decisions, etc.). I certainly can send out any correspondence to owners, contractor, etc.
3. We need to schedule a board meeting – mainly for budget - sometime the week of Oct. 29 – who will be here and who will be on conference call?

Thanks all – Please get with Richard if you have questions.
Kellie

EXHIBIT NO. "E"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

PROCON
WATERPROOFING, INC.

Corporate Office:
P.O. Box 4518
Wilmington, N.C. 28406
NC & SC
(919) 392-3935

Branch Office:
1133 Louisiana Avenue
Suite 100
Winter Park, Fla. 32789
(407) 236-9134

April 9, 1993

Waccamaw Management Company
P.O. Box 2308
Pawleys Island, SC 29585
Attn: Rory Shellenburger

RE: Sandpiper B
Shipyard A&B

Mr. Shellenburger,

After our preliminary inspection of the concrete structural slabs at the properties Sandpiper B and Shipyard A&B, we recommend that a structural engineer further evaluate the cracking and spalling which is occurring in the pre-cast slabs and beams. After their investigation is complete, our company would then submit contracts for any repairs required and include pricing to apply a waterproof membrane to these areas to avoid future concrete problems.

If we can be of any assistance in this matter or review the project with the engineers, please contact us at your earliest convenience.

Sincerely,



Bob Gallagher
PROCON Waterproofing, Inc.

BG/sjl

EXHIBIT NO. "F"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

E

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

SPECIAL MEETING OF THE BOARD OF DIRECTORS

MARCH 11, 1994
9:30 AM

A G E N D A

1. OPENING OF MEETING

2. APPROVAL OF MINUTES

3. FINANCIAL REPORT

   A. Presentation of Current Financial Statements

   B. Report on Operating and Reserve Account Balances

   C. Discussion Concerning Outstanding Delinquencies

4. UNFINISHED BUSINESS

   A. 1994 Management Agreement
   B. Fire Pump System Repairs
   C. Special Assessment - Fire System Repairs
   D. 24-Hour Fire Alarm Monitoring System
   E. Litchfield Theatres, Limited Stock
   F. Elevator Phone System
   G. Siding Replacement
   H. Parking Lot - Slurry Seal & Stripe
   I. On-Site Maintenance
   J. Other

5. NEW BUSINESS

   A. Bank Resolution
   B. Preparation for 12th Annual Members' Meeting
      a. Date, Time and Place
      b. Nominating Committee
      c. Proxy Agent
      d. Tax Resolution
      e. Major Topics
      f. Social
   C. Other

6. ADJOURNMENT

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

SPECIAL MEETING OF THE BOARD OF DIRECTORS

March 11, 1994

M I N U T E S

Pursuant to call, a Special Meeting of the Board of Directors of Shipyard Village Council of Co-Owners, Inc. was held on Friday, March 11, 1994 commencing at 9:30 a.m. in the offices of Waccamaw Management Company, Pawleys Island, South Carolina.

The following Directors of the Association were present:

David O'Brien
Robert Harbers, Jr.
Betty Owens
K. W. Smith

Charles Oakey, Director of the Association, was absent.

Also present were Edward J. Ewing, Jr., Thomas W. Crocker, Susan Ledbetter and Beverly Brocki of Waccamaw Management Company, Managing Agent for the Association.

David O'Brien, President of the Association, served as Chairman of the Meeting and Betty Owens, Secretary/Treasurer of the Association, served as Secretary of the Meeting.

Chairman O'Brien opened the Meeting and requested a motion to approve the Minutes of the Special Meetings of the Board of Directors held on September 25, 1993 and December 7, 1993. Upon a motion by Mr. Harbers, seconded by Mr. Smith, and unanimously approved, it was:

> MOVED; That the Minutes of the Special Meetings of the Board of Directors of Shipyard Village Council of Co-Owners, Inc. held on September 25, 1993 and December 7, 1993 be approved as written. Further, that the reading of these Minutes be waived.

LARRY ELKINS 0485 0524

within the next week to ensure they are in proper working order.

The next item was the Litchfield Theatres, Limited stock. This item was discussed in conjunction with the Fire Pump System repairs.

The next item was the elevator phone system. Mr. Crocker reported that as instructed by the Board of Directors, Waccamaw Management Company researched the possibility of tieing the phones into the fire alarm monitoring system and that the request was denied by the Fire Marshall. Mr. Crocker recommended purchasing four regular telephones at a cost of $25.00 each to replace the current phones which are old and in need of replacement. The Board then entered into a discussion regarding this matter. Following the discussion, the Board approved the purchase of the four telephones at a cost of $25.00 each and instructed Waccamaw Management Company to research the possibility of installing a switch that will activate the elevator's emergency bell when the telephone door cover is opened.

The next item was the siding replacement. Mr. Crocker presented the following bids: T & A Construction - $55,200.00; Greenwall - $59,675.00; Commercial Systems - $55,000.00 or if they can do in conjunction with the adjacent building, the cost would be $49,590.00; and ProCon - $44,500.00 if they can start April 1. The Board then entered into a discussion regarding this matter. Following the discussion, upon a motion by Mr. Harbers, seconded by Mr. Smith, and unanimously approved, it was:

LARRY ELKINS 0489 0525

MOVED; 1) That based upon the stipulation that the work will be completed with thirty (30) days, that Shipyard Village enter into a contract with ProCon to replace the T-111 siding and fascia boards on Buildings "A" and "B" with dryvit at a cost not to exceed $44,500.00. 2) That the funds be taken from the Painting and Waterproofing Reserves. 3) To see if ProCon will include in that cost the replacement of the end bands on the courtyard side of the buildings.

The next item was slurry sealing and striping the parking lot. Mr. Crocker reported that the cost would be approximately $6,000.00 and recommended that this item be postponed for one year due to other repairs requiring priority attention. The Board agreed with Mr. Crocker's recommendation.

The next item was the on-site maintenance. Mr. Ewing announced that Kevin Wilcox, who was introduced prior to the meeting, is the new on-site maintenance manager for Shipyard Village. Mr. Ewing then reported that as instructed by the Board, Waccamaw Management Company re-assessed whether an additional on-site maintenance person is needed at Shipyard Village. It was recommended that Mr. Wilcox's responsibilities include building maintenance only and that Waccamaw Management Company provide the landscape maintenance at a cost of $250.00 per week for the remainder of 1994 at which time the Board can address the issue of Waccamaw Management continuing the landscape maintenance. Mr. Ewing also recommended utilizing the budgeted funds for the part-time maintenance person and the funds from landscape equipment repairs that would no longer be needed towards the landscape maintenance fee. The Board then entered into a discussion regarding this matter. Following the discussion, it was the Board's decision to approve Mr. Ewing's recom-

mendations.

The next item concerned Other Unfinished Business.

Mr. Crocker asked the Board if the owners are responsible for the balcony carpet. It was the Board's decision that the balcony carpet is owner's responsibility.

Mr. Crocker next reported that as instructed by the Board, he obtained two bids relative to installation of a parapet wall on the roofs at Shipyard Village and that the cost would be approximately $51,000.00. Following a brief discussion, it was the Board's decision to table this item for discussion at the next Board Meeting.

Mr. Crocker next reported that approximately 35 windows on the south wing, courtyard side, of both buildings were damaged due to vandalism. The insurance coverage will pay $100.00 per window with a $1,000.00 deductible. Mr. Crocker stated that the insurance company recommended that the owners repair their windows and send their bills to Waccamaw Management Company who would then submit a claim to the insurance company. The Board entered into a discussion regarding this matter. Following the discussion, the Board instructed Waccamaw Management Company send a bulletin to those owners affected that Waccamaw Management will have the windows replaced and also to include in the bulletin the cost of the replacement, how much the Association's insurance will cover, the amount of the deductible and the balance due from the owner.

Mr. Crocker next reported that both buildings were inspected by ProCon relative to the structural stress fractures and stucco

LARRY ELKINS 0491 0527

coming off the walls which is resulting in water intrusion problems. Mr. Crocker presented pictures and ProCon's report for the Board's consideration, stating that the repair cost would be approximately $20,000.00 per building. Following a discussion regarding this matter, it was the Board's decision to table this item until the siding replacement is completed. A copy of ProCon's report dated March 9, 1994 is attached to these Minutes and identified as Exhibit B.

Mrs. Owens commented that there is a problem with standing water in front of the elevators when it rains. Mr. Ewing stated that Waccamaw Management Company will check into this matter.

There being no further Other Unfinished Business to come before, discussion resumed relative to the Special Assessment to fund the expense of the Fire Suppression System repairs. Mr. Ewing recommended proceeding with the Special Assessment of $1,000.00 per unit as approved by the Board of Directors after the Annual Members' Meeting and after the delinquency issues on Units B-28 and B-43 are resolved. Also, that should the Association receive any Litchfield Theatre Company stock and recover any money from the stock, that the Board address the issue at that time whether to utilize the funds for other needed repairs or to refund the money to the owners. Following a discussion regarding this matter, the Board agreed with Mr. Ewing's recommendation. Mr. Ewing stated that a draft of the Special Assessment Bulletin will be submitted to the Board for approval prior to mailing to the Membership.

There being no further Unfinished Business to come before the

LARRY ELKINS 0492 0528

EXHIBIT A

SHIPYARD VILLAGE
Council of Co-Owners, Inc.

MEMORANDUM

DATE: March 11, 1994

TO: The Board of Directors
Shipyard Village Council of Co-Owners, Inc.

FROM: Edward J. Ewing, Jr., Managing Director E.J.E.
Waccamaw Management Company

RE: Recap of Fire Suppression System Repairs

Below are the costs which have been expended to date and the estimated costs to complete the above referenced project. These costs relate only to the repairs which are being filed under the developer warranty claim. Not included are the costs associated with the alarm system and trash chute sprinklers.

COSTS–TO–DATE	
Viking Fire Protection, Inc. – Physical installation of underground and riser piping	$39,720.00
S & O Remolding – Digging, trenching, concrete removal, opening of chases and removal of existing piping	17,985.00
Georgetown County – Building permits	320.00
McNair & Sanford – Attorney fees for defending summons	312.50
NationWide Security – Additional cost of security for fire watch while system down	340.00
Surfside Equipment Rental – Rental of saw and jack hammer for pipe removal	1,082.34
Chapman Home Maintenance – Repair & rebuilding of chases	11,201.80
Total Cost–To–Date	$70,961.64
REMAINING COSTS TO COMPLETE	
Viking Fire Protection, Inc. – Final payment on contract	$9,872.00
Chapman Home Maintenance – Estimated cost to complete rebuilding of chases	5,000.00
Total Remaining Costs	$14,872.00
TOTAL ESTIMATED COST OF WARRANTY CLAIM	$85,833.64

6.17

EXHIBIT B

PROCON
WATERPROOFING, INC.

Corporate Office:
P.O. Box 4518
Wilmington, N.C. 28406
NC & SC
(919) 392-3935

Branch Office:
1133 Louisiana Avenue
Suite 100
Winter Park, Fla. 32789
(407) 236-9134

March 9, 1994

Waccamaw Management Co.
P.O. Box 2308
Pawleys Island, SC 29585
Attn: Mr. Thomas Crocker



RE: Litchfield By The Sea
Buildings A & B

Mr. Crocker,

After our discussion and my review of the Shipyard buildings A&B on February 28th and March the 1st, the following information has been completed with regards to the exterior building repair, waterproofing and maintenance needs which are associated with these two buildings. The purpose of this information is to inform all parties involved the actual conditions found and to help establish an ongoing maintenance program.

Inspection of these buildings were to complete a preliminary on-site evaluation of each building to identify any existing or potential problems in the construction of the buildings which may be contributing to the deterioration of the buildings since they were waterproofed in 1990.

-REVIEW OF THE BUILDINGS-

As outlined in our letter dated November 15, 1993, these two buildings were waterproofed in 1990 by our company and are currently in the fourth year of the warranty period. The repair and waterproofing work completed during that time excluded all corridors.

During this evaluation of the building, we noted that all work which was completed in 1990 is performing as intended with no problems at this time. Observations of the ocean front windows did find that the metal end stop bead associated with the stucco system which was installed during the original construction over each floor band are beginning to deteriorate and rust. This bead can be seen along the top and bottom of each window and appears to be directly in contact with the aluminum window frame thus creating the deterioration through electrolysis.

-continued-

When we inspected the same window locations on the north and south sides of the building, it appears that vinyl casing beads were used in this application, therefore these areas should not deteriorate like the ocean front. (See photo #1).

Our next inspection area was to evaluate the corridor walls, window units, concrete walk-ways and beams. Observations of the corridor lath and plaster stucco walls found that there are numerous areas where water and moisture can penetrate the wall system. Items such as no caulking around the perimeter of doors and windows, poor or deteriorated caulking at the wall to slab juncture and extensive cracks throughout the stucco system are all contributing to moisture entry. Effects of this moisture entry can be seen in the general deterioration and breakdown of the stucco materials and its components such as the rusted lath. More important however is the wood framing which the wall system is attached to. Wood rot and decay of the framing system can easily take place inside the cavity of these walls because once the moisture is inside, it often never dries out. Should this occur, extensive work would be required to correct such a problem. (See photos 2 through 9).

The next inspection area includes the structural concrete walk-ways and supporting beams. Observations of these areas found that the overall condition of the concrete itself is in generally good condition with a few isolated problems at or near the beams which should be evaluated by a structural engineer.

Actual concrete spalling is minor at this time. What is visually spalling off many of the beams is the stucco materials which were applied over the structural concrete. However, this does indicate that there is a stress problem at this juncture between the beam and slab above. Additionally, we observed that what appears to be a structural crack has formed in the beam as well as in the slab above. The location and repeated occurrence of these structural cracks may indicate that there is a structural problem where the corridors intersect.

Additional problems observed in the walk-ways include the total deterioration of the steel plates which are intended to bridge the juncture again where the corridors intersect. (See photos 10 through 18).

Also noted were the concrete rail stanchion holes where the rail system is anchored into the walk-way. Many of these stanchion holes were never completely filled and sealed. Water which now stands in the stanchion hole is lending to the corrosion of the rail and possibly the concrete re-enforcing rebar. (See photo #19).

Additional preventive maintenance measures to help protect the concrete from future deterioration should include the application of a protective waterproof deck coating material such as the

-continued-

system recently applied at Sandpiper A. Balconies and corridors should be considered.

-SUMMARY-

We recommend that all corridor stucco walls be repaired and waterproofed as soon as possible to prevent further deterioration of the construction materials related to these areas. The cost to complete all corridor walls on each building is approximately $19,676.00 per building.

To address repairs and waterproofing needs associated with the structural concrete, walk-ways and beams should start with the engineering evaluation to ensure that if potential structural problems exist, they can be corrected properly. Once this evaluation is completed, our company can provide cost estimates for all related work.

Cost related to removing and replacing the rusted casing beads on the ocean front can be determined after a thorough inspection has been completed to insure that the window flashing has not been effected by the deteriorating beads.

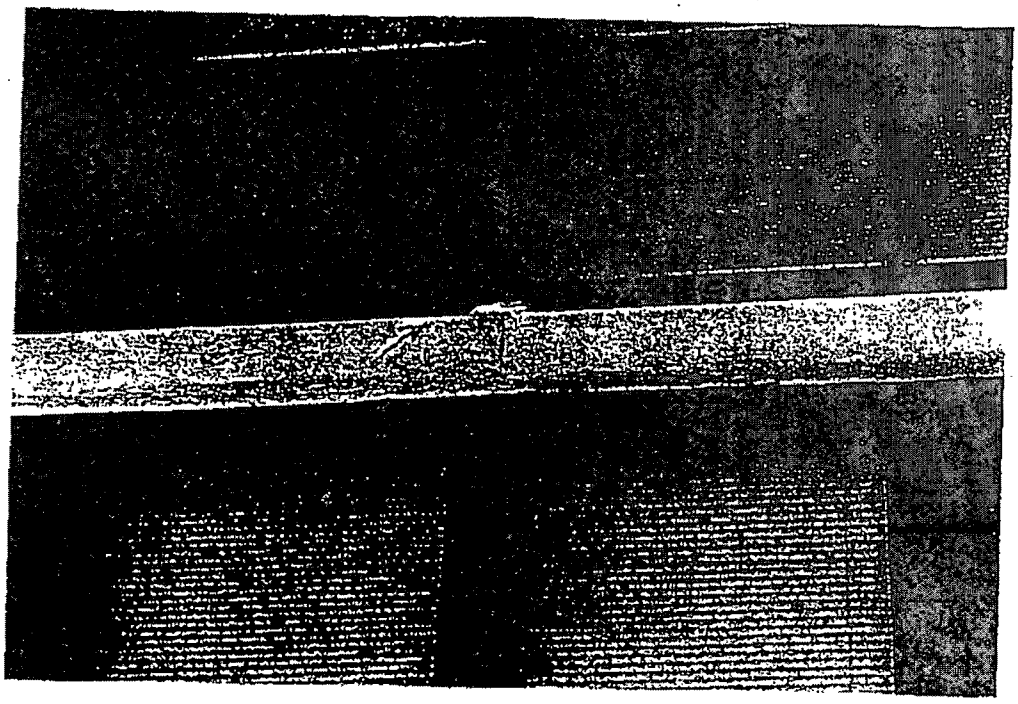
Thank you for allowing PROCON Waterproofing, Inc. to assist you with this building inspections and evaluation. If possible, we would like the opportunity to meet with you and discuss this information in further detail and perhaps negotiate completing some of these repairs along with removing the existing T1-11 siding and replacing it with a new stucco wall system. In this manner, we could offer additional discounts on all contacts and allow you to save some moneys on these projects. If there are any questions, please call at your earliest convenience.

Sincerely,

Bob Gallagher
General Manager

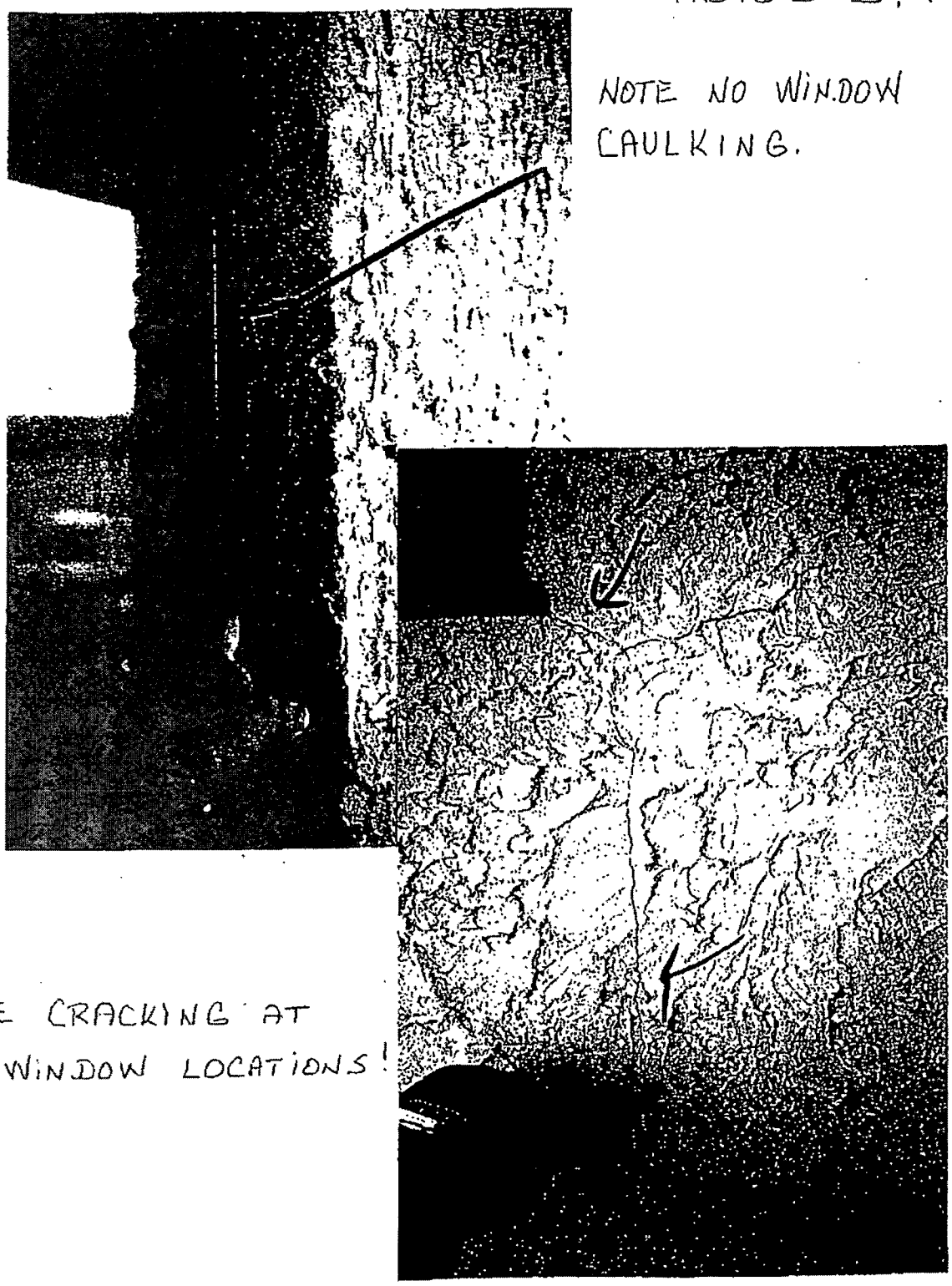
BG/sjl

Photo # 1



NOTE RUSTED CASING BEAD PLACEMENT.

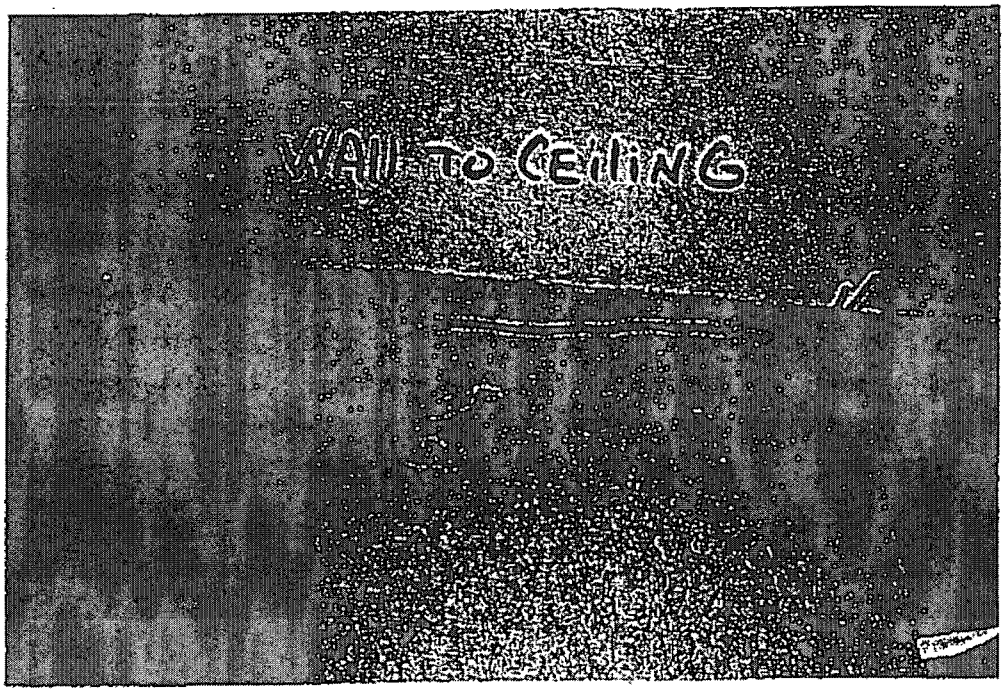
Photo's 3;4 30



NOTE NO WINDOW CAULKING.

NOTE CRACKING AT ALL WINDOW LOCATIONS!

'Photo's 5 & 6 31



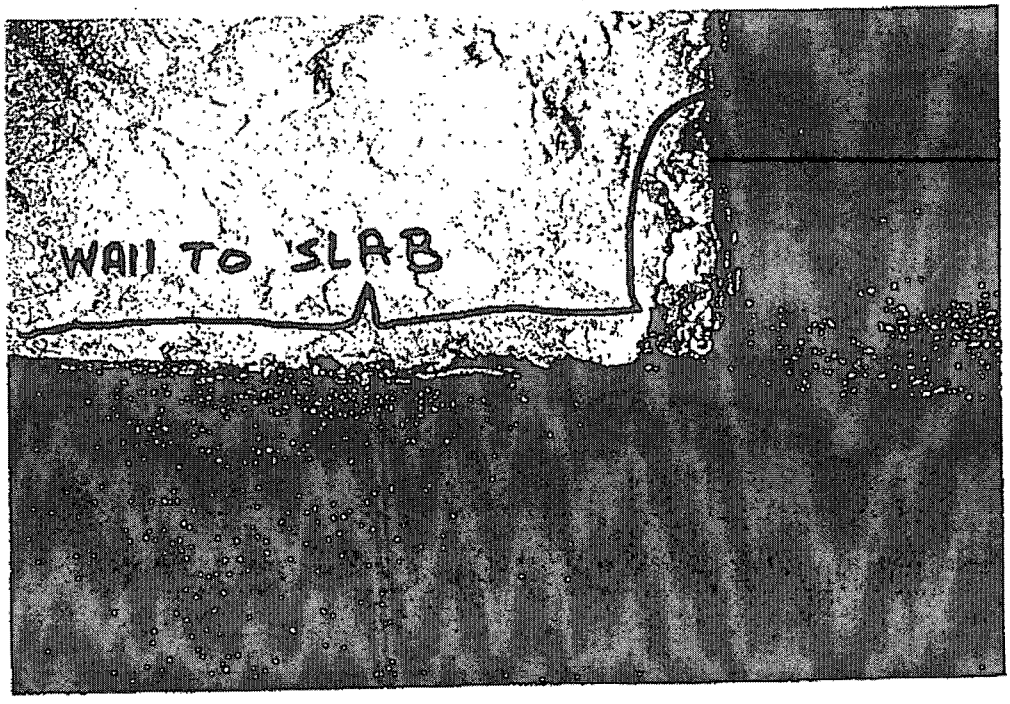
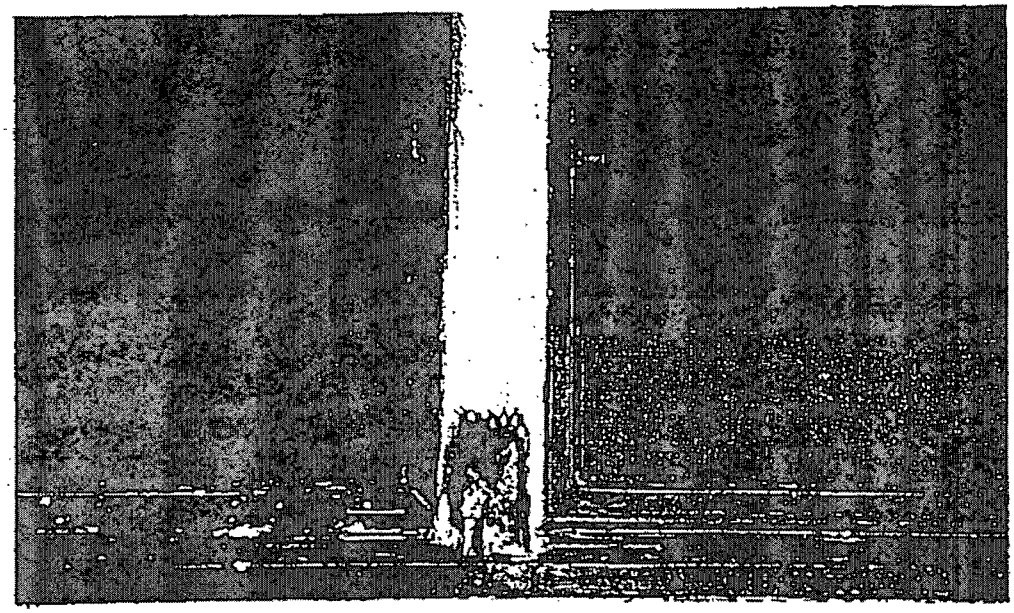
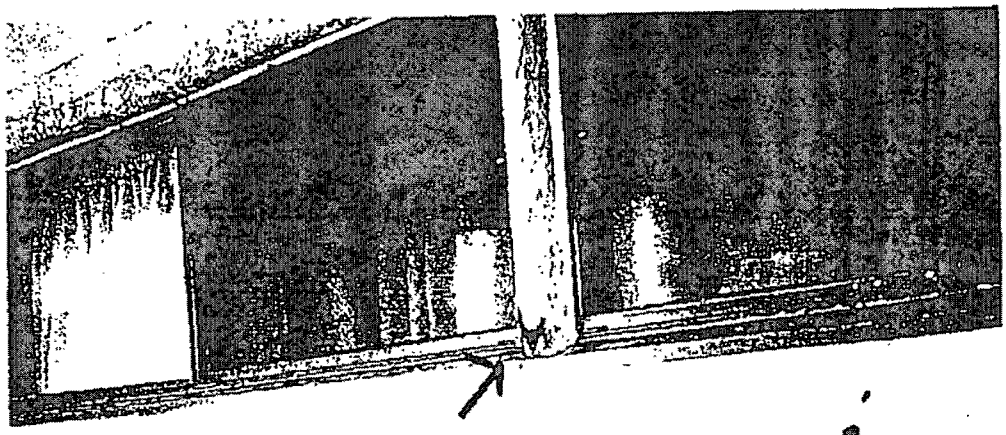


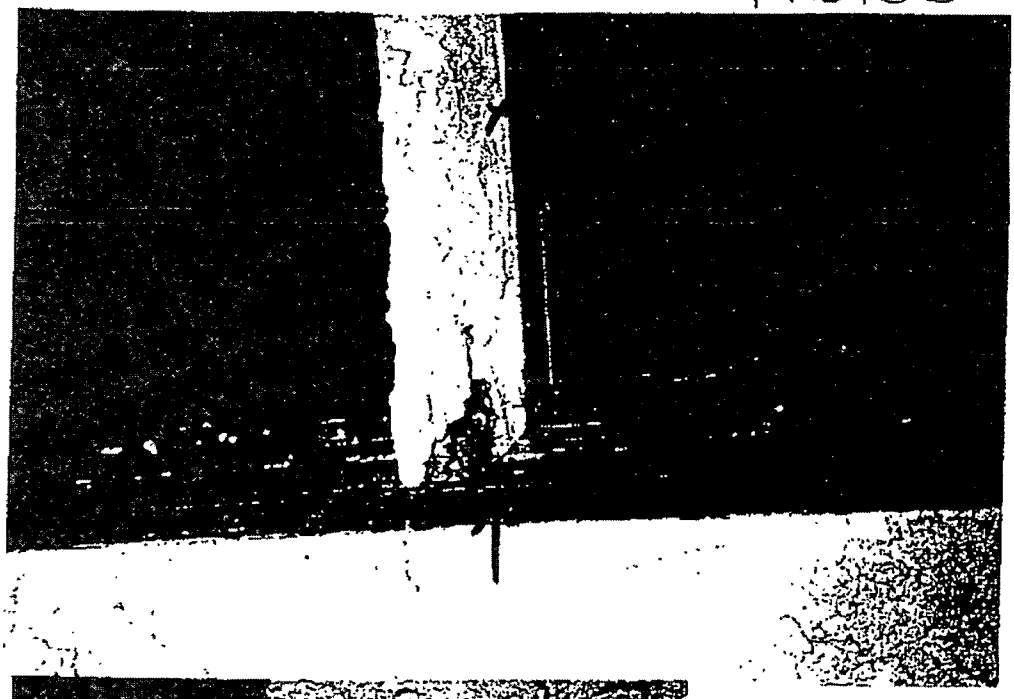
Photo # 7 of 32





NOTE CONDITION OF STUCCO ;
LATH AT All WINDOWS

Photo's 9 & 10



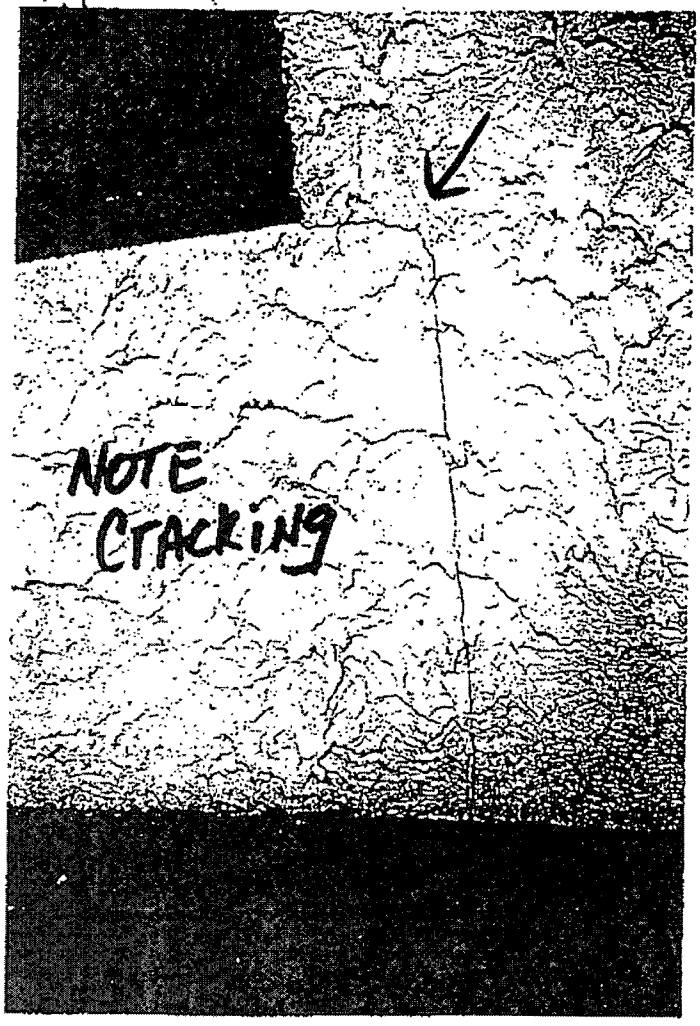
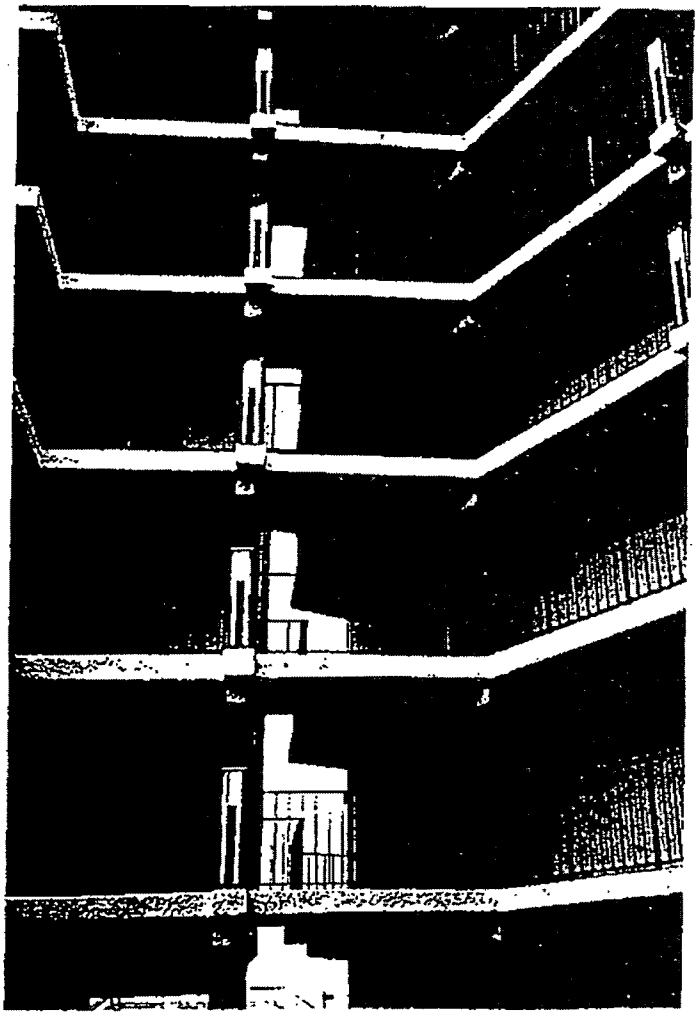


Photo # 11



—— INDICATES STRESS CRACK LOCATIONS IN SLAB.

X INDICATES STRESS CRACKS IN BEAMS.

Photo # 12 35

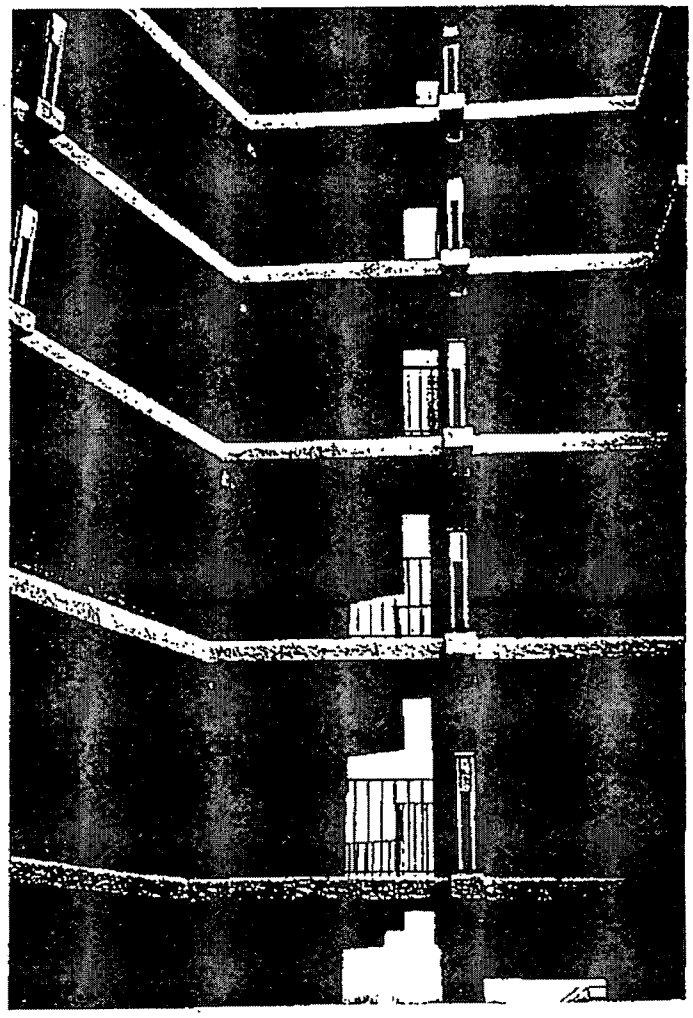
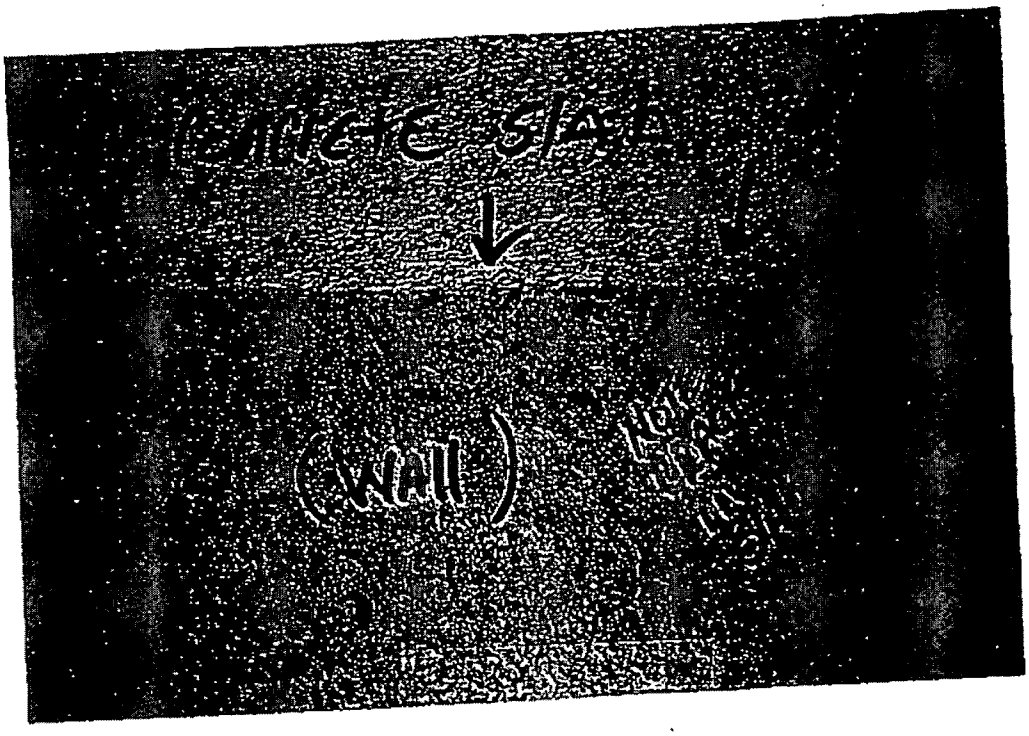


Photo # 13 & 14



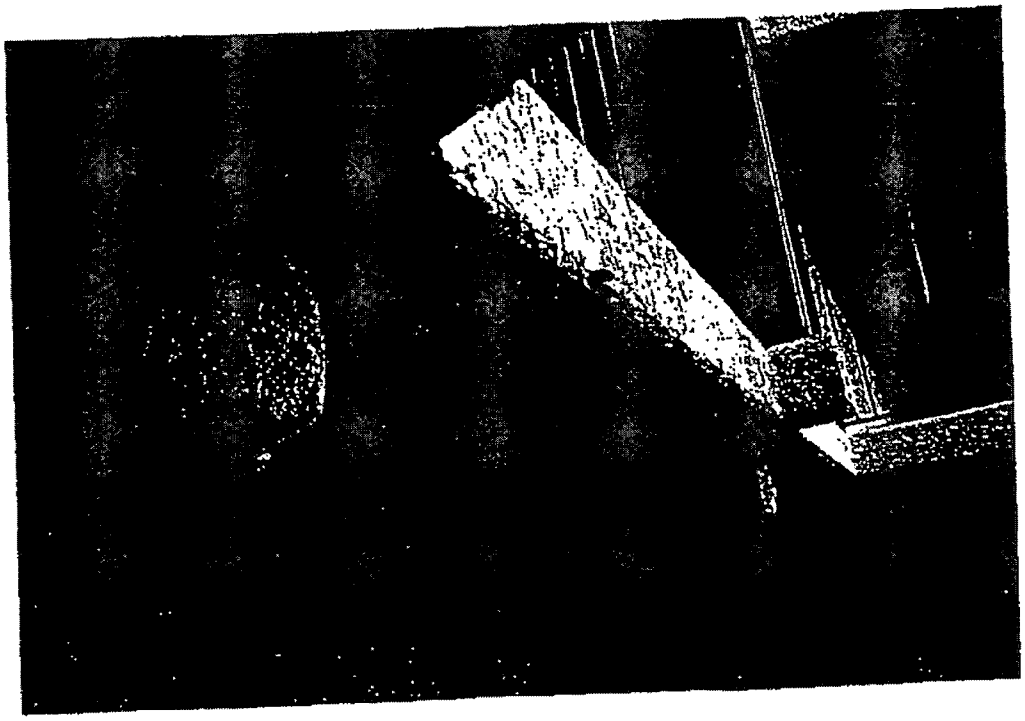
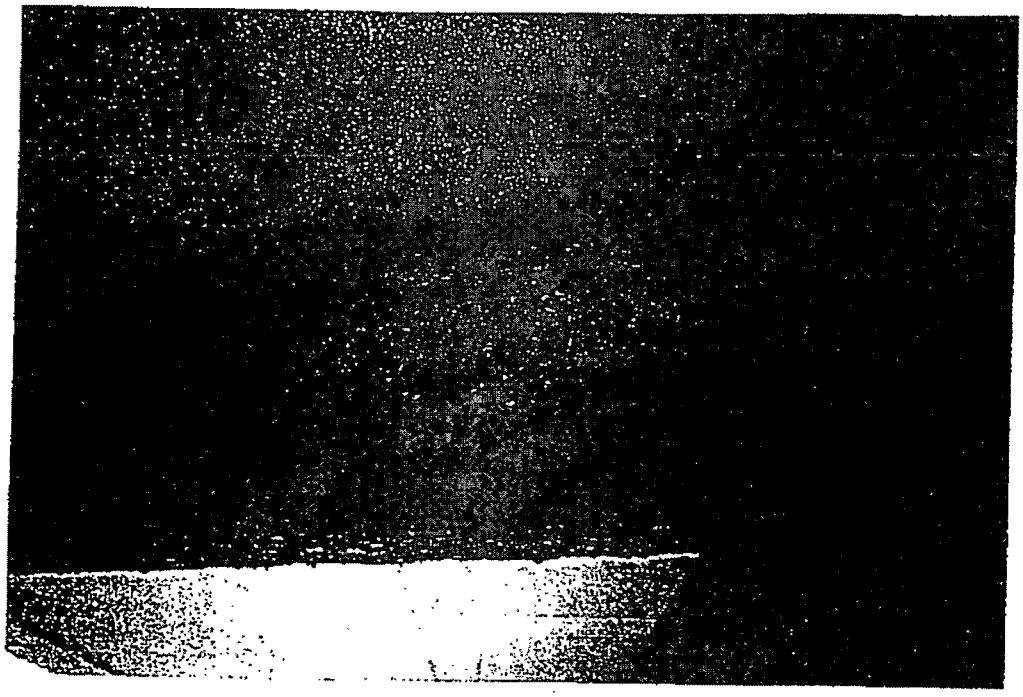


Photo 15 & 16 97



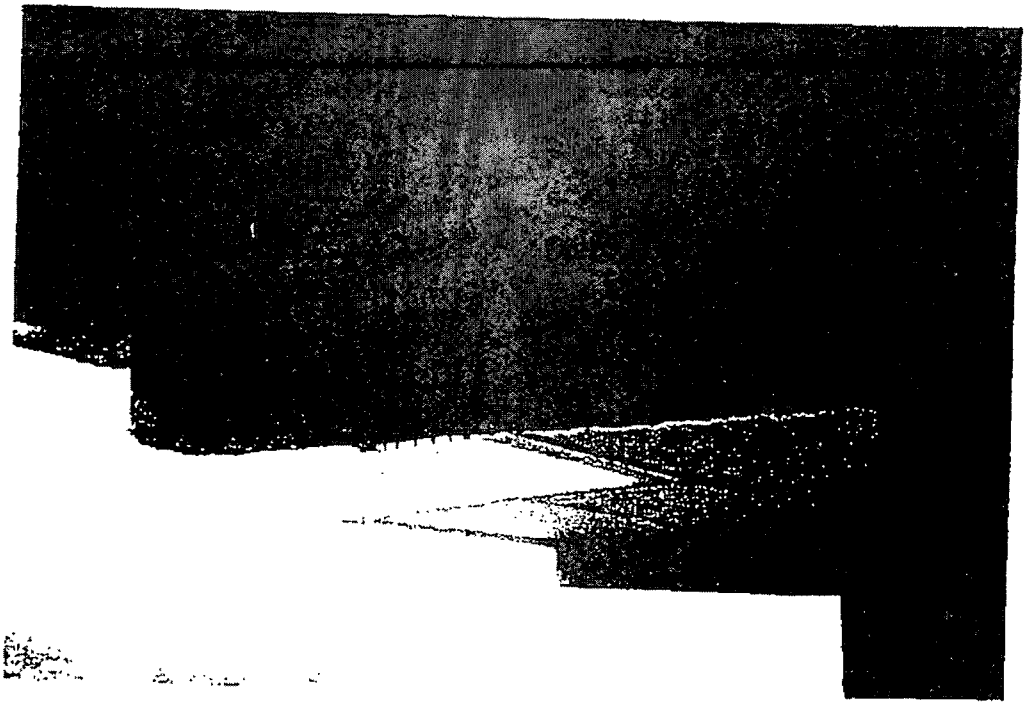
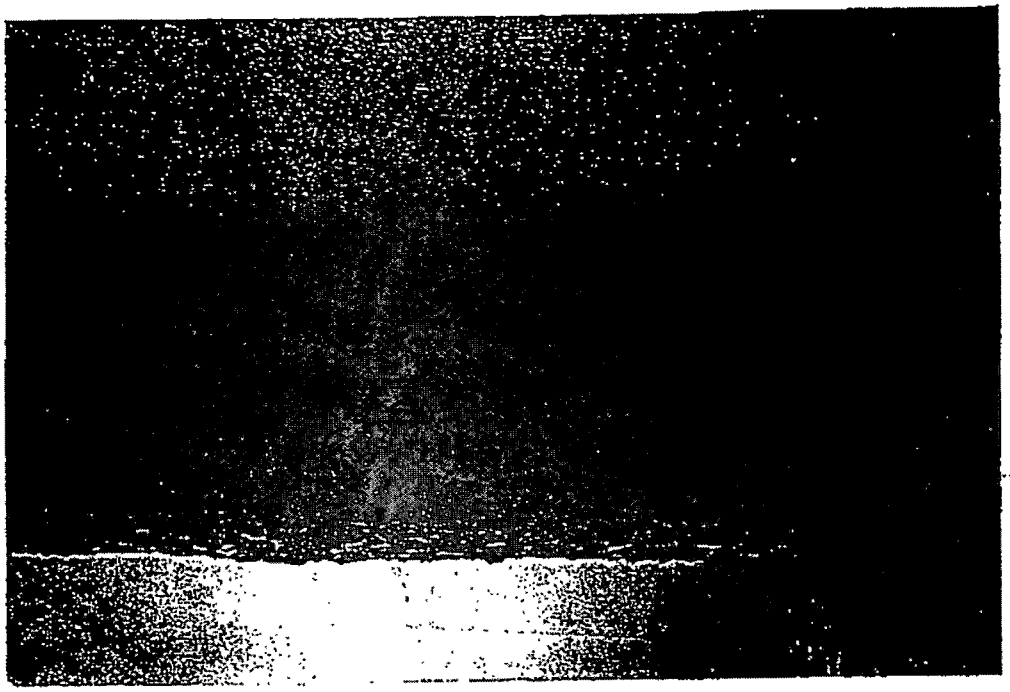


Photo 17 & 18



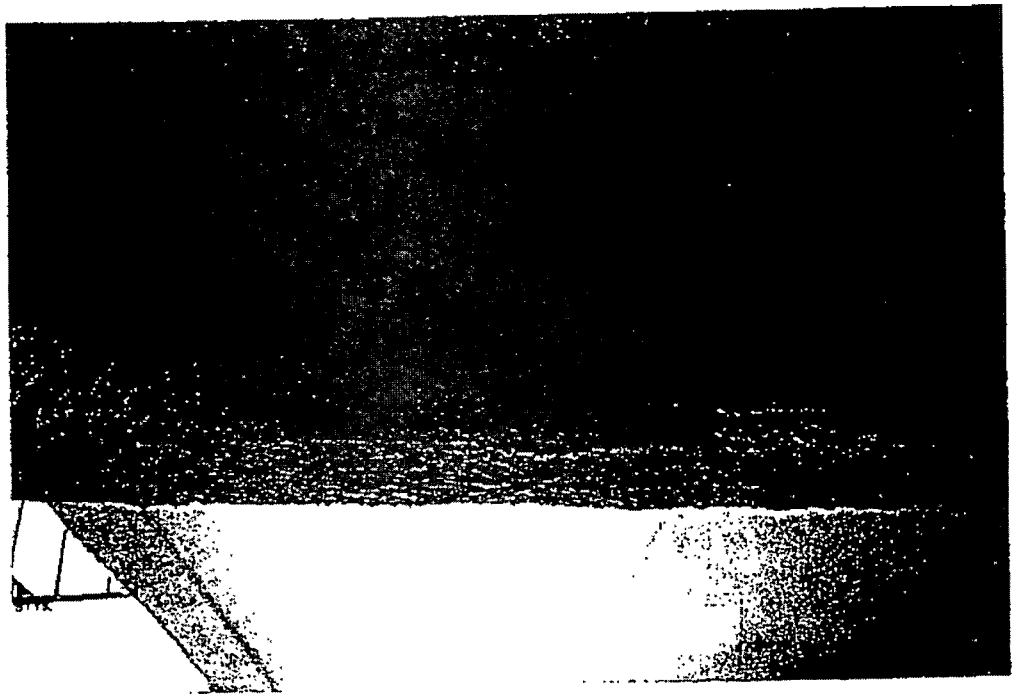
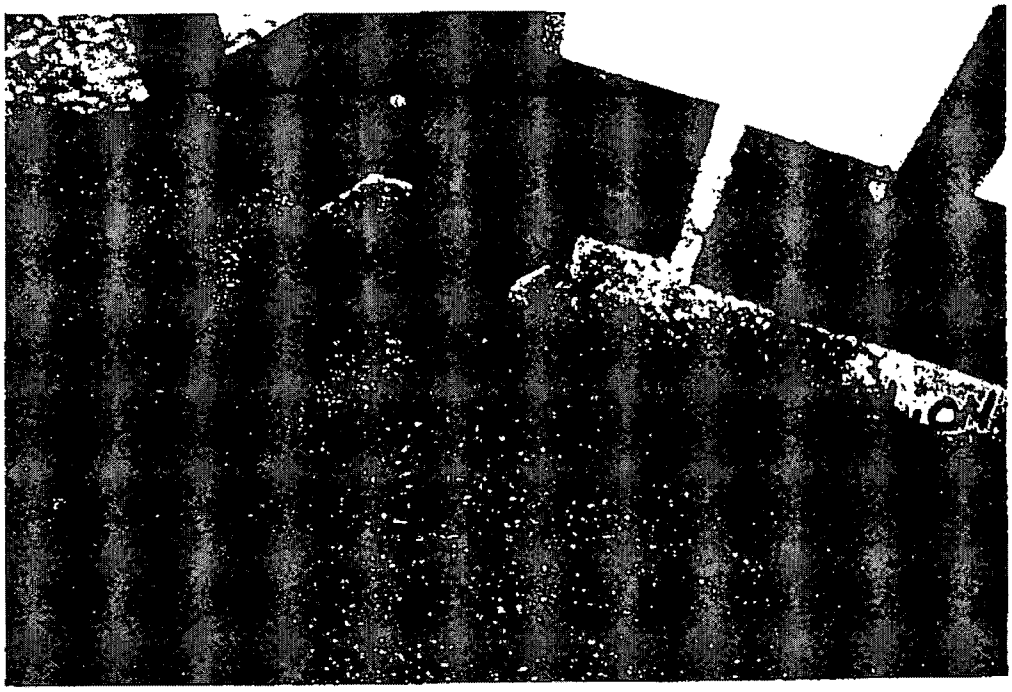


Photo # 19





2009-CP-22-01655

EXHIBIT NO. "G"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

PROCON
WATERPROOFING, INC.

Corporate Office:
P.O. Box 4518
Wilmington, N.C. 28406
NC & SC
(910) 392-3935

Branch Office:
P.O. Box 20236
Bradenton, FL 34203-0236
(407) 236-9134

August 11, 1994

Waccamaw Management
P.O. Box 2308
Pawleys Island, SC 29585-2308
Attn: Mr. Tom Crocker

RE: Shipyard A & B
Balcony wall to slab sealants.

Mr. Crocker,

A recent inspection of the balcony "wall to slab" caulking which was installed during the waterproofing project has found that the sealant is performing as intended with no signs of failure.

We suspect that the moisture intrusion that is being observed in the balcony wing walls is a result of the balcony concrete decks which are not sealed and leaking back into the wall through cracks in the slab, unsealed rail stanchion holes or the beam butt joint between precast panels.

Repair recommendations should include the application of a waterproof deck coating.

Sincerely,

Bob Gallagher
General Manager

BG/sjl

EXHIBIT NO. "H"

Richard Fisher, Platte, B. Moring, Jr., Marianne G. Kochanski, and Jim H. Markley, on Behalf of all Persons Similarly Situated Who Owned Units in Buildings C & D of the Shipyard Village Property Regime vs Shipyard Village Council of Co-Owners, Inc.
Civil Action Number: 2009-CP-22-0152
Civil Action Number: 2009-CP-22-01655

PROCON & ASSOCIATES, INC.

Corporate Office: (843)399-8918 Fax: (843)399-8928
PO Box 4466
North Myrtle Beach S.C. 29597-4466
Email: fkennington@proconglobal.com

Florida Office: (407)841-7095 Fax: (407)841-7098
4704 L.B. McLeod Rd., Ste. B
Orlando, FL 32811-6408
Website: www.proconglobal.com

October 22, 2007

Eddie Stokes
P.O. Box 15758
Surfside Beach, SC 29587

Re: SHIPYARD VILLAGE CONDOMINIUMS
Buildings A & B
Litchfield By The Sea, South Carolina

Subject: Preliminary Concrete Inspection

Dear Mr. Stokes,

Per our agreement, Procon & Associates, Inc. (Procon) has conducted a preliminary inspection of the elevated exterior concrete walkways and private balcony decks associated with the Shipyard Buildings A & B.

A) INTRODUCTION:

The purpose of this inspection was to assist the Shipyard Condominium Homeowners Association with a better understanding of the following items:

1) The extent of concrete distress which has occurred in the form of visible cracks occurring in the concrete and visible spall locations which have also formed.
2) Potential causes of the identified concrete distress and spalling concrete.
3) Preliminary or possible repair options, based on this preliminary inspection and observations of the typical concrete distress locations using International Concrete Repair Institute (ICRI) standards as the guidelines for repairs.
5) Prepare a rough "ball park" budget estimate outlining the possible cost of repairs for the known or visible areas of concrete distress which were quantified during our time at the site. It is important to note that Procon's inspection and estimated quantities are based only on visible observations. Based on our condition survey and repair of other concrete structures of similar type construction and oceanfront exposure, we would expect to find numerous other concrete distress locations under the corridor and balcony outdoor carpet and layers of carpet glue. We would also expect to find multiple other areas of concrete distress under the heavy stucco texture, multiple layers of caulking and paint which have been applied over the years to the exposed concrete members such as the cantilevered saddle beams which support the precast floor panels. Other possible areas of hidden concrete damage may be occurring under the corridors and balcony ceiling texture and paint areas. We also observed numerous old concrete repairs which were disbonding and/or installed improperly and should be replaced.

B) DISCUSSION:

During our time at the site, Procon walked around every exterior walkway and accessed every private balcony deck using a 60' man lift. After accessing each area, our personnel used a method known as "sounding the concrete" to aid in identification of distressed concrete locations.

Based on our visible observations, our team of inspectors documented approximate quantities to be used for determining a cost budget to perform the needed repairs. These quantities are to be used for cost budget information only as the actual final quantities can only be determined once all required repair areas are uncovered and identified.

BUILDINGS:	A	B
Exterior Balconies/Parking Level		
LF Concrete Cracking @ Decks	385 LF	209 LF
Repair Concrete Spalls	551 Sq. Ft.	429 Sq. Ft.
Repair Handrail Pockets	280 EA.	280 EA.
Remove carpet/glue @ balconies	5200 Sq. Ft.	5200 Sq. Ft.
Prep/Install Deck Coating @ balconies	5200 Sq. Ft.	5200 Sq. Ft.
Exterior Corridors/Walkways		
Concrete Cracks @ Corridor Panels	298 LF	438 LF
Concrete Repair, Spalls @ Ceiling Panels	1481 Sq. Ft.	2430 Sq. Ft.
Repair Concrete Saddle Beams	3114 Sq. Ft.	3114 Sq. Ft.
Repair Concrete Beams @ Outer Edge	2479 Sq. Ft.	3943 Sq. Ft.
Repair Concrete Stair Landing	200 Sq. Ft.	200 Sq. Ft
Repair Concrete Stair Stringers & Steps	20 Sq. Ft.	10 Sq. Ft.
Repair Exposed Steel Chairs	24 EA.	8 EA.
Repair Concrete Light Boxes	35 EA.	35 EA.
Repair Handrail Pockets	988 EA.	988 EA.
Remove carpet & glue @ walkways	11988 Sq.Ft.	11988 Sq.Ft.
Repair Control Joints @ Walkways	317 LF	317 LF
Prep/Install Deck Coating @ Walkways	11988 Sq. Ft.	11988 Sq. Ft.

Before discussing the potential causes of concrete distress, it is important to acknowledge the type of concrete systems which were utilized in the design and original construction of the two original Shipyard buildings. While our team has not reviewed the original structural plan sheets, we have noted from our field observations that the Shipyard(s) concrete superstructure appears to be cast-in-place concrete for all of the vertical and horizontal beams including the exposed saddle beams which support a second type of concrete system which are the exterior precast concrete floor panels. The cast-in-place concrete members contain carbon steel reinforcing rebar of various dimensions while the precast concrete floor panels contain carbon steel cable or strands of wire wound together. During the inspection process, our team observed moderate to heavy rust and corrosion on both the carbon steel reinforcing and carbon steel cables to the extent that a significant cross section of the steel had been lost due to long term corrosion problems.

Based on Procon's observations at the site along with mapping the locations of each visible concrete distress location, our inspection leads our team to summarize the following conclusions:

Multiple cracks have developed in many of the precast floor panels. Most of the cracks run parallel or the length of each panel. Cracks were also observed extending from every aluminum rail stanchion pocket through to the exterior face or front edge of each precast

member. Rainwater which blows onto the open walkways and balconies is being held by the outdoor carpet. Bu' vater and moisture are penetrating throug' 'he cracks in the precast floor panels and all of the aluminum handrail stanchions and is migrating down the bottom of the panel where it comes into contact with the carbon steel cable.

Because these structures are located in an oceanfront environment, salt which is deposited on the structure as well as in the carpet is being carried into the concrete with the rainwater through the cracks in the concrete and then coming into contact with the steel cables. This water/salt chloride combination is corroding/rusting the steel. As the steel rusts, it expands in the concrete to the point where the pressure of the expanding steel actually forces the surrounding concrete to separate from the steel thus creating a spall in the underside or ends of the precast floor panels. Spalls may be occurring in the top side of the floor panels but our inspection was not able to identify these areas due to the carpet and multiple layers of glue still being in place.

The inspection also found moderate to severe concrete spalls occurring in the concrete saddle beams which sit directly under each location where two (2) precast floor panels abut from above. Again, rainwater and moisture are blowing onto each walkway and balcony. The water is then migrating down between the two ends of the floor panels and sitting on top of the cast-in-place saddle beams. On the balconies, the water appears to be entering through cracks along the outside face or end of each panel and also migrating down to sit on top of the saddle beam.

C) SUMMARY:

Bulk water and moisture have been entering between the floor panel butt joints for a long period of time; perhaps since the structure was built.

Over the years, the saddle beams directly below each floor panel butt joint have slowly deteriorated and may have even deflected to some degree. The deterioration of the saddle beams which hold and support the floor panels has most likely contributed to movement, stress and cracks occurring in the floor panels. This deterioration of the saddle beams along with the age of the structure as well as original construction shrinkage and some settlement are possibly the primary reasons the precast floor panels have sustained cracking.

Conclusions & Recommendations:

The preliminary investigation was important to help identify the quantity, cause and effect of the concrete distress locations, there are some additional areas of the inspection which should be considered:

1. A corrosion engineer should be considered to evaluate the level of chloride contamination in the concrete, extent of corrosion on the steel reinforcing and remaining life span of the cast-in-place structure and precast floor panels.
2. It is recommended that all carpet and carpet glue be removed from all walkways and balconies to help identify areas of concrete distress. It is recommended that all ceiling texture and paint be removed and that all heavy stucco finishes be removed from all cantilevered saddle beams, again to help identify areas of concrete distress.

3. A structural engineer is recommended to evaluate the concrete repairs to ensur 'hat the structural integrity is returned ' the effected members. Shoring diagrams may also be needed before repair work starts on the saddle beams.
4. Final concrete repair requirements will need to be developed in accordance with ICRI standards by a structural engineer, corrosion engineer (if engaged) and product manufacturer. Sika Corporation who manufactures specialty product lines for concrete repair problems, has been to the site and assisted Procon in the preliminary inspection process.
5. Exterior walkway and balcony waterproof deck coating systems with special "butt end" joint details such as mechanical joint systems are recommended in conjunction with the concrete repair systems to prevent further water penetration from the top side of the precast floor panels.

D) CLOSING:

In general concrete repairs and the application of waterproof deck coatings are intended to correct the physical concrete damage which has occurred to the structure as well as aiding or slowing the time to corrosion process. These repairs and waterproof systems alone will not stop the corrosion process. More spalls will occur over time. The only way to significantly reduce the time to corrosion process is through some means of cathoditic protection. This is the reason that Procon has listed a corrosion engineer as one possible team member who should inspect the buildings and provide his opinions and options for protecting the structure through other means other than just waterproofing systems.

As part of Procon's inspection process our company was asked to provide a ball park cost as to what the anticipated cost of repairs might be. Please keep in mind that structural or corrosion engineers have not looked at the buildings. The following budget range is solely dependent on what we know to date, based on our visual observations. The work scope would include the cost for removing the existing carpet, carpet glue and applying a deck coating system and general concrete repairs based on the areas and quantities documented. Based on this qualification, we would expect the repair cost to range from $ 2,000,000.00 to $ 2,900,000.00 for both buildings again based solely in regards to what has been observed to date. Please note that there are still a lot of potential hidden damages and work scope which may be required once the engineers inspect the site. It is always recommended that the owner's project budget carry allowances and contingencies to cover potential hidden or unforeseen conditions, even after the Engineer develops the final repair scope documents.

Budget Qualifications/Exclusions

No shoring of structure is included in budget
No splicing or adding of reinforcing steel is included
No cathodtic protection of any kind is included
No epoxy injection in cracks is included
No replacement of floor panels is included
No floor panel to superstructure clip/attachments are included
No full depth repairs are included
No removal/replacement of existing or new handrails is included
No replacement of outdoor carpet is included

No carbon wr. ,/concrete strengthening applications ar. included
No entire slab/column corrosion inhibitors are included
No painting or finishing of the "repaired areas" is included

This completes our preliminary concrete inspection and report of findings. Please call should you have any questions.

Sincerely,

Bob Gallagher
President

Attachment:
Plan Floor Sheets Per Floor Per Building A & B

RG:jep

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO.: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC;

DEFENDANT SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.'S NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER, ALTER OR AMEND PURSUANT TO RULES 52 AND 59, SCRCP

FILED
GEORGETOWN COUNTY, S.C.
2012 JUN -6 PM 3:59
ALMA V. WHITE
CLERK OF COURT

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia

M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

TO: HOWELL V. BELLAMY, III AND HOWELL V. BELLAMY, JR., ATTORNEYS FOR PLAINTIFFS ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the Defendant, Shipyard Village Council of Co-Owners, Inc., hereby moves the Court to reconsider, alter or amend its Form 4 Order granting partial summary judgment to Plaintiffs, which Order is dated May 23, 2012; was filed May 23, 2012; and was received by counsel for Defendant on May 29, 2012. This Motion is made pursuant to Rules 52 and 59, SCRCP, and upon the grounds set forth below. Defendant seeks this Court's Order reconsidering and

vacating its previous Order granting Plaintiffs' Motion for Partial Summary Judgment on the issue of duty and breach. In the alternative, Defendant seeks this Court's altered or amended Order explicitly ruling on each of the grounds raised by Defendant in opposition and established by the evidence of record before the Court and issuing a written ruling on the numerous other rulings announced by the Court on the multiple motions argued on May 21, 2012.

BACKGROUND

This case is actually two (2) cases: Civil Action No.: 2009-CP-22-0152 (filed January 29, 2009) and Civil Action No.: 2009-CP-22-01655 (filed October 7, 2009). The trial of these consolidated, complex-designated cases was scheduled by the Court for Monday, May 21, 2012. On the afternoon of May 21, after general qualification of the jury venire, but prior to the commencement of trial, the Court heard arguments of counsel on numerous pending pre-trial motions. Among those was Plaintiffs' "Notice of Motion for Summary Judgment and/or Partial Summary Judgment Against the Defendant." After hearing the arguments of counsel, the Court announced from the bench the award of partial Summary Judgment in favor of Plaintiffs on the issues of "duty" and "breach."

On May 23, 2012, the Court executed, and the Clerk filed a Form 4 Order which held in its entirety that the ruling of the Court was: "Partial Summary Judgment Granted/Case Stayed by Filing of Appeal." Defendant seeks reconsideration, alteration or amendment of the Court's ruling and Form 4 Order.

I. Defendant Respectfully Contends that the Court Applied an Incomplete Legal Standard in Ruling Upon Plaintiffs' Motion

In determining whether triable issues of fact exist so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). If the issues exist, those issues must go to the jury for consideration. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991); Joubert v. S.C. Department of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000).

While the Court's ruling from the bench acknowledged the standard of viewing all inferences in the light most favorable to the non-moving party, the Court stopped short of applying the "mere scintilla" standard in its review of the evidence. South Carolina's Supreme Court recently eliminated any doubt as to the standard to withstand a motion for summary judgment: "Accordingly, we hold that 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 in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 573 S.E.2d 801 (S.C. 2009).

As demonstrated herein, the evidence before the Court demonstrated at the very least a scintilla of evidence – and demonstrably more – on the issues of duty and breach.

II. **The Court Committed Reversible Error in Disregarding Evidence Which Demonstrated the Board of Director's Exercise of its Duties; Established Genuine Issues of Material Fact on the Issue of "Breach" of those Duties; and Set Forth Genuine Issues of Material Fact on the Exercise of Business Judgment**

The Court ruled from the bench that pursuant to the Master Deed, Defendant's Board of Directors had a duty to inquire and determine how much of the damage to the A and B Buildings (necessitating the repairs at issue) was attributable to the alleged negligence of the A and B Owners in failing to maintain windows and doors for which they held maintenance responsibility. The Court ruled as a matter of law that the Board breached that duty.

"The question of negligence is a mixed question of law and fact. Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). First, the Court must resolve, as a matter of law, whether the law recognizes a particular duty. Id. If the Court determines there is no duty, the defendant is entitled to a judgment as a matter of law. Id. However, if a duty does exist, the jury determines whether a breach of the duty that resulted in damages occurred." Burnett v. Family Kingdom Inc., 387 S.C. 183, 691 S.E.2d 170 (S.C. 2010).

The Court's ruling on the factual issue of breach disregarded evidence of the Board's exercise of reasonable business judgment in a number of particulars, thereby usurping the jury's role, as follows:

a. Doris Bray's Affidavit Creates, at a Minimum, a Factual Issue on "Duty" and "Breach"

Plaintiffs' Motion for Summary Judgment, heard and ruled upon on the day of trial, was not the first time Plaintiffs had brought this issue before the Court. In "Plaintiff's Notice of Motion and Motion for Partial Summary Judgment Against the

Defendant Shipyard Village Council of Co-Owners, Inc." filed on August 31, 2011, Plaintiffs argued at page 13 of 15 as follows:

> *Even if the Third Amendment/2006 Window Amendment is valid and enforceable, which is expressly denied, its application is prospective (from September 26, 2006, to the present) and not retroactive. Accordingly, the A and B co-owners are still responsible for all the collateral water intrusion damaged caused by their leaking windows and sliding glass doors in accordance with Section 6.3, Default of Co-Owner, of the By-Laws. Section 6.3 provides:*
>
> > ***In the event that any Co-owner fails to perform the maintenance required of him by these Bylaws or by any lawful Regulation, and such failure creates or permits a condition which is hazardous to life, health or property, or which unreasonably interferes with the rights of another Co-owner or which substantially detracts from the value or appearance of the Regime Property, the Board of Directors shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment.***
>
> *Furthermore, the Defendant SYVCOC is not discharged from its responsibility to directly assess the Building A and B Co-owners for their failure to maintain and repair their leaking windows and sliding glass doors in a timely manner. See footnote one (1), Sections 6.1, 6.3, 6.4 of the By-Laws. As such, the Defendant SYVCOC has an affirmative duty to directly assess the Buildings A and B co-owners for the resulting damage caused to their buildings due to their failure*

to maintain and repair their leaking windows and sliding glass doors in a timely manner. (Exhibit No. 11, Report of Steve Geiger dated April 25, 2011). (Emphasis in original).

Plaintiffs reinforced this argument in "Plaintiffs' Notice of Motion and Motion for Temporary Injunction" filed on November 3, 2011, citing in support of their injunction Motion the same Affidavit of Plaintiffs' expert, Stephen E. Geiger, P.E.[1]

In opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendant submitted the Affidavit of Board Member Doris Bray. A true and accurate copy of Ms. Bray's Affidavit, filed October 28, 2011, is appended to this Motion as **Exhibit 1** for the Court's convenience. Ms. Bray's Affidavit averred, in relevant part, as follows:

> *6. Plaintiffs' Motion contends that the Council (or Board) had a duty to directly assess the Building A and B Co-Owners for their alleged failure to maintain and repair their windows and sliding glass doors in a timely manner. (Plaintiffs' Motion, ¶2 on page 13). I strongly disagree with that assertion.*
>
> *7. There is no evidence that the windows and/or sliding glass doors were the primary cause or source of the leaks experienced in the A and B Buildings. For example, the windows in my Unit were not leaking. I am aware of additional Unit Owners in both Buildings A and B whose windows and/or doors were not leaking. The Council was advised that the damage was the result of the failure of the building envelope system. Based on my ownership in Building B and my involvement as a board member, I believe that it is impossible to determine if the water intrusion and leaks in the Buildings were primarily caused by the windows and sliding glass doors or by design and/or construction deficiencies originating with the Common Elements of the Buildings and by the Buildings' constant exposure to salt air and water as oceanfront properties.*
>
> *8. It would be unfair, unreasonable and contrary to the best interests of the Council to have "individually assessed" the A and B Building Unit Owners for water intrusion that may not have resulted from any lack of maintenance of windows and sliding glass doors by*

[1] The Court's Form 4 Order entered on December 9, 2011 confirmed Plaintiffs' withdrawal of their Motion for Temporary Injunction.

owners, but rather from original design and/or construction defects of the Common Elements and constant exposure to the ocean environment.

9. Plaintiffs' Motion further contends that Plaintiffs are entitled to a $531,679.00 reduction of their assessment to account for the "soft" project costs attributable to the windows and doors that should have exclusively be borne by the Co-Owners in Buildings A and B (Plaintiffs' Motion, ¶2 on page 10; ¶d. on page 14; and ¶e. on page 14). I also strongly disagree with this assertion.

10. Setting aside for the moment the validity of the Windows and Doors Amendment (which Plaintiffs have previously requested, and continue to request, be declared invalid by the Court), Plaintiffs' theory regarding allocation of "soft" project costs is seriously flawed. There was no practical, equitable way to apportion such costs. As previously stated, there is no conclusive evidence that the Building A and B Unit Co-Owners were negligent, nor is there any conclusive evidence that all Building A and B windows and/or doors were leaking. There was however, no question that the building envelope system had to be repaired, the majority of which Plaintiffs agree is a Common Expense. Considering that the work to the Common Elements was a necessity and the lack of conclusive evidence that leaky windows were the culprit in every Unit, or even any Unit, the Board was faced with uncertainty as to how to treat the costs associated with the windows and doors. Arguably, Building A and B Unit Co-Owners could have been charged the same amount as Building C and D Unit Co-Owners regardless of the validity of the Windows and Doors Amendment. For example, absent Code restrictions, the windows in my personal unit could have been reinstalled after the repairs to the Common Elements were completed (This assumes the removal could have been accomplished without causing damage to the windows, which could not be guaranteed). Under this scenario, I could argue that, whether or not the Windows and Doors Amendments were valid, the removal and reinstallation of the windows was a repair incident to repairs to the Common Elements and I should not be responsible for any costs associated with the window and doors other than my pro-rata share of the Common Expense to be borne equally by all Co-Owners.

11. The per unit allocation was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity. In keeping with this effort, and to avoid litigation expenses associated with Plaintiffs' claims about the validity of the Windows and Doors Amendment, we as a Board decided to put the matter before the ownership for another

vote in 2009. This alternative vote on the Amendment was not a "legal position" expressed by the Board; it was an attempt to ratify the amendment and therefore resolve the complaints of the ownership. By their votes, the ownership made clear that the amendment did not enjoy a supermajority of support so we allocated costs of the replacement windows and doors themselves to the A and B owners. We made our decision based on business judgment, not what might or might not happen in court.

12. Given the costs of the work to the Common Elements was undisputedly a Common Expense under the governing documents and the uncertainty surrounding the Windows and Doors Amendment, the Board decided the most that could be attributed to Building A and B Unit Owners was the actual costs of the windows and doors. To attribute any more of the repair costs, including the "soft" project costs, to Building A and B Unit Co-Owners, would have been an exercise of bad business judgment and, in my opinion, wrong.

The Court's ruling on the issues of "duty" and "breach" utterly disregarded the affirmative testimony set forth in Ms. Bray's Affidavit. As set forth in paragraph 7, Board Member Bray testified that "there is no evidence that the windows and/or sliding glass doors were the primary cause or source of the leaks experienced in the A and B Buildings." (Bray Affidavit, ¶7). Ms. Bray further established her belief that "it is impossible to determine if the water intrusion and leaks in the buildings were primarily caused by the windows and sliding glass doors or by design and/or construction deficiencies originating with the Common Elements of the buildings and by the buildings' constant exposure to salt air and water as oceanfront properties." Ms. Bray's Affidavit sets forth at paragraph 10 her belief that "[t]here was no practical, equitable way to apportion such costs."

Ms. Bray's Affidavit – and the reasonable inferences to be drawn therefrom – established that the Board of Directors gave consideration to the issue of whether to individually assess the A and B Members for an additional portion of the costs of

remediating the A and B Buildings. Her Affidavit creates far beyond a "mere scintilla" of evidence which, if deemed credible by the jury, could reasonably lead to the conclusion that the Board exercised reasonable business judgment in assessing the A and B members for the cost of the windows and doors themselves, but not for additional damage allegedly incident to their maintenance of windows and doors.

The Court erred in disregarding this testimony and deprived the jury of the opportunity to assess the credibility of the witness, weigh the conflicting information with which the Board was presented, and determine the reasonableness of the Board's decision.

b. The Testimony of Defendant's Expert J. Lawrence Elkin, P.E. Established Genuine Issues of Material Fact for Consideration by a Jury

The deposition and report of Defendant's expert J. Lawrence Elkin, P.E. was presented to the Court as Defendant's Exhibit 1 at the hearing on the Motion for Partial Summary Judgment on May 21, 2012. The Court ruled that the Board had "breached" its duty of care in allocating the charges for remediation of the A and B Buildings. Mr. Elkin's testimony clearly established, at a minimum, a scintilla of evidence as to the reasonableness of the Board's decision considering the conflicting technical information with which it was presented. This is established at paragraph 5 of Mr. Elkin's report:

> *5) Shipyard Village changed the Master Deed to make windows common elements for technical reasons and not financial reasons.*
>
> > *a. Windows, once installed, cannot be considered independent of the opaque wall areas. They both work as part of a larger system called the building enclosure. The building enclosure separates the interior from the exterior in a manner as to protect the interior from weather and to provide a space which can be climate controlled.*

b. Windows transition to walls at an interface. This interface must be properly detained with flashings and sealants to prevent the intrusion of water. In addition, windows are not intended to be watertight under all conditions: therefore the flashings must collect and redirect that water back to the exterior.

c. Prior to the inclusion of Buildings C & D, the HOA included many aspects of window repair, replacement and maintenance as part of annual operating costs, reserve costs or insurance funded repairs.

d. The two year history of the window leakage and replacement in Unit B28, owned by the Morrows is an excellent example of the inherent difficulty for the BOD to exercise its authority when confronted with conflicting technical information regarding the performance of the windows and wall.

> *i. April 17, 2004: Morrows reported an on-going leakage problem in Unit B28. The Morrows believed that the issue was related to water leaking through the stucco. Site maintenance manager Bobby Warner reported to the board that water leaked through the window.*
>
> *ii. October 12, 2004: Warner reported to the BOD that he visited the site during a rain event and reiterated that the leakage was related to the window.*
>
> *iii. March 4, 2005: The BOD records that the Morrows replaced the windows in B28.*
>
> *iv. April 15, 2005: Morrows reported to the BOD that their Unit still leaks despite having new windows installed. They engaged an engineer who identified stucco cracks as the source of the water intrusion. The Morrows also forwarded a memo from Architect Hiller to opined that water in B28 was not related to windows.*
>
> *v. June 17, 2005: The Morrows report to the BOD that leakage in their Unit remains unresolved. New site maintenance manager Bennett is directed to investigate this issue. He identifies sealant joint failures at the windows/stucco interface which could be a problem. Bennett also founds cracked stucco over CMU at a previous repair which could allow water intrusion.*

vi. October 14, 2005: A thermographer was engaged to scan the walls in B28 to determine the source of the leakage (Both Buildings A & B were scanned).

vii. February 17, 2006: The Morrows attend the BOD meeting with their engineer Manning. Manning described his study which indicated that repairing one window will not solve leak issues. The leakage occurred at the window/stucco interface. The repair required a vertical stack of windows to be removed, flashed and replaced. This resulted in the BOD discussing the need for windows to be a common element.

viii. February 18, 2006: The BOD discussed the Morrow matter along with a letter that the Morrows sent to all A & B unit owners. In addition, the difficulty that owners have with regard to finding qualified contractors to work for one unit owner on a tall building was shared. A previous show-of-hands vote was taken to see if the BOD's motion from the previous day should be on a proxy ballot. The majority present were in favor of the motion.

e. I visited the site in 2010 and observed the windows and doors that were removed. Most of the aluminum frames exhibited corrosion from contact with stucco or concrete. The windows were designed to be attached with nail flanges which extended over the face of the exterior sheathing and were covered with stucco. Removing and replacing this type of window cannot be accomplished without damaging the stucco.

The Court's ruling disregarded this evidence of conflicting technical information presented to the Board and deprived Defendant of the opportunity to present evidence from which a jury could have concluded that the Board exercised reasonable business judgment.

The Court's ruling also disregarded evidence submitted by the Defendant's expert that the Board of Directors indeed enforced the provisions of the Master Deed regarding the duties of A and B Owners. Specifically, Mr. Elkin opined in his report as follows:

6) There is no evidence indicating that the BOD failed to enforce the provisions of the Master Deed requiring Unit Owners in Buildings A & B to maintain, repair and replace certain aspects of their units. Rather the record clearly shows that individual unit owners were notified of needed repairs and violations. It also shows that some owners, who had performed maintenance on their own, inquired about refunds from the BOD when similar repairs were undertaken on a wide scale by the HOA. This included such things as reimbursements for window replacements.

Viewed in a light most favorable to Defendant, the foregoing opinion creates a genuine issue of material fact as to the reasonableness of the Board's efforts to require owners in Buildings A and B to maintain, repair and replace conditions in their unit for which they were responsible.

Similarly, the Court ignored the report of Defendant's expert creating a genuine issue of material fact as to the underlying reasons necessitating the remediation project. Specifically, Mr. Elkin opined in his report as follows:

9) The need for the $11,000,000 assessment is more directly associated with the fact that the facility is located ocean front and was constructed nearly 30 years ago. The construction technology, means and methods available today are more robust but they are also more expensive. For example, the implementation of cathodic protection is an appropriate repair and it will reduce the potential for future rebar corrosion. However, this technology was not widely available at the time the facility was constructed and none of the construction professionals recommended it to the BOD prior to the current repairs. My experience is that similarly aged and located properties undergo major rehabilitations every 25 to 30 years.

This evidence is more than sufficient to create a genuine issue of material fact as to the reasonableness of the Board's decisions and created a jury issue.

Similarly, the Court disregarded the testimony of Defendant's expert which established the conflicting sources of the leaks experienced in the A and B Buildings. Defendant's expert opined in that regard as follows:

12) The records do reflect that leaks occurred from time to time in various units. These leaks were attributed to the roof, windows, stucco, sliding glass doors, fenestration in neighboring units, HVAC equipment, water heaters, kitchen fixtures, bathroom fixtures and laundry equipment. Each of these conditions, when reported to the board, was referred to the property manager or site maintenance supervisor for further investigation. When needed, the board notified owners of the need to repair or maintain fixtures and equipment. The BOD also undertook to repair the roofs and secure roof-top HVAC equipment to resolve leak issues.

From the opinions espoused in paragraph 12 of Mr. Elkin's report, it is reasonably inferable, and a jury could have reasonably concluded, that confronted with these varying sources of leaks, the Board exercised reasonable business judgment in not attempting to parse the percentages of leaks allegedly attributable to window and door conditions in 80 separate A and B Units. The Court erred in removing this issue from the jury's consideration.

The Court disregarded the evidence submitted by Defendant's expert that a "reallocation" of assessments as proposed by Plaintiffs was not merited under the facts presented here. Mr. Elkin directly addressed this issue in this report:

Re-Allocation of Assessment

There is no justification for re-allocation of assessments. Historically, the HOA has adhered to the principle that all association costs are to be borne by the owners in accordance with the Master Deed. In fact, this issue was addressed with the owners on June 15, 2001 in a letter entitled Urgent Message and Notice of Proxy which stated:

> *It is important for A and B owners to support this year's assessment. We are not competing owners but neighbors protecting our investments and all owners (A, B, C and D) are at risk and responsible for repairs to any buildings in our Association as stated in the Master Deed and By-Laws.*

This position was reiterated on April 16, 2005 at the Shipyard Village Council of Co-Owners Twenty Third Annual Members' Meeting. The following excerpt is from the minutes:

Joe Henson (B46) asked how the owners in the A and B building will be affected by the lawsuit and repairs needed in C and D. The Board explained that the A, B, C and D buildings are all part of Shipyard Village Council of Co-Owners, Inc. and all expenses, regardless of what building, are shared by all owners based on percentage of ownership.

Given that this policy is in accordance with the Master Deed, and that this policy has historically been enforced, there is no justification for re-allocating the assessments for the recent repairs to Buildings A and B.

This is a further example of the Court's invasion of the jury's province in determining that a "breach" of a Board duty occurred. Two (2) expert engineers offered disparate evidence of the information with which the Board was presented; the Board's consideration of that information; and the conclusions reached by the Board. This evidence, too, created a genuine issue of material fact and at the very least a scintilla of evidence that the Board had not breached any duty to the Plaintiffs. The Court erred in making a factual determination when presented with this conflicting evidence.

c. The Court Also Disregarded the Previously Filed Affidavit of Defendant's Expert Which Established the Existence of Genuine Issues of Material Fact Precluding Summary Judgment

The Court disregarded the previously filed Affidavit of Defendant's expert Elkin. Specifically, in response to Plaintiffs' previously filed Motion for Partial Summary Judgment on the issue of whether the Board breached a duty, Defendant's filed the Affidavit of their expert on October 28, 2011. For the Court's convenience, a true and accurate copy of Mr. Elkin's Affidavit is appended to this Motion as **Exhibit 2**. Pertinent portions of Elkin's Affidavit, cited below, establish that genuine issues of material fact existed regarding the reasonableness of the Board's approach in allocating the shared expense of the A/B remediation project:

17. It is important to note that the remediation of the Shipyard A and B Buildings cannot be viewed in isolation as a "window and door replacement project." As catalogued in Sutton Kennerly & Associates' "Structural and Façade Repairs for Shipyard Village Opinion of Project Cost"; in Geiger's report; and in my report, the Board of Directors here was faced with a systemic failure of the building system. I catalog in significant detail at paragraph 5 of my report that windows are not independent of the stucco wall system, but are instead part of the building enclosure. Transitions must be interfaced properly, detailed with flashing and sealants to prevent the intrusion of water.

18. As noted at paragraph 12 of my report, my review of the Association's voluminous records reflect that leaks occurred throughout various units at different times, but these leaks were not limited to windows and sliding glass doors. On the contrary, leaks were attributed to the roof, the stucco, HVAC equipment, and other factors. As further noted in paragraph 11 of my report, there are contradictory records as to the source of the leaks. One report, for example, noted that no water leaked through windows, but water penetration occurred through the stucco (a Common Element which is a repair responsibility of the Association). Unit B-28, for example, provides informative background as to the inherent difficulty for the Board of Directors when confronted with conflicting technical information concerning the source of the leaks. One source reported that Unit B-28 was leaking at the windows; the Unit Owner engaged an engineer who identified stucco cracks (a Common Element) as a source of the water intrusion.

19. Simply put, windows and doors in the A and B Buildings cannot be viewed independently. They are part of an integrated building enclosure system which all parties agreed was in dire need of repair. The cost of repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation. In my opinion, this is also true as to the "soft costs" attendant to window and door replacement as well.

23. Accordingly, I reaffirm the opinions set forth in detail in my June 30, 2011 report that the Board of Directors of the Shipyard Village Council of Co-Owners, Inc. did not breach any fiduciary duty in its maintenance of the buildings or in the allocation of charges for repair in the exercise of its business judgment.

Paragraph 17 of Elkin's Affidavit establishes that "the Board of Directors here was faced with a systemic failure of the building system." Faced with that systemic

failure, the inferences to be drawn from the evidence could have led a jury to conclude that the Board exercised reasonable business judgment in making its decisions regarding the allocation of expenses. The Court erred in invading the province of the jury by determining this contested factual issue as a matter of law.

d. The Testimony of Defendant's Expert Gary C. Bradham Also Established Genuine Issues of Material Fact for Consideration by a Jury

The deposition and report of Defendant's expert Gary C. Bradham was presented to the Court as Defendant's Exhibit 2 at the hearing on Plaintiffs' Motion for Partial Summary Judgment on May 21, 2012. Mr. Bradham's testimony clearly established, at a minimum, a scintilla of evidence as to the reasonableness of the Board's decision considering the flexibility afforded to the Board on its methodology in carrying out the duties and obligations as outlined under the governing documents and statutes. Mr. Bradham opined in his report as follows:

> **3) The Acts, the Master Deed, and the Bylaws outline the basic Standards of Care required by the Boards. But, the standards of duty for the Board and its Directors are not "right and/or wrong" standards of responsibility and duty. They require some interpretation by the BOD.**
>
> *"From the discussion above, it is easy to see that the standard to maintain, protect and enhance the common property of SVCOC, while outlined in the governing directives, allowed flexibility to the Boards to make decisions on how to proceed. There are no "cookie cutter" approaches, nor a playbook on how to respond to every possible situation. The Board is a group of individuals making real time decisions on a wide variety of issues. The record shows the Boards used the information available at the time to make what they felt was the best decision. ..."*
>
> **4) The obligation of fiduciary duty for the Duty of Care and the Duty of Loyalty are also subjective in nature as well. The Board cannot and should not be held to a standard of perfection. The Master Deed and Bylaws section 2.2(7) of the SVCOC requires**

that directors act in good faith and on behalf of and the fulfillment of the benefit of all co-owners.

"'20/20 Hind-sight' can make something look simple and clear; but in reality, whether or not someone or a board has acted responsibly or without reckless disregard or based upon ones' personal agenda, is somewhat subjective. In making such a determination, one must take the totality of the situation to make a determination of 'good faith' or 'bad faith' and one 'with or without' negligence.

The presumption is that in making a business decision, the directors must act on an informed basis, in good faith and in the honest belief that the action being taken is in the best interest of the membership."

5) It is my opinion that over the years the Boards of SVCOC were engaged and focused on the acts that were provided for in the master deed within the scope of powers allowed by the bylaws.

"From my review of the record and the thousands of pages of information in the files, they show that at no time did the board act outside of its scope. Instead it always relied on technical experts with whom they had hired and feedback from the membership to guide its decision process and final actions."

From the opinions espoused in Mr. Bradham's report, it is reasonably inferable, and a jury could have concluded that, confronted with the varying sources of leaks, the lack of any conclusive evidence that the source of any leak was the result of a Unit Owner's negligent maintenance, and evidence the damage to Buildings A and B was the result of a systemic building envelope failure (a Common Element failure), the Board exercised reasonable business judgment in not attempting to parse the percentages of leaks allegedly attributable to conditions in 80 separate A and B Units.

Similarly, the Court disregarded the testimony of Defendant's expert Bradham which established that leaks at windows and doors were being repaired and maintained.

"So I looked for and tried to follow through, if we had windows that said they were leaking, did it get reported? Yes, they were taken

care of. Were there any other complaints from that particular arena? Was it hairline cracks in stucco? Was the stucco repaired? I was looking for things like that, seeing what type of actions was it that the board was actually doing. And I didn't find any time where the board had something put in front of them and did nothing."
(BRADHAM, GARY CURTIS - Vol. 1, 61:22-62:6, May 3, 2012)

The Court discounted the process the Board took to get to its final assessment determination. Bradham's deposition testimony and report establish that the documents cannot be read in isolation and without giving full consideration to the entire process leading up to the assessment. Bradham's testimony created, at a minimum, a genuine issue of material fact as to the Board's exercise of reasonable business judgment.

e. The Testimony of Defendant's Board Members Established Genuine Issues of Material Fact for Consideration by a Jury

The depositions of Defendant's Board Members, which are in evidence before the Court, established that the Board 1) was aware of its duties under the governing documents; 2) gave consideration to all of its duties in rendering the assessment; and 3) did not find that any conclusive evidence existed on the issue of whether or not any A or B Unit Owner failed to maintain their Unit causing damage to the Common Elements.

Don Johnston, the Board President at the time the proposed assessment was submitted to the Association's owners, testified as follows:

Q. Okay. That's fair. In any case, at the point -- Sutton-Kennerly was not asked or requested, in their assessment of all the damages, to break out what damages, if any, they attributed to the leaks around the windows and doors that may have gotten into the common elements, as to whether unit owners in A and B should be responsible for that collateral damage.

A. That's correct.
Q. They were never asked to do that.

A. That's correct.

Q. All right, sir. Is it because there wasn't any information that the windows had leaked into the common elements, or the board just felt that was too cumbersome to do?

A. It was because the information provided by Sutton-Kennerly was such that the corrosion throughout the building is not the end result of any one item. It was made clear that from Day One, the buildings absorbed corrosives, and that leaks found throughout -- corrosion found throughout the building could come from anywhere.

Q. Including the windows?

A. Including the windows.

Q. All right, sir. And so what I hear you saying is it was kind of hard to break out?

A. Absolutely, yes.

Q. Okay. And this is the first time we have really got the guy to do it. The board just made the decision, We'll just have a general assessment and won't deal with that situation --

MS. BOAN: Object to the form.

BY MR. SKEETS BELLAMY:

Q. -- what A and B is responsible for.

A. The board made the decision to assess, based on the costs associated with repairing that building, and the repair of that building, the board recognized the cause for those repairs was not necessarily limited to any one problem in the building. Based on the feedback from the -- from Sutton-Kennerly, that did the investigation, where the corrosives were found, the end result of leaks everywhere - -

Q. All right, sir.

A. -- and just not at the windows and doors.

(JOHNSTON, DON - Vol. 1, 49:12-51:6, Apr. 23, 2012)

In viewing Mr. Johnston's testimony in the light most favorable to the non-moving party, a jury could find that the Board reasonably believed the damage to the A and B

Buildings was not a result of any failure on the part of a Unit Owner to maintain his, her or its unit, but rather the result of systemic building problems and conditions related to the age of the buildings, the oceanfront environment, and original construction conditions.

It could also be inferred from Mr. Johnston's testimony that this Board reasonably believed, based on the exercise of reasonable business judgment, that it was impractical, if not impossible, to sort out any "negligence" on the part of A and B Unit Owners given the moving targets of time, age, environment, and the definitions of Common Element and Common Expenses as compared with the definition of Maintenance Requirements for a unit. There would be no reason to ask SKA or anyone else to parse out the negligence of the individual A and B Unit Owners if the Board believed it already had the answer. That is exactly what is meant in Board Member Doris Bray's deposition when she states the following:

> *Q. Well, all the experts have said that the windows have not been properly maintained and repaired, not only from '83 going forward but also from 2006 going to 2010.*
>
> *A. I disagree with that statement.*
>
> *Q. All right. Explain why you disagree.*
>
> *A. I don't think the windows are responsible for the problems.*
>
> *Q. Why do you not think the windows are not responsible for --*
>
> *A. The windows didn't leak.*
>
> *Q. Well, some of the experts, McGee & Associates, said the windows leaked. Did you read McGee's report back in 2002?*
>
> *A. I may have. The windows themselves did not leak. I never had a leak in my unit.*

Q. Okay. Your unit, if I understand -- all right. You're telling me today -- have you ever made any repairs to your unit regarding water intrusion coming in from the windows or sliding glass doors?

A. No.

Q. Okay.

(Bray, Doris, 48:23-49:20, May 17, 2012)

Q. Did the board -- let me back up for a second. When the board got Sutton-Kennerly's estimated cost of repair for Buildings A and B in the amount of $11 million, did the board undertake to do any investigation to find out to what extent the A and B unit owners had been negligent regarding the maintenance repair of their units?

A. No.

Q. Can you explain why? No. Was it -- was it -- was it -- did the board -- why didn't they undertake that responsibility to do that?

A. Why should we have?

Q. All right. You would agree that Buildings A and B are 16 years older than Buildings C and D, correct?

A. Well, I'm not sure of the exact dates, but I take your word for that.

Q. Okay. And based upon all the reports that I've read and all the minutes, I'll represent to you, would indicate, after all the experts have gone in there, the experts -- the experts that you hired when you were on the board, such as Stantec, Eddie Porcher, I think, also Kyzer & Timmerman, which was a structural engineer firm, Tourney Consulting, which was a corrosion -- they were structural engineers dealing with basically -- corrosion structural engineers that y'all hired, and they were out of Michigan -- and I'm trying to think of -- and, of course, I think -- and, of course, you hired -- when you were on the board, you had Spectrum Engineering -- and their report is made part of the record -- and you also hired Sutton-Kennerly & Associates. And I represent to you, if you go back and read all those reports, they clearly indicated that water was coming in around or through the windows and under sliding glass doors?
MS. BOAN: Object to the form.

THE DEPONENT: Well, I don't think anything coming in around the windows has anything to do with the quality of the windows or whether the windows were leaking.

BY MR. HOWELL BELLAMY: Q. Well, if it was coming underneath the threshold of the windows, you would agree that the unit owners would be responsible for it?

A. No, I don't agree with that.

Q. Why not?

A. I think that's a question of how the windows were installed, and the windows are the windows. And what's around the windows is what's around the windows, and that's two different things to me.

Q. All right. One second.

A. My windows have been there since the beginning. I didn't put them in.

(Bray, Doris 53:20-55:25, May 17, 2012)

Q. Okay. So any water intrusion damage from August -- I mean, excuse me -- October 16, 2007 up until the present date, it is due to the failure to caulk and waterproof around the windows and sliding glass doors would be the responsibility of the board, it would be due to their negligence, correct?
MS. BOAN: Object to the form.

THE DEPONENT: Not correct.

BY MR. HOWELL BELLAMY:

Q. Explain.

A. You're making an assumption of negligence, and I disagree with that assumption.

Q. Well, let me restate my question. If the board failed to maintain, waterproof, caulk and seal around the windows and sliding glass doors from October 16, 2007 to present day and water intrusion entered the windows under the threshold, around the windows where the windows interfaces with the stucco, the board would be responsible for that or partly responsible for that due to their negligence -- if the board -- let me say this. If the board failed to maintain the windows from October 16,

2007 by failing to maintain, by caulking, waterproofing and sealing the windows and doors, and water intrusion entered the units, they would be responsible for that, correct?

A. I don't agree with that statement.

(Bray, Doris, 63:4-64:6, May 17, 2012)

Q. Okay. Well, if you have -- assuming -- let me ask the question this way. For the sake -- if a board has knowledge that a unit owner has not properly maintained or repaired his unit, shouldn't the board -- well, let me ask you this. My question basically is this. The board did not individually assess any of the A and B unit owners for failure to maintain and repair the units, correct?

A. We assessed the individual unit owners for cost of the windows.

Q. Only, correct?

A. Correct.

Q. But not for the collateral damage or the water intrusion damage into the interior of the unit?

A. We didn't assess anybody for what happened in the interior of the windows -- of the units. That's the homeowners association -- I mean, that's a homeowner's responsibility. And I don't agree with you that the windows had anything to do with the rest of the damage in the building. I don't agree with you on that.

Q. All right. Then let me ask you this. If it's -- the windows weren't responsible -- then I would assume the water was coming in through the stucco, correct?

A. I don't know; I'm not an engineer.

Q. Well, let me ask you. What I'm saying is this. If you're saying the windows aren't responsible, then what else -- how else would water get into the building?

A. The windows weren't responsible. It may have been the way the contractor put the windows in originally. But I don't think that's the homeowners association -- the homeowners' responsibility. We didn't put in the windows; no homeowner put in a window. So I don't know why that's the responsibility of any homeowner.

Q. Once you have a problem then, how do you deal with it? I mean, do you -- does the board take the position that they've got to fix it or do they basically take -- well, you know, it's not the individual unit owner responsibility, it's the contractor's responsibility, we are not going to do anything?

A. Well, the board did take action. We repaired the buildings. That's what we did.

Q. What year?

A. We were working on it from the time I went on the board. It takes a long time to plan for such a big repair job.

Q. Four years?

A. (Pause.)

Q. Four years?

A. It wasn't four years.

Q. From 2006, beginning of 2006, when the board hired Ken Schneider, all the way up to until when y'all made the -- as far as the budget, the $11 million repair budget to fix Buildings A and B, operating expense, that's about four years or less.

A. Well, I can tell you that the board worked very diligently to get to the bottom of the thing to make sure we had the proper people who were advising us and who were going to make the repairs. And I don't think we could have done it any quicker than what we did.

(Bray, Doris, 88:24-91:15, May 17, 2012)

Board Member Clinton Carter also testified that he did not believe the windows themselves were leaking and that the water penetration at the windows and doors was related to Common Elements, not those items the Unit Owner was responsible for (i.e. window or doors, including frames, casings and hinges).

Q. Well, let me refer to Exhibit No. 3 to your deposition, the third paragraph. It says: In addition, the windows and sliding glass doors will be replaced. The envelope around the windows, sliding glass doors, are experiencing water penetration. And, therefore, the windows

and sliders will be replaced with windows that meet current codes. It was obvious from that statement the windows were leaking --

MS. BOAN: Object to the form.

BY MR. SKEETS BELLAMY: Q. -- was it not?

A. I don't think the windows themselves were leaking.

(CARTER, CLINTON - Vol. 1, 42:1-42:15, Apr. 25, 2012)

Board member Jim Poag testified that the Board considered assessing A and B Unit Owners separately, but determined that the leaks occurring around the windows and doors was part of the Common Elements and not the result of any negligent maintenance on the part of A and B Unit Owners.

Q. All right. And when you looked at assessing the situation—assuming and for the purpose – the Master Deed provided A and B were responsible for the maintenance of the windows and doors.

All right sir. Did you use, as a member of the board, or the board collectively, instruct any of your experts to make a determination of how much of the repair costs to Buildings A and B should be assessed against the unit owners in A and B.

A. Separately? No, not until later when we talk about the windows and the doors.

(POAG, JIM - - Vol 1, 30:19 – 31:4, Apr. 18, 2012)

Q. Why did you not ask Sutton-Kennerly to investigate what damage, besides replacing the windows, should be attributable to the A and B unit owners for the collateral damage that came for leakage around the windows that went into the common elements, did you ask them to extensively go in and look at what that should be and what would be a fair assessment?

A. Not to my knowledge, because that was part of the common elements.

(POAG, JIM - - Vol 1, 31:20 – 32:4, Apr. 18, 2012)

Mr. Poag's testimony, viewed in the light most favorable to the Defendant, evidences that through the Board's investigative process, it was informed and reasonably concluded that the Common Elements were the problem, not those items for which a Unit Owner is responsible.

f. The April 14, 2005 Letter From J. Ben Morrow, Esquire Containing the Professional Opinion of Joe W. Hiller, Jr., AIA Established Genuine Issues of Material Fact for Consideration By a Jury

Mr. Morrow's letter is in evidence before the Court as Defendant's Exhibit 19 and is appended hereto as **Exhibit 3** for the Court's reference. This letter establishes the water leaks manifesting at the windows and doors were not the result of the failure of a Unit Owner to maintain their Unit, but rather from conditions in the Common Elements. A jury could conclude that this letter, in combination with the subsequent investigations of Buildings A and B, gave the Board a good faith basis to believe that the water penetration into the A and B Buildings was from Common Elements such as flashing, transitions and wall joints and not from the window glass, casing, frames, hinges or sliding glass doors. Additionally, as the Board was informed that the damage to the buildings resulted from the Common Elements and not from the individual Units, it would not seek to apportion "negligence" where none existed. At a minimum, this is a factual issue to be determined by the jury.

g. The 2/7/07 letter from Kenneth G. Schneider, Jr., AIA, to the Shipyard Village Council of co-owners c/o Kellie A Diehl and Richard Bennett established genuine issues of material fact for consideration by a jury

This letter was attached as exhibit 8 to the deposition of Plaintiff's expert Kenneth Schneider before the Court as Defendant's Exhibit 3 and is appended hereto as **Exhibit 4** for the Court's reference. Mr. Schneider's letter advised the Board as follows:

> "Schneider and Associates' (S & A) recent and ongoing investigations of the window-wall systems at Shipyard A and B have revealed not-so-surprising conditions, relating to the behaviors of the building envelopes. With the exception of the doors and windows that are near the end of their life expectancy and considering that the buildings are now going on thirty (30) years old, I observe better than average building envelope performance. ...
>
> Shipyard A and B are constructed of reinforced concrete masonry with "tube-slab" floor and roof systems and "curtain wall" window systems. These building systems were leading design elements at the time of A and B's construction. We have confirmed the composition of the wall systems through some recent destructive testing and have related the cause/effect conditions of the building envelopes' behavior. .....
>
> During the destructive window testing on Ben and Katie Morrow's unit, B-28, we discovered the "stack" of units was leaking from top-to-bottom at the jamb and sill terminations. The existing conditions rely on the window-wall's frame configuration to "turn" the water to the exterior. The spandrel, formed by the slab edge, is insufficient to accomplish this alone. ...."

Considering this evidence in the light most favorable to the Defendant establishes that: 1) the Window and Doors had simply reached the end of their lives, unrelated to any maintenance issue; 2) the window system is comprised of many components which were not a part of the "unit"; and 3) those components of the window system which were leaking, the jamb and sill terminations are not components for which a unit owner was responsible. In light of Schneider's communications to the Board, a jury could conclude the Board reasonably determined that window and door conditions were attributable to age, original construction and ocean front conditions rather than maintenance. Moreover, a jury could have concluded from this evidence that it was reasonable for the Board to determine that deficient window and door conditions were attributable to common elements rather than maintenance.

h. The Court Disregarded The Information Presented By Engineering Experts To The Board

Plaintiffs' arguments in support of their allegations of negligence are replete with references to the engineering investigation and construction services performed by various engineering and construction professionals on behalf of the Board. Plaintiffs' engineering expert Geiger referenced these professionals' work extensively in his report (Exhibit 6 to his depositions, which were entered into evidence in their entirety by Plaintiffs' as Plaintiffs' Exhibits 21 and 22) . Moreover, numerous inspection reports were appended to the Deposition of Robert Gallagher (Plaintiffs' Construction Expert).[2]

One of these reports, a November 7, 2008 "Structural Inspection" by Spectrum Engineering Services, Inc. (the relevant portion is appended hereto as **Exhibit 5** for the Court's reference) sets forth an extensive list of SKA's inspection results, assumptions and recommendations. These include – in order of presentation – roof failure, façade failure, edge beam failure, soffit failure, concrete failure, expansion joint failure, horizontal surface failure, HVAC anchorage failure, and windows and sliding door replacement.

Both the order of presentation of these issues to the Board and their substance is instructive. "Window and Doors" Assumptions include only the following entries at page 19:

> The present windows and doors have poor to non-existent flashing to prevent wind driven rain from getting into the units. These obsolete objects need to be replaced.

This is the information presented to the Board at the very point in time it was faced with the prospect of determining what deficient conditions existed in Buildings A

[2] Gallagher's deposition transcript was entered into evidence in its entirety as Plaintiffs' Exhibit 23.

and B, what remediation was recommended by consulting engineers, and how the Association would fund the repairs.

First, under the Master Deed, window glasses, screens, frames and casings are included within the definition of a "Unit"; the definition does not extend to "flashing" (Master Deed, Section 3.6(c)). Next, the Board was presented with expert advice concluding that the windows and doors were "obsolete" and needed to be replaced and modernized. Perhaps most importantly, the assumptions of its engineers provided no basis whatsoever upon which the Board should have concluded that the conditions exhibited by the windows and doors in any way resulted from any act or omission by any A or B Unit Owner. On the contrary, the Board was presented with expert advice that the windows and doors were old, inefficient, and needed to be replaced.

In light of that evidence and the inferences to be reasonably drawn therefrom, there is at least a genuine issue of material fact as to whether any further inquiry by the Board as to the alleged "negligence" of the A and B Unit Owners was necessary for the Board to discharge its duties in accordance with the Business Judgment Rule.

i. The 7/30/09 Letter From Stephen P. Robinson of SKA to Managing Agent Vicki Gallagher Established Genuine Issues of Material Fact for Consideration by a Jury[3]

Mr. Robinson's letter is in evidence before the Court as Defendant's Exhibit 20 and is appended hereto as **Exhibit 7** for the Court's reference. This letter establishes that the Board sought professional guidance as to leaks in Buildings A and B and their

[3] This information is reiterated in the Affidavit of Charles L. Ernest, Jr., P.E. which was filed with the Court on October 9, 2009 and referenced in opposition to Plaintiffs' Motions for Partial Summary Judgment heard on December 9, 2011 and May 21, 2012. Ernest's Affidavit established that genuine issues of material fact existed regarding the reasonableness of the Board's approach in allocating the shared expense of the A/B remediation project. A copy of Mr. Ernest's Affidavit is appended hereto as **Exhibit 6** for the Court's reference.

relationship to the windows and doors. After the window and door amendment was voted down in 2009 and Plaintiffs had voiced their Complaints – but before reaching a final decision on the amount to be charged to the owners – the Board specifically asked its engineer "why are the windows and doors being replaced?" Stephen Robinson responded as follows :

> *2. Aside from Building Code issues, it is not reasonable or feasible to remove and reinstall the existing units during this repair project because:*
>
> *a. The original windows and doors are approximately 20-25 years old and have reached the reasonable service life for coastal environments . . .*

The letter also informed the Board that "the perimeter flashing is a part of the window and door system and it is critical that this system coordinate with the window and door systems so that the window/door units perform as an effective system." There is nothing from SKA to indicate that the failure of a unit owner to caulk and/or paint their window frame or door threshold resulted in damage that could be parsed out from the other contributing sources of window leaks (i.e. flashing, stucco, etc.). In fact, this letter supports the conclusion that a window and door repair or replacement alone would not stop the leaks. Considering the totality of the circumstances, it was not unreasonable for the Board to conclude that there was no conclusive evidence of negligence on the part of the A and B Unit Owners, especially since the Board was informed there were multiple sources of windows and door leaks. This evidence establishes, at a minimum, a genuine issue of material fact as to the reasonableness of the Board's decision.

j. The September 26, 2007 Newsletter to the Association Established Genuine Issues of Material Fact for Consideration by a Jury

This Newsletter, in evidence before the Court as Defendant's Exhibit 22, establishes that the Board was aware of prior repairs to windows and doors. A copy of the Newsletter is appended hereto as **Exhibit 8** for the Court's reference. It also provides that "[s]tudies have shown that repairs made in past years did not really address the water intrusion issue, but were more cosmetic in nature." In hindsight, the conducted repairs may not have permanently remediated water intrusion, but the fact that repairs were conducted reasonably supports the Board's belief that there was no conclusive evidence of negligence or the failure to maintain on the part of the A and B Unit Owners. Assuming the facts in the light most favorable to the non-moving party, a jury could find that the Board did not breach its duty to assess the A and B Unit Owners for an alleged failure to maintain if the Board did not reasonably believe there was any such evidence of negligence. The fact that the Board was told that the damage to the buildings was the result of the failure of the building envelope (i.e. Common Elements) is enough to establish a reasonable basis to conclude there is no evidence of individual owner negligence. Further, considering that there were multiple sources of leaks which manifested at the windows and doors, none of which were reportedly from any failure of a Unit Owner to caulk or paint their threshold or timely replace their window, questions about "negligence" on the part of a Co-Owner is further attenuated.

III. The Court Failed to Apply The Appropriate Test When Ruling the Board Breached its Duty to Assess Unit Owners For Their "Direct Negligence"

The Court's ruling imparts an obligation on the Defendant that is not prescribed under the governing documents. The Court ruled that the Defendant breached a duty to

the Plaintiffs because it failed to ask an expert to determine what, if any, damage to the Common Elements was a result of the "direct negligence" of the A and B Unit Owners in failing to maintain their window and doors. This is not the correct test. As set forth in Defendant's expert Bradham's report referenced herein, there is "how to proceed" flexibility afforded to the Board. The review of any decision by a Board must be completed with a real time perspective and not viewed with hindsight. Before a determination can be made on whether a particular duty was breached, consideration must be given to whether or not the Board acted reasonably, using the information available at the time, to make what it felt was the best decision for the membership. Assuming the facts in the light most favorable to the Defendant, there is evidence that, after the amendment was voted down in 2009, the Board reconsidered its initial Association-wide assessment to determine what, if anything, should be separately charged to the A and B Unit Owners. This reconsideration took into account Plaintiffs' allegations that the A and B Unit Owners should be assessed for any collateral damage caused by their failure to maintain their windows and doors.

The evidence before the Court showed that the Board engaged numerous technical experts for guidance. The experts' reports confirmed that a fix to those items which were a Unit Owner's responsibility (i.e. windows or doors, including frames, casings, and hinges) would not stop the water intrusion. A reasonable inference from this fact is that water intrusion was being caused by something other than those items which could be considered a Unit Owner's responsibility to maintain. A jury could conclude that if the Board believed that there was no conclusive evidence of negligence on the part of any A and B unit owner to maintain their windows and doors, or that there

was no proof that any such negligence caused collateral damage to the common elements, no further inquiry was required.

The Court held that because the Board was presented with information that the windows and doors leaked and possibly allowed water intrusion into the Common Elements, it had no choice but to ascertain what damage, if any, occurred as a result of a unit owner's failure to maintain his/her/its unit. The Court held that the Board did not undertake an investigation to determine this issue and therefore breached a duty. The Court's findings fail to consider the facts in the light most favorable to the non- moving party and were premised on an incomplete construct. First, this ruling ignores substantial lay and expert testimony that the building conditions were thoroughly investigated. Second, this ruling disregards evidence that confronted with multiple sources of leaks the Board could in their exercise of business judgment reasonably conclude that quantifying any such "negligence" was an unattainable goal. Third, this ruling assumes that the source(s) of window and door leaks were "uncontroverted."

Simply because a leak manifested itself at the windows and doors does not mean that such leak was a result of the failure of a unit owner to maintain his/her/its windows and doors. The record before the Court contains factual information to support that maintenance and repair of the windows and doors was performed. This fact alone, considered in the light most favorable to the non-moving party, would show that maintenance obligations of the unit owners were being performed. The record contained further factual information to support that leaks at the windows and doors were not occurring because a unit owner had failed to maintain them. Leaks manifesting at the windows and doors were a part of a bigger problem that did not

include items that were the responsibility of a Unit owner. Because windows and doors in this type of structure are not independent, but rather are a part of a comprehensive envelope system, the Board concluded that it would be impossible to determine with any certainty the true source of any leak. Advised by experts that there was no one source, it would have been illogical to ask for a determination as to which source caused what damage. The facts considered in the light most favorable to the non-moving party would provide a reasonable basis for a jury to conclude that a Board determination of "negligence" was impossible, impractical and unenforceable.

The Court stated that to meet its obligations under the governing documents, the Board was required to ascertain if, in fact, a Unit Owner was "negligent." The Board did ascertain this information through its investigative process of the condition and possible repair scope for the buildings. The Board did not believe the damages to the buildings were a result of the negligent maintenance by anyone. Experts informed the Board that given the age of the buildings, the close proximity of these buildings to the ocean front environment and original construction defect issues these buildings were in need of significant repairs. At a minimum, a jury should be allowed to decide whether the Board exercised reasonable business judgment in how it reached the conclusion that no conclusive evidence of "negligence" existed.

IV. The Court Failed To Consider In A Light Most Favorable To The Defendant The Three Years (2006 -2009) The Association Operated Under The Reasonable Assumption It Was Responsible For The Maintenance Of The Window Glass, Frames, Casing And Hinges And Doors

Regardless of the validity of the windows and doors Amendment, the Association operated as if it was responsible for all aspects of the windows and doors for three years. An assessment against any A and B Unit Owner for alleged lack of maintenance

during that time period is not practical, equitable or supported under the Master Deed. The Board utilized its business judgment to determine that an A or B Unit Owner should not be charged extra for any leak or any resulting damage that occurred during this 3 year period. Knowing this, and understanding the facts presented about the overall condition of the buildings, the Board had a good faith basis to believe that no determination as to "negligence" of an A and B Unit Owner could be made with any accuracy or certainty. The Board reasonably believed such determination was impossible. Defendant's expert, Larry Elkin maintains in his Affidavit and report that such a determination was impractical. Therefore, a jury could infer from these facts that the Board did not breach any duty by failing to investigate A and B unit owner's "negligence" where no conclusive evidence of such "negligence" existed.

V. The Court's Ruling on Duty and Breach Disregarded the Business Judgment Rule

Under the business judgment rule, a court will not review the business judgment of a corporate governing Board when it acts within its authority and it acts without corrupt motives and in good faith. Bauman v. Long Cove Club Owners Association, Inc., 380 S.C. 131, 668 S.E.2d 420 (Ct. App. 2008); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000).

Defendant respectfully contends that the Court's ruling on duty and breach failed to give the Board the benefit of the Business Judgment Rule as required by controlling case law. First, the evidence before the Court established, at a minimum, that Defendant's Board of Directors acted within its authority, without corrupt motives and in good faith. It is undisputed, for example, that the Defendant is a non-profit corporation; that its Board Members are (and always have been) uncompensated volunteers; that

the Board voted unanimously to allocate the costs of the A/B Building remediation in the manner it did; and that each Board Member (4 A/B Owners and 3 C/D Owners) paid exactly the same amount per unit as their fellow owners in Buildings A, B, C and D. The record is devoid of evidence that the Board acted with corrupt motives or in bad faith. But at a minimum, the evidence of record establishes a genuine issue of material fact as to the Board's motives and good faith. The Court's Order is silent on these critical factual issues.

VI. The Court Erred in Questioning The Board's Motive in Amending The Master Deed But Disregarding The Testimony of Jennings

The Court questioned the Board's motive in proposing an amendment to the Master Deed to make windows and doors an Association-wide responsibility (as opposed to an individual Unit Owner responsibility). To the extent the Court's decision that a breach occurred was influenced by this question – and that is unclear from the record or the Order – the Court erred in disregarding the following testimony in Dr. Jennings' deposition:

> *Q. All right, sir. Now, obviously your attempt to amend the Master Deed to make the maintenance going forward of the windows and the doors the responsibility of the Association. Do you understand my question?*
>
> *A. Yes.*
>
> *Q. And the amendment was going forward in the future, going forward, the association would be responsible for the windows and the doors.*
>
> *A. Yes.*
>
> *Q. All right, sir. And that was what your intent was at the time.*
>
> *A. Yes.*

Q. All right, sir. Did you not fee that you and other members of the board that were on the - - that lived in Units A and B had a conflict in attempting to move the responsibility for the maintenance of the windows and doors to the association?

A. No, we did not.

Q. All right, sir. And you did not recuse yourself or offer to recuse yourself with regard to that because it was going to be a financial responsibility passed on to C and D as well as A and B for those things. You didn't see that problem?

A. No.

Q. All right, sir.

A. There were C and D members on the board as well.

Q. Well, I'm just asking about what you did because the - - if the amendment had passed, you were going to - - the responsibility for repairing whatever damage - - the leaks occurred around A and B units was going to be passed on to A, B, C and D going forward.

A. Yes.

Q. All right, sir. And you thought that was fair.

A. Yes.

Q. All right, sir.

A. Because as I mentioned before, there had been other attempts to replace windows, different tints, different sizes had been used. There was no standard for the type of window or the grade of windows and no standard for the installation. It was thought the only way that this could be achieved for the association to take the responsibility, and it was recommended by our property manager K.A. Diehl that this be the avenue that we follow. Because almost all of the properties that she managed, the association had a responsibility for the windows.

At a minimum, Dr. Jennings' above-cited testimony established that he believed the Board acted in good faith; that the Board was composed of both A/B and C/D members; that this course was recommended by the Board's Property Manager; and

that the reasoning behind the amendment was standardization and consistency. The reasonableness of the Board's exercise of business judgment in this regard was an issue to be determined by the jury.

VII. The Court's Form 4 Order is Incomplete and Potentially Confusing

The Court's Form 4 Order, executed by the Presiding Judge on May 23, 2012, orders as follows in its entirety: "Partial Summary Judgment Granted/Case Stayed by Filing of Appeal." Defendant respectfully contends that a case of this length, complexity and magnitude merits specific findings of fact and conclusions of law from the Court. By way of example, during the course of the hearing on various pre-trial motions, the Court granted Defendant's Motion for Partial Summary Judgment on Plaintiffs' Cause of Action for Negligent Misrepresentation. The Court also granted Plaintiffs' Motion for Partial Summary Judgment on the issues of "duty" and "breach." The Court certainly enunciated from the bench its ruling regarding the grant of Plaintiffs' Motion for partial Summary Judgment on the issue of "duty" and "breach." In its current state, however, the Form 4 Order sets forth no findings of fact and/or conclusions of law forming the basis of the Court's ruling(s). The Order in its current state leaves the parties (and/or ultimately an Appellate Court) unaware of the basis of the Court's ruling. In the event the reconsideration sought herein by Defendant is not granted, Defendant respectfully submits that the Court should enter its formal order setting forth findings of fact and conclusions of law and establishing the arguments and evidence considered, accepted or rejected by the Court in its decision-making process.

Defendant also respectfully requests that the Court enter a written Order setting forth the Court's rulings from the bench on the following motions argued on May 12, 2012, specifically:

1. Defendant Shipyard Village Council of Co-Owners, Inc.'s Notice of Motion and Motions in Limine 1 – 5;

2. Defendant Shipyard Village Council of Co-Owners, Inc.'s Notice of Motion and Motion for Partial Summary Judgment as to Plaintiffs' Claim for Attorney's Fees, Costs and Expenses;

3. Defendant Shipyard Village Council of Co-Owners, Inc.'s Notice of Motion and Motion for Partial Summary Judgment on Plaintiffs' Third Cause of Action (Negligent Misrepresentation);

4. Defendant Shipyard Village Council of Co-Owners, Inc.'s Notice of Motion and Motion to Dismiss (Rule 19, SCRCP – Failure to Join)

5. Plaintiffs' Motion to Exclude the Testimony of Defendant Shipyard Village Council of Co-Owners, Inc.'s Designated Expert, Larry Elkin, on the Following Grounds;

6. Plaintiffs' Motion to Exclude the Testimony of Defendant Shipyard Village Council of Co-Owners, Inc.'s Designated Expert, Gary Bradham, on the Following Grounds; and

7. Plaintiffs' Motion to Exclude the Newly Asserted Affirmative Defenses of the Defendant Shipyard Village Council of Co-Owners, Inc.

CONCLUSION

Based on the foregoing cited evidence before the Court, and upon such other arguments and submissions of counsel as may be reviewed by the Court, and viewing the evidence and all reasonable inferences to be drawn therefrom, Defendant respectfully requests this Court's Order:

1. Reconsidering and vacating its previous Order Granting Partial Summary Judgment to the Plaintiffs on the issues of duty and breach and re-setting this case for trial by jury; or

2. Alternatively, altering and amending its Order to specifically consider the questions, issues, arguments and grounds presented by Defendant and make a ruling thereon; and

3. For such other and further relief as this Court deems reasonable and proper.

MCNAIR LAW FIRM, P.A.

David J. Mills, SC Bar #10194
Leigh P. Boan, SC Bar #68300
11019 Ocean Highway
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 235-4100 – Telephone
(843) 235-4101 – Facsimile
dmills@mcnair.net
lboan@mcnair.net

Attorneys for Defendant

June 6, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC; and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC;

AFFIDAVIT OF DORIS BRAY

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT 28 PM 1:20
ALMA Y. WHITE
CLERK OF COURT

EXHIBIT 1

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Linda A. Mendicino; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A.

Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

PERSONALLY APPEARED BEFORE ME, the undersigned, who being duly sworn, deposes and states as follows:

1. My name is Doris Bray. I am over the age of eighteen (18) years and competent to make this Affidavit, which I submit in opposition to Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion"). This Affidavit is sworn under oath and based on my own personal knowledge, except for those matters I state upon information and belief. As to those matters, I believe them to be true.

2. I am familiar with the affairs of the Defendant Shipyard Village Council of Co-Owners, Inc. ("the Council") against whom the Plaintiffs seek partial Summary

Judgment. I have owned Unit 27 in Building B in Shipyard Village since 1983. I have continuously served on the Council's Board of Directors ("Board") for the past five (5) years.

3. I am familiar with and have reviewed the Plaintiffs' Complaints in this case, the Defendant's Answer, and Plaintiffs' Motion.

4. Shipyard Village Horizontal Property Regime ("the Regime") consists of four (4) buildings, A, B, C, and D. The buildings in the Regime were constructed at different times but all Unit Owners are automatically members of the Council of Co-Owners by virtue of the Master Deed (as amended).

5. It is undisputed that Buildings A and B were in serious distress and in need of substantial repair. The Board was at all times mindful of its fiduciary duties when it made decisions as to necessary maintenance, repair and/or replacement of the Buildings.

6. Plaintiffs' Motion contends that the Council (or Board) had a duty to assess directly the Building A and B Co-Owners for their alleged failure to maintain and repair their windows and sliding glass doors in a timely manner. (Plaintiffs' Motion, ¶2 on page 13). I strongly disagree with that assertion.

7. There is no evidence that the windows and/or sliding glass doors were the primary cause or source of the leaks experienced in the A and B Buildings. For example, the windows in my Unit were not leaking. I am aware of additional Unit Owners in both Buildings A and B whose windows and/or doors were not leaking. The Council was advised that the damage was the result of the failure of the building envelope system. Based on my ownership in Building B and my involvement as a

board member, I believe that it is impossible to determine if the water intrusion and leaks in the Buildings were primarily caused by the windows and sliding glass doors or by design and/or construction deficiencies originating with the Common Elements of the Buildings and by the Buildings' constant exposure to salt air and water as oceanfront properties.

8. It would be unfair, unreasonable and contrary to the best interests of the Council to have "individually assessed" the A and B Building Unit Owners for water intrusion that may not have resulted from any lack of maintenance of windows and sliding glass doors by owners, but rather from original design and/or construction defects of the Common Elements and constant exposure to the ocean environment.

9. Plaintiffs' Motion further contends that Plaintiffs are entitled to a $531,679.00 reduction of their assessment to account for the "soft" project costs attributable to the windows and doors that should have exclusively been borne by the Co-Owners in Buildings A and B (Plaintiffs' Motion, ¶2 on page 10; ¶d. on page 14; and ¶e. on page 14). I also strongly disagree with this assertion.

10. Setting aside for the moment the validity of the Windows and Doors Amendment (which Plaintiffs have previously requested, and continue to request, be declared invalid by the Court) Plaintiffs' theory regarding allocation of "soft" project costs is seriously flawed. There was no practical, equitable way to apportion such costs. As previously stated, there is no conclusive evidence that the Building A and B Unit Co-Owners were negligent, nor is there any conclusive evidence that all Building A and B windows and/or doors were leaking. There was however, no question that the building envelope system had to be repaired, the majority of which Plaintiffs agree is a Common

Expense. Considering that the work to the Common Elements was a necessity and the lack of conclusive evidence that leaky windows were the culprit in every Unit, or even any Unit, the Board was faced with uncertainty as to how to treat the costs associated with the windows and doors. Arguably, Building A and B Unit Co-Owners could have been charged the same amount as Building C and D Unit Co-Owners regardless of the validity of the Windows and Doors Amendment. For example, absent Code restrictions, the windows in my personal unit could have been reinstalled after the repairs to the Common Elements were completed (This assumes the removal could have been accomplished without causing damage to the windows, which could not be guaranteed). Under this scenario, I could argue that, whether or not the Windows and Doors Amendments were valid, the removal and reinstallation of the windows was a repair incident to repairs to the Common Elements and I should not be responsible for any costs associated with the window and doors other than my pro-rata share of the Common Expense to be borne equally by all Co-Owners.

11. The per unit allocation was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity. In keeping with this effort, and to avoid litigation expenses associated with Plaintiffs' claims about the validity of the Windows and Doors Amendment, we as a Board decided to put the matter before the ownership for another vote in 2009. This alternative vote on the Amendment was not a "legal position" expressed by the Board; it was an attempt to ratify the amendment and therefore resolve the complaints of the ownership. By their votes, the ownership made clear that the amendment did not enjoy a supermajority of support so we allocated costs of the replacement windows and doors

themselves to the A and B owners. We made our decision based on business judgment, not what might or might not happen in court.

12. Given that the costs of the work to the Common Elements was undisputedly a Common Expense under the governing documents and the uncertainty surrounding the Windows and Doors Amendment, the Board decided the most that could be attributed to Building A and B Unit Owners was the actual costs of the windows and doors. To attribute any more of the repair costs, including the "soft" project costs, to Building A and B Unit Co-Owners, would have been an exercise of bad business judgment and, in my opinion, wrong.

FURTHER AFFIANT SAYETH NOT.

Doris Bray

Greensboro, North Carolina
October 27, 2011

SWORN to before me this 27 day of October, 2011.

SUE HOBBS NOTARY PUBLIC GUILFORD COUNTY, N.C.

Notary Public for North Carolina
My Commission Expires: 1-30-13

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne KOCHANSKI, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savona, Ann D. Savona, William John Savona and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer, Montrose Associates, LLC;

AFFIDAVIT OF
J. LAWRENCE ELKIN, P.E.

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT 20 PM 2:25
ALPHA Y. WHITE
CLERK OF COURT

EXHIBIT 2

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Linda A. Mendicino; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A.

Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

PERSONALLY APPEARED BEFORE ME, the undersigned, who being duly sworn, deposes and states as follows:

1. My name is J. Lawrence Elkin. I am over the age of eighteen (18) years and competent to make this Affidavit.

2. I am currently employed as the Senior Professional Engineer at Applied Building Sciences, Inc. of Charleston, South Carolina. My experience includes over fifteen (15) years of diagnostic evaluations, building repair design, and construction project management.

3. I have extensive experience in evaluations of roof, wall, fenestration, floor and foundation systems to identify moisture infiltration paths and to determine the potential for moisture accumulation within these systems.

4. I am a licensed Professional Engineer in the states of Alabama, Florida, Georgia, Kentucky, North Carolina, Mississippi, South Carolina and Tennessee. My Professional Engineering license is in good standing in all of those states, and I have been qualified as an expert in the field of engineering in both state and federal courts.

5. In further support of my qualifications, I have appended to my Affidavit a current copy of my Curriculum Vitae as **Exhibit A**.

6. During my service as a designated expert witness for the Defendant in this case, I have performed site inspections of the subject premises; reviewed thousands of pages of background documents; reviewed the Master Deed to the Shipyard Village Council of Co-Owners; and otherwise made myself familiar with the condition of the buildings prior to repair, the proposed remediation of the buildings, and the allocation of repair charges to Unit Owners.

7. I have also reviewed "Plaintiffs' Notice of Motion and Motion for Partial Summary Judgment Against Defendant Shipyard Village Council of Co-Owners, Inc." and the Affidavits of Plaintiffs' retained experts Stephen J. Geiger, P.E. ("Geiger") and Derek A. Hodgin, P.E. ("Hodgin") submitted in support thereof.

8. I submit my Affidavit to counter those of Geiger and Hodgin and explain to the Court my differences of opinions with the Plaintiffs' witnesses.

9. First, I disagree with Hodgin's assertion in his Affidavit that "the 2006 Amendment alters the dimensions of the units and/or percentage interest in the Common Elements." (Hodgin Affidavit, para. 7)

10. I too have reviewed the Master Deed as well as the Amendments cited in Hodgin's Affidavit and I disagree with his opinion. It is difficult to articulate the basis of my disagreement with Hodgin's opinion as his Affidavit contains nothing more than recitals of the Master Deed and Amendments and concludes with his stark, unsubstantiated "opinion" that the 2006 Amendment alters the dimensions of the units and/or percentage interest in the Common Elements. His opinions contain no measurements, dimensions, calculations or percentages to provide factual support for his conclusion. I can affirmatively state, however, that no data I have seen during the course of my extensive involvement in this case has led me to conclude that any Amendment effected any change whatsoever in the dimensions of any Unit or the percentage of any Unit Owners interest in the Common Elements. I have reviewed Hodgin's deposition where he admits that the Amendment does not change the dimensions of the unit and he is unclear as to how it would have changed the percentage ownership.

11. I call the Court's attention to my June 30, 2011 report submitted in this matter, a true and accurate copy of which is appended to my Affidavit as **Exhibit B**. I set forth therein my background in this case, the materials I have reviewed, opinions I have rendered, and my rebuttal to the opinions proffered on Plaintiffs' behalf by Geiger.

12. I understand from my review of Geiger's Affidavit in support of Plaintiffs' Motion that his analysis of the damages here is relatively straightforward and

mathematical: he contends that because the owners of the A and B Buildings paid for the cost of windows and doors replaced, they should bear a proportionate share of the "soft costs" attributable to the entire project. Stated otherwise, Geiger's Affidavit is submitted in support of Plaintiffs' attempt to "shift" a proportionate share of the "soft costs" for the entire project away from the Plaintiffs' (i.e. the owners of certain C and D Units) back to the entire Association.

13. I strongly disagree both with Geiger's methodology and with the assumptions underlying the conclusions set forth in his Affidavit.

14. At the outset, it is my opinion that Geiger's August 30, 2011 Affidavit represents a substantial departure from the position he (and Plaintiffs) have consistently maintained in this case. Specifically, one of the functions of my service as an expert witness in this case was to thoroughly review and comment upon Geiger's April 25, 2011 report submitted to support Plaintiffs' claims (Geiger's Report is appended to Plaintiffs' Motion for Partial Summary Judgment as **Exhibit 11**). Geiger's lengthy report culminates in a spreadsheet characterized as an "Assessment Allocation Summary", appended as the last page of his report. On this "Assessment Allocation Summary", Geiger set forth his view of the amounts Plaintiffs should have actually been charged to fund the remediation project. Geiger's summary designates General Conditions, Overhead and Profit, Contingency, and Engineering Contract Administration as "soft costs" which, he claims, should have been paid on a proportionate basis by the Building A and B Owners (resulting in a reduction of the amount allocated to the Building C and D Plaintiffs).

15. Geiger's August 30, 2011 Affidavit in support of Plaintiffs' Motion for Partial Summary Judgment, however, contains a significant departure from his original opinion. Specifically, at paragraph 5(d) of his August 30 Affidavit, Geiger designates "Engineering and Design Fees of $131,500.00" as "soft costs" which should be shifted away from the C and D Unit Owners and made the responsibility of the entire Association. This is wholly inconsistent with the position Geiger espoused in his April 25, 2011 report and the appended Assessment Allocation Summary. In those documents, Geiger designated Engineering and Design Fees of $131,500.00 as "All Common" expenses which were not to be included in the "soft costs" allegedly attributable to replacement of windows and doors. By re-designating the Engineering and Design fees in the amount of $131,500.00, Geiger has now attempted to shift a pro rata portion of that charge away from the "All Common" category to a percentage of "soft costs" to be borne by the Association.

16. I dispute Geiger's "Assessment Allocation Summary" and Affidavit not only with regard to his methodology, but more fundamentally with his assumptions relating to "soft costs."

17. It is important to note that the remediation of the Shipyard A and B Buildings cannot be viewed in isolation as a "window and door replacement project." As catalogued in Sutton Kennerly & Associates' "Structural and Façade Repairs for Shipyard Village Opinion of Project Cost"; in Geiger's report; and in my report, the Board of Directors here was faced with a systemic failure of the building system. I catalog in significant detail at paragraph 5 of my report that windows are not independent of the stucco wall system, but are instead part of the building enclosure.

Transitions must be interfaced properly, detailed with flashing and sealants to prevent the intrusion of water.

18. As noted at paragraph 12 of my report, my review of the Association's voluminous records reflect that leaks occurred throughout various units at different times, but these leaks were not limited to windows and sliding glass doors. On the contrary, leaks were attributed to the roof, the stucco, HVAC equipment, and other factors. As further noted in paragraph 11 of my report, there are contradictory records as to the source of the leaks. One report, for example, noted that no water leaked through windows, but water penetration occurred through the stucco (a Common Element which is a repair responsibility of the Association). Unit B-28, for example, provides informative background as to the inherent difficulty for the Board of Directors when confronted with conflicting technical information concerning the source of the leaks. One source reported that Unit B-28 was leaking at the windows; the Unit Owner engaged an engineer who identified stucco cracks (a Common Element) as a source of the water intrusion.

19. Simply put, windows and doors in the A and B Buildings cannot be viewed independently. They are part of an integrated building enclosure system which all parties agreed was in dire need of repair. The cost of repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation. In my opinion, this is also true as to the "soft costs" attendant to window and door replacement as well.

20. Geiger purports to assign a pro rata percentage of soft costs (i.e. 29.4797%) to "soft costs" allocable to replacing windows and doors. In my experience,

this simple mechanical application of a pro rata percentage does not reflect the reality of engineering services, contract administration, or other "soft costs" involved in a replacement project. Geiger has not performed any analysis of the "soft costs" actually incurred relating to window and door replacement.

21. The A and B buildings' cladding systems had to be repaired. "Soft costs" attendant to that repair would certainly have been incurred whether the windows and doors were replaced with newly engineered windows and doors, or if the existing windows and doors were simply removed and stored while the cladding was repaired to prevent leaks, then re-installed on the buildings. In other words, Geiger has not calculated – nor can he – the specific amount of engineering or design or administration fees actually attributable to the process of replacing the windows and doors. Under those circumstances, in my opinion, it would be unfair and not reflective of actual contract administration to apply a simple mechanical formula and thus "reallocate" soft costs. My experience in construction management is that there is no direct, one-to-one correlation between hard costs and soft costs on a project, and certainly not in a project the size and scope of Shipyard Village.

22. Another way to consider this issue is to analyze the soft costs if the stucco clad walls were to be repaired and the windows simply removed and re-installed. There would be no changes to fees associated with the general conditions, OH&P, contingency, design or contract administration. The only difference would be the unit cost of the fenestration which is already being paid in whole by the A & B Unit Owners.

23. Accordingly, I reaffirm the opinions set forth in detail in my June 30, 2011 report that the Board of Directors of the Shipyard Village Council of Co-Owners, Inc. did

not breach any fiduciary duty in its maintenance of the buildings or in the allocation of charges for repair in the exercise of its business judgment.

FURTHER AFFIANT SAYETH NOT.

J. Lawrence Elkin, P.E.

Charleston, South Carolina
October 26, 2011

SWORN to before me this
24 Day of October 2011.

Notary Public for South Carolina
My Commission Expires: 2-17-20

APPLIED BUILDING SCIENCES INC.
ENGINEERS, ARCHITECTS AND
ENVIRONMENTAL CONSULTANTS

J. LAWRENCE ELKIN, P.E.

Senior Professional Engineer
Adjunct Professor of Engineering: Trident Technical College

Mr. Elkin's professional career includes more than ten years of experience in diagnostic evaluations, building repair design, and construction project management. His expertise is primarily in the physics of Thermodynamics and Fluid-dynamics as they apply to building envelope systems. He has performed evaluations of roof, wall, floor and foundation systems to identify moisture infiltration paths and determine the potential for moisture accumulation within these systems. Mr. Elkin has developed computer models and databases to simulate and track building failures. He has particular expertise regarding evaluations of thermal/moisture barriers, designing repairs for failed building envelopes and managing building envelope remediation projects. More recently Mr. Elkin has focused on building assembly failures associated with inappropriate building practices and misinterpretation of building code requirements. Mr. Elkin has also provided expert testimony to assist in the resolution of construction litigation.

Mr. Elkin is also knowledgeable in the fields of mechanical systems. He has performed indoor air quality evaluations and thermal comfort studies in accordance with American Society of Heating Refrigerating and Air-Conditioning Engineers (ASHRAE) standards. Mr. Elkin has also designed mechanical systems including a ventilation network for the Smithsonian Institute in Washington, D.C. and a Department of Energy research facility.

Mr. Elkin combines his knowledge of building materials, thermo-fluid science and mechanical equipment to diagnose complex moisture intrusion problems. These problems are often linked to fungal growth and deterioration of building components. Mr. Elkin works closely with Industrial Hygiene and Environmental Science professionals to assess the cause and extent of mold contamination. Using sound engineering principles, Mr. Elkin develops unique and cost-effective solutions to resolve moisture and fungal growth problems.

Education

- Master of Science in Mechanical Engineering, Rose-Hulman Institute of Technology, 1993.
- Bachelor of Science in Mechanical Engineering, Rose-Hulman Institute of Technology, 1991.

Registrations

- Professional Engineer: Alabama, Florida, Georgia, Kentucky, North Carolina, Mississippi, South Carolina, & Tennessee.

Previous Experience

- Applied Building Sciences, Inc., Senior Engineer, 2004 to Present.
- Campbell, Schneider and Associates, LLC, Engineering Associate, 1998 to 2004.
- Titan Atlantic Group, Inc., Facilities Engineer, 1997 to 1998.
- Law Engineering and Environmental Services, Inc., Facilities Engineer, 1995 to 1997.
- Doty Scientific, Inc., Design Engineer, 1993 to 1995.

1890 Milford Street – Charleston, South Carolina 29405 – Tel 843.724.1456 – Fax 843.724.1458
205 Columbia Avenue – Chapin, South Carolina 29036 – Tel 803.345.3833 – Fax 803.345.2823

EXHIBIT
A

Principal Areas of Practice

- Thermal/Moisture Related Problems
- Mechanical Systems
- Building Envelope Failures
- Hurricane/Catastrophe Assessments
- Roofing Failures
- Facility Condition Assessments

Publications & Lectures

- ASHRAE Guide for Hot and Humid Climates, Project Committee Member, ASHRAE, Atlanta, GA, 2007
- BEC Window Flashing Rodeo Results. *Proceedings of the ASTM Symposium: Up Against a Wall*, ASTM, Tampa, FL, 2007
- Using a Heat and Moisture Transfer Simulation to Diagnose Moisture-Related Expansion/Contraction Problems in an Exterior Roof/Wall Assembly. *Proceedings of the Performance of Exterior Envelopes of Whole Buildings IX International Conference*, ASHRAE/DOE, Atlanta, GA. 2004
- Mold Mitigation. *Architectural Series*. Four Hour Seminar. Trident Technical College, Charleston, SC. 2004 to 2006
- Building Code Issues and Underfloor Moisture Problems in Warm, Humid Climates, *RCI Interface: Journal of the Roof Consultants Institute, Vol. XXI, No. 10.*, Roof Consultants Institute, Raleigh, NC, 2003.
- Employing the Sealed Floor Technique to Resolve Underfloor Moisture Problems in Warm, Humid Climates, *RCI Interface: Journal of the Roof Consultants Institute, Vol. XXI, No. 11.*, Roof Consultants Institute, Raleigh, NC, 2003
- Field Techniques to Diagnose Moisture and Mold Problems, RJMW Hurricane Catastrophe Seminar, April, 2001.
- Solving Water Intrusion and Mold Problems in South Carolina, Medical University of South Carolina, 2002 to 2005
- Window Flashing Workshop, *Performance of Exterior Envelopes of Whole Buildings X International Conference*, ASHRAE/DOE, Clearwater, FL. 2007

Awards

- *American Institute of Architects South Carolina: Alliance Award, 2007*

Professional Organizations

- *American Society of Heating, Refrigerating, and Air-Conditioning Engineers* (ASHRAE). Voting Member of Technical Committee 4.4: Building Materials and Envelope Performance. Member Technical Committee 1.12 Moisture in Buildings.
- *National Institute of Building Sciences: Building Envelope and Thermal Environment Council* (BETEC). Board of Directors Member. Chairman of the Heat, Air and Moisture Research Coordinating Committee.
- *Building Enclosure Council-Charleston:* Member –Board of Directors and past Vice Chairman.

Post Graduate Courses and Seminars

- Roofing Industry Educational Institute, Roofing Technology Course, 36 hours, 1999.
- Sto Exterior Plaster Applicator Training, 16 hours, 1996.
- Exterior Design Institute, Third Party EIFS Inspector Course, 40 hours, 1999.
- BETEC, Air Barriers Seminar, 8 hours, 2001.
- ASHRAE/DOE, Performance of Exterior Envelopes of Whole Buildings VIII, 48 hours.
- ASHRAE/DOE, Performance of Exterior Envelopes of Whole Buildings IX, 48 hours AIVC/BETEC, Ventilation, Humidity Control and Energy, 16 hours.
- DOE/ORNL, WUFI Pro Training, 2002. 20 hours
- NBSC/DOE/ORNL, Advanced WUFI Training, 2006, 40 hours
- ABAA, Air Barrier University, 2005, 8 hours.
- BETEC, Air Barriers III, Air Barrier Solutions for Buildings in North American Climates, 2001, 8 hours.
- BETEC, M^4 – Mold, Moisture, Misery and Money, 2003, 16 hours
- BETEC/CMHC, Rain Penetration Control: Applying Current Knowledge, 2002, 8 hours.

Examples of Previous Studies

Thermal/Moisture Related Problems

- Evaluation of residential moisture intrusion and mold growth, numerous locations in FL, GA, NC and SC.
- Wall Condensation, Breakers North Tower, Myrtle Beach, SC.
- Air Infiltration and Wall Condensation, Charleston Public Works, Charleston, SC.
- Evaluation of moisture intrusion and mold growth at Dialysis Clinics, Inc, James Island, SC.
- Crawl space moisture issues, numerous locations GA, NC and SC.
- Evaluation of moisture intrusion and mold growth at Piggly Wiggly Corporate Office, North Charleston, SC.
- Floor framing failures due to condensation and decay, over 75 locations along the Atlantic Coast.
- Hardwood flooring failures, North and South Carolina.

Mechanical Systems

- Design of HVAC systems for the Department of Energy's Natural Exposure Testing Facility: Hollywood, SC.
- Design of a ventilation system for a subterranean storage facility, Smithsonian Institute, Washington, D.C.
- Compressor and reversing valve failure analysis in heat pump systems: Charleston, SC
- Analysis of domestic water valve failures: numerous locations in NC and SC.
- Burst pipe analysis: numerous locations NC, TN, and SC.
- HVAC duct installation evaluations: numerous locations, SC.
- HVAC condensate drainage system failure: Shem Creek Inn, Mt. Pleasant, SC
- Thermal comfort study, Gaston County Health Department, Gastonia, NC.
- Design of a warehouse heating and ventilation system, Garner, NC.
- Evaluation of residential sooting problems, SC.

Building Envelope Failures

- Residential and Commercial stucco and Fiber Reinforced Plaster evaluations, numerous locations in FL, NC, and SC.
- Exterior Brick Veneer Failure, NNPTC, Naval Weapons Station, Goose Creek, SC.
- Residential brick veneer failures in NC and SC.
- Cedar Siding Failure, The Cottages At Shipyard, Hilton Head Island, SC.
- Brick veneer failure, Embassy Suites, Washington, D.C.
- Residential and Commercial EIFS evaluations, numerous locations in GA, NC, PA, SC, and TN.
- Moisture intrusion through cast-in-place concrete, Caravelle Towers, Myrtle Beach, SC.

Hurricane/Catastrophe Assessments

- Evaluation and restoration projects in Mississippi and Louisiana after Hurricane Katrina, 2005
- Evaluation of wind damaged structures in Florida after Hurricanes Charley, Francis, Jean and Ivan, 2004.
- Inspection of wind and flood related structural, exterior and roof damage to commercial and residential structures after Hurricanes Bertha, Bonnie, Floyd and Fran, 1996 to 1999.
- Metal building collapse due to severe thunderstorm and inadequate bracing, Goose Creek, SC

Roofing Failures

- Asphalt shingle failures: numerous locations in NC, SC and GA.
- EPDM membrane failures: numerous locations in NC, SC and GA.
- Smooth and gravel surfaced built-up roof failures: numerous locations in NC, SC and GA.
- Standing seam roof failures: numerous locations in IL, NC, SC and GA.
- Modified bitumen roof system failures: numerous locations in NC, SC and GA.

Facility Condition Assessments

- Mariners Cay, Folly Beach, SC
- CVS Pharmacies, Greenville, Spartanburg and Columbia, SC.
- Southeast Eyecare Centers, Greensboro, Winston-Salem, and High Point, NC.
- Numerous Apartment complexes in North Carolina, South Carolina, Virginia, and Georgia.
- Tanger Outlet Shopping Center, Dalton, GA.
- Former Wachovia Building, Fayetteville, NC.

APPLIED BUILDING SCIENCES INC

ENGINEERS ■ ARCHITECTS ■ ENVIRONMENTAL CONSULTANTS

June 30, 2011

David J. Mills, Esquire
14361 Ocean Highway, 3rd Floor
Pawley's Island, South Carolina 29585

Re: Fisher et al vs. Shipyard Village Council of Co-Owners, Inc.
Shipyard Village, Litchfield by The Sea
Pawley's Island, South Carolina
Civil Action No. 2009-CP-22-01655
ABS Project No. 950.10113

Dear Mr. Mills:

Pursuant to your request, I have reviewed documents pertaining to this case. In addition, ABS personnel conducted two site visits to observe conditions during the recent rehabilitation of the subject facility. The purpose of my work was to determine the validity of the claims by some of the homeowners that they have been unfairly assessed for the rehabilitation of Buildings A and B at Shipyard Village. This report summarizes my findings.

Description and Background

Shipyard Village was originally constructed around 1982 in the Litchfield by the Sea development. This facility consisted of two "V" shaped condominium buildings situated along the ocean front; these structures are referred to as Buildings A and B. These buildings included a combination of cast-in-place and pre-cast concrete primary structural elements with wood-framed in-fill walls. The exteriors are clad with cementitious stucco and aluminum framed fenestration. The original facility included a pool and cabana between the two condominium buildings. In the late 1990's two additional condominiums were erected just west of the pool. These buildings, referred to as C and D, joined the Council of Co-Owners around 1998.

Methodology

I was provided with reports and affidavits produced by the plaintiffs. In addition, I visited the office of ECS Carolinas, LLP to review their file. Finally I was provided with documents from the files of the Shipyard Village Council of Co-Owners (HOA) and the Shipyard Village Council

1890 Milford Street
Charleston, SC 29405
ph 843.724.1456
fx 843.724.1458

1416 Chapin Road
Chapin, SC 29036
ph 803.345.3833
fx 803.345.2823

398 College Avenue
Clemson, SC 29631
ph 864.680.6582

10612-D Providence Road, #702
Charlotte, NC 28277
ph 704.634.7276

email info@appliedbuildingsciences.com ■ web www.appliedbuildingsciences.com

EXHIBIT B

of Co-Owners Board of Directors (BOD). Documents from these sources were often, but not entirely, duplicative.

I visited the site on November 17, 2010 and Wayne Butler, Associate AIA visited the site on November 30, 2010. During these site visits, we documented the progress of the rehabilitation and, where possible, observed the remaining undisturbed conditions at the site. We also sorted through debris removed from the demolished areas to ascertain the condition of the windows, doors, stucco and framing.

Based on my reviews and site visits, I have developed the following opinions:

Shipyard Opinions

1) The BOD enlisted the assistance of technical experts and consultants to provide them guidance as to the condition of Buildings A & B. The BOD acted in accordance with their recommendations. At times these recommendations were conflicting; the BOD made choices based on the best information at their disposal and within the constraints of their budgets.
   a. 1993: Procon recommended engaging an engineer to survey the facility so that they can propose on the waterproofing scope of repairs.
   b. 1994: Procon accepted an engagement to survey the facility so that they can recommend their own waterproofing scope of repairs. Procon then provided pricing for this work. Highlights from this report include:
      i. Reports that all 1990 waterproofing work performed by Procon is performing as intended.
      ii. Reports that metal casing beads on corridor side of facility are beginning to corrode.
      iii. States that concrete walkways are in good condition with only a few, isolated areas which should be surveyed by an engineer.
      iv. Indicates that concrete spalling is minor.
      v. Identifies corroded bridge plates.
      vi. Some handrail stanchions not adequately filled.
      vii. Failed to identify defective windows and improper flashing installed after Hurricane Hugo.
      viii. Failed to identify improper stucco repairs around windows after Hurricane Hugo
   c. 1994: Procon reported that wall-to-slab sealants (installed by Procon in 1990) are in good condition and performing as intended. They opine that water in the balcony wing-walls is from deck slab absorption. Later, in 2008, Spectrum determined that this water is entering via the roof (Gallagher 602).

d. 1998: Henderson Waterproofing was engaged to survey the buildings. They recommended approximately $300,000 in stucco and concrete repairs.
e. 1999: Henderson performed triage repairs as HOA did not fund full scope. Site Maintenance Supervisor Warner monitored repairs and reported to the BOD that the damage was not as severe as Henderson characterized; he relayed that no rebar is corroded. Subsequently he advised that the BOD does not need an engineer to assess the building.
f. 2002: McGee engaged to study Building A & B windows. He reported that the Hugo replacement windows were the wrong model for this facility and that many leak under hose spray. The BOD recognized that the windows are individual responsibilities and notifies owners. Attorneys at Finkel and Altman reported that there was a viable entity to pursue for window case.
g. 2003: Finkel and Altman reverse position on window case. They reported that there was no viable entity to pursue as the statutes had expired.
h. 2003: Keystone Construction studied window leak issues. They reported that water was leaking through stucco and not windows; this contradicted McGee's report. Keystone identified absence of flashing at window openings as part of the problem. They also reported that the windows were improperly sized and that poorly installed stucco was used to infill the gap around the windows.
i. 2004: Bobby Warner recommended Absolute Painting and Waterproofing to perform stucco repairs. Upon completion of repairs, owners were notified that they must repair windows.
j. 2005: Reserved depleted to fund Building C&D litigation. BOD moved to increase monthly assessments to replenish reserves.
k. 2005: BOD engages a thermographer to scan for moisture in Buildings A & B. Water penetration around windows was found with no great amounts of water identified elsewhere.
l. 2005: BOD had Bennett develop window installation standards so that each owner is required to perform the identical scope when replacing a window.
m. 2006: BOD interviewed McGee & Associates and Schneider & Associates to develop a window and stucco priority plan for Buildings A & B.
n. 2006: Schneider reported that the balcony damage was more severe than initially anticipated. He ranked the order of window stacks that need repairs as 8, 1 and the 4 with the others to follow.

2) The BOD engaged financial consultants and property managers to provide them with guidance regarding the operating and reserve budgets for the HOA. The BOD followed the guidance of these professionals.
   a. Reserve studies were completed in 1986, 1990, 1992, 1996, 1997, 1998, 1999, 2000, 2001, 2003, 2004 and 2008.

b. An analysis of the reserves shows that they were funded in accordance with the reserves each year unless there was a significant event that prevented such funding. Examples of such events are Hurricane Hugo, Hurricane Fran and the unanticipated fire suppression system modifications.
c. An analysis of expenditures shows that BOD was responsible in the use of the reserve funds. The most significant event which consumed reserves other than building maintenance was funding of the litigation regarding Buildings C & D.
d. ABS's analysis of the reserves and expenditures is available upon request.

3) Geiger's report mischaracterizes the BOD's actions with respect to funds spent on maintenance of the facility. His values completely neglect any money which did not come directly from the reserves such as warranty work and over $1M spent on building envelope work subsequent to Hurricanes Hugo and Fran.
   a. 1983: Binswanger Glass recaulked all windows in 1983 as a warranty item.
   b. 1986: Lesley Construction and LBTS performed repairs as part of warranty efforts and out of courtesy
   c. 1986: Sliding glass door thresholds were modified by the Developer in 1986. Several repair mock-ups were created and tested to select the best option.
   d. 1986: Bennett Painting was engaged to repair exterior finish where it was cracked and chipped. They also repaired areas of the deck coverings to prevent spalling in beams.
   e. 1987: The BOD met with the Developer and Bennett Painting to resolve on-going leaks. The Developer paid to reseal the windows and doors.
   f. 1989-1990: Subsequent to Hurricane Hugo, over $825,000 was expended on repairs which included new roofs, new windows on the ocean elevations, stucco repairs, and the application of an elastomeric coating by Procon Associates for $106,000.
   g. Procon was engaged to replace corroded roof grates.
   h. 1992: Fascias and gravel stops were repaired along the roof
   i. 1992: Stairways reroofed
   j. 1994: Procon and Associates was paid $44,500 to replace deteriorated T-1-11 siding with synthetic stucco.
   k. 1994: Procon and Associates was engaged to survey the exterior and provide repair recommendations. Subsequently, Procon was paid $34,000 to replace corroded metal casing beads on corridor side of facility. This is pursuant to Procon's recommendations.
   l. 1995: All the handrail stanchions were filled as per Procon's recommendations. In addition, all window and door frames were resealed.
   m. 1996: Henderson Painting coated all breezeways.

n. 1996: Subsequent to Hurricane Fran, nearly $190,000 was spent on repairs including nearly $75,000 for roofs. This included stucco, window and Building A rebar repair.
o. 1999: Subsequent to the membership's rejection of a special assessment, the BOD subsequently had Henderson perform "triage" repairs for $24,000.
p. 1999: BOD developed a bulk purchase plan for A&B owners to seal SGD's and Windows. Each A&B owner had to opt-in/opt-out of bulk deal for $1,500. Owners were reminded that they were responsible for their own window maintenance.
q. 2001: BOD reported that $253,000 spent on painting and waterproofing.
r. 2002: BOD notified owners about conditions reported by McGee pertaining to window leaks.
s. 2004: Absolute Painting and Waterproofing performed stucco repairs for $25,660. Unit owners notified to perform window repairs. BOD negotiated bulk window maintenance price for owners from Absolute.
t. 2005: BOD approves $142,400 to re-roof Building A and an additional $13,000 to move roof-top HVAC equipment.
u. 2006: Perkins Waterproofing performed isolated repairs to Buildings A & B.

4) The BOD encountered issues not related to the building enclosure at A & B which consumed financial resources that could have been used for A & B building enclosure maintenance.
a. 1987: Flooding damaged ground level flatwork
b. 1987: Insurance required the construction of a pool fence
c. 1988: Fire pump needed repair
d. 1988: Replaced common area carpeting
e. 1989: Improved site lighting, added dune fencing, replaced corroded door hardware
f. 1991: Fire Marshall required roof grates to be replaced
g. 1992: State Elevator Inspector required upgrades
h. 1992: Replaced fire suppression jockey pump
i. 1993: Fire Marshall determined that the original supply from the water main must be upgraded. Included riser to the roof. Total cost was approximately $110,000.
j. 1993: Fire suppression monitoring system installed
k. 1993: Elevator telephones upgraded
l. 1995: Elevator repairs
m. 1999: BOD moved to special assess HOA for $300,000 to fund Henderson repairs. HOA voted down the special assessment. The special assessment was defeated by the C&D units owners (A/B 89% for, C/D 73% against, 47.8% of membership for)

n. 1999: Maintenance cost increase 5% due to C&D EIFS inspections
o. 1999: Elevators required new fire control panels
p. 1999: Two fire sprinkler lines burst in Building B
q. 2001: HOA assessed $253,000 to fund EIFS litigation on Buildings C&D
r. 2004: Building B elevator repairs
s. 2004: Litigation fund was depleted; HOA reserves moved to supplement litigation funding
t. 2005: Site maintenance supervisor Warner approved excess payments to the window painting contractor totaling $22,488.62.
u. 2005: Improved site drainage $4,526.00
v. 2006: Fire Marshall required emergency lighting upgrade
w. 2006: BOD had additional flood venting installed on the ground level storage areas to reduce the property insurance premiums
x. 2006: Fire suppression system repairs $12,140.00
y. 2006: Expended $17,000 on Schneider & Associates to study water intrusion.

5) Shipyard Village changed the Master Deed to make windows common elements for technical reasons and not financial reasons.
   a. Windows, once installed, cannot be considered independent of the opaque wall areas. They both work as part of a larger system called the building enclosure. The building enclosure separates the interior from the exterior in a manner as to protect the interior from weather and to provide a space which can be climate controlled.
   b. Windows transition to walls at an interface. This interface must be properly detailed with flashings and sealants to prevent the intrusion of water. In addition, windows are not intended to be watertight under all conditions; therefore the flashings must collect and redirect that water back to the exterior.
   c. Prior to the inclusion of Buildings C & D, the HOA included many aspects of window repair, replacement and maintenance as part of annual operating costs, reserve costs or insurance funded repairs.
   d. The two year history of the window leakage and replacement at Unit B28, owned by the Morrows is an excellent example of the inherent difficulty for the BOD to exercise its authority when confronted with conflicting technical information regarding the performance of the windows and wall.
      i. April 17, 2004: Morrows reported an on-going leakage problem in Unit B28. The Morrows believed that the issue was related to water leaking through the stucco. Site maintenance manager Bobby Warner reported to the board that water leaked through the window.

ii. October 12, 2004: Warner reported to the BOD that he visited the site during a rain event and reiterated that the leakage was related to the window.

iii. March 4, 2005: The BOD records that the Morrows replaced the windows in B28.

iv. April 15, 2005: Morrows reported to the BOD that their Unit still leaks despite having new windows installed. They engaged an engineer who identified stucco cracks as the source of the water intrusion. The Morrows also forwarded a memo from Architect Hiller who opined that water intrusion in B28 was not related to windows.

v. June 17, 2005: The Morrows report to the BOD that leakage in their Unit remains unresolved. New site maintenance manager Bennett is directed to investigate this issue. He identifies sealant joint failures at the windows/stucco interface which could be a problem. Bennett also founds cracked stucco over CMU at a previous repair which could allow water intrusion.

vi. October 14, 2005: A thermographer was engaged to scan the walls in B28 to determine the source of the leakage (Both Buildings A & B were scanned).

vii. February 17, 2006: The Morrows attend the BOD meeting with their engineer Manning. Manning described his study which indicated that repairing one window will not solve leak issues. The leakage occurred at the window/stucco interface. The repair required a vertical stack of windows to be removed, flashed and replaced. This resulted in the BOD discussing the need for windows to be a common element.

viii. February 18, 2006: The BOD discussed the Morrow matter along with a letter that the Morrows sent to all A & B unit owners. In addition, the difficulty that owners have with regard to finding qualified contractors to work for one unit owner on a tall building was shared. A show-of-hands vote was taken to see if the BOD's motion from the previous day should be on a proxy ballot. The majority present were in favor of the motion.

e. I visited the site in 2010 and observed the windows and doors that were removed. Most of the aluminum frames exhibited corrosion from contact with stucco or concrete. The windows were designed to be attached with nail flanges which extended over the face of the exterior sheathing and were covered with stucco. Removing and replacing this type of window cannot be accomplished without damaging the stucco.

6) There is no evidence that the BOD had actual and/or constructive knowledge of damages and/or deficient conditions upon which they failed to act.

a. 1994: Procon's survey stated that structural elements are in good condition with a few isolated areas which may be a concern. Concrete spalling wass described as "minor" as only stucco materials have released from areas of the concrete substrate.
b. 1999: Henderson proposes to repair damaged rebar. Only limited work was performed due to special assessment not passing. This work was monitored by Bobby Warner. Warner reported to the BOD that the rebar was not damaged. Only wire mesh was corroded.
c. 2006: Bennett reports that Schneider & Associates identified "rebar showing through" on some balconies.
d. 2006: Schneider reports that balcony damage is more severe than initially anticipated. The repairs will be more complex as they are tube-slabs.
e. 2008: Spectrum Engineering Services reports that rebar is exposed on the lanais (decks) where concrete has spalled away.

Rebuttal to Geiger Opinions

Please refer to page 32 of the ECS report for Mr. Geiger's summary of opinions. The item numbers below correspond to his item numbers.

1) The evidence does not support this allegation. There is a clear history that the BOD reserved funds for building maintenance and performed repairs in accordance with recommendation from construction professionals and property managers. Mr. Geiger's education and training does not provide a basis for determining the fiduciary responsibility of a homeowner's association board of directors.

2) The evidence does not support this allegation. There is a clear history that the BOD reserved funds for building maintenance and performed repairs in accordance with recommendations from construction professionals and property managers. Mr. Geiger's education and training does not provide a basis for determining the obligations of a homeowner's association board of directors.

3) The basis for this allegation appears to be Mr. Gallagher's affidavit. A review of the affidavit and subsequent events shows that the BOD engaged Gallagher's company Procon to perform the repairs which he recommended. Though Gallagher mentioned conditions such as spalling and cracking, he characterized these conditions as minor and isolated. There is no record that Gallagher provided a follow-up report to the BOD warning that the work he performed did not address all of the conditions of which he had concern. The record clearly indicates that the BOD responded appropriately to Gallagher's recommendations.

4) Geiger alleges that the seriousness of the conditions was downplayed according to the meeting minutes and correspondence. There are records indicating that the BOD received conflicting reports from various professionals. Bobby Warner, a member of the property management staff, reported to the board on multiple occasions that the severity of damage was not as high as had been characterized by some contractors. He also advised the board that they did not need to engage engineers to assess conditions or manage repairs when that had been recommended by others. There is no evidence the BOD downplayed the seriousness of any conditions. Rather, they were made to choose between alarming characterizations made by contractors who would have benefited financially from extensive repairs and the more conservative representations of a maintenance staff professional who was seen as a trusted representative of the HOA.

5) Aspects of this allegation are true. There are records that the original developer and builder performed repairs to leaking windows shortly after construction. However the wording of this paragraph is deliberately misleading. Geiger completely ignores the fact that all ocean side windows were removed and replaced after Hurricane Hugo. He also fails to acknowledge that much of the window maintenance, prior to the addition of Buildings C & D, was performed collectively based assessments as each owner had a nearly identical stake in the repairs. The issue of individual window repairs only became a significant issue after the addition of Buildings C & D to the association as these owners already had new windows. Coincidentally, the change in the HOA composition came approximately 10 years after the windows were replaced and these windows were approaching the end of their expected useful life. When the HOA voted to not fund a collective window effort, the BOD issued a reminder to the owners that they are responsible for the window maintenance. And, the BOD also arranged for bulk pricing to allow the Building A & B owners to spread the contractor mobilization costs between several homeowners.

6) There is no evidence indicating that the BOD failed to enforce the provisions of the Master Deed requiring Unit Owners in Buildings A & B to maintain, repair and replace certain aspects of their units. Rather the record clearly shows that individual unit owners were notified of needed repairs and violations. It also shows that some owners, who had performed maintenance on their own, inquired about refunds from the BOD when similar repairs were undertaken on a widescale by the HOA. This included such things as reimbursements for window replacements.

7) This allegation is not supported by the evidence. For example, the first time the BOD was notified of significant slab reinforcement corrosion was in 2006 by Schneider & Associates. The BOD responded by engaging more qualified consultants to fully

investigate these conditions and to develop a repair plan. Prior to 2006, the BOD engaged contractors such as Procon and Henderson to provide them with recommendations for repairs; these contractors were subsequently engaged to perform the repairs.

8) This allegation is also not supported by the evidence. The records show that the BOD placed the owners on notice of needed repairs and worked to arrange bulk pricing for this work when appropriate.

9) The need for the $11,000,000 assessment is more directly associated with the fact that the facility is located ocean front and was constructed nearly 30 years ago. The construction technology, means and methods available today are more robust but they are also more expensive. For example, the implementation of cathodic protection is an appropriate repair and it will reduce the potential for future rebar corrosion. However, this technology was not widely available at the time the facility was constructed and none of the construction professionals recommended it to the BOD prior to the current repairs. My experience is that similarly aged and located properties undergo major rehabilitations every 25 to 30 years.

10) This allegation is redundant to previous allegations. It is unsupported by the evidence.

11) The Master Deed was amended to make windows and doors common elements; therefore this allegation is without merit. That notwithstanding, there was never any testing performed to demonstrate that water leaked through any windows. The hose testing performed by McGee was not reported to comply with published standards for window leak testing. Within a year of McGee's work, Keystone reported that no water leaked through windows; they reported water penetration through the stucco. The windows and stucco have been removed and there is no means to determine whether the windows did, or did not, actually leak.

12) The records do reflect that leaks occurred from time to time in various units. These leaks were attributed to the roof, windows, stucco, sliding glass doors, fenestration in neighboring units, HVAC equipment, water heaters, kitchen fixtures, bathroom fixtures and laundry equipment. Each of these conditions, when reported to the board, was referred to the property manager or site maintenance supervisor for further investigation. When needed, the board notified owners of the need to repair or maintain fixtures and equipment. The BOD also undertook to repair the roofs and secure roof-top HVAC equipment to resolve leak issues.

13) This allegation is without merit and is not supported by the evidence.

14) This allegation is without merit and not supported by the evidence. Geiger claims that the BOD did not engage qualified professionals to assess the facility. The records show that qualified construction professionals were providing guidance to the BOD as early as 1993 and a professional property manager was engaged from the inception of the HOA. Ironically, the first construction professional to submit a letter to the BOD was Mr. Gallagher who provided an affidavit for the plaintiffs; Mr. Geiger relies on this affidavit.

15) This allegation is redundant and without merit. The BOD followed the recommendations of the qualified construction professionals engaged to provide assessments.

16) This allegation is without merit. The BOD sought guidance on the preparation of a reserve schedule; this schedule was improved and revised throughout the history of the HOA. The BOD funded the reserved in accordance with the schedule each year except when significant mitigating circumstances prevented it. The availability of reserve funds for maintenance and repairs was impeded in the early 2000's as reserves were diverted to the fund for Buildings C & D litigation.

17) This allegation is without merit as the reserves were appropriately budgeted and funded.

18) This item is a statement of fact and not an allegation. To the extent that this is an interpretation of a contract, Mr. Geiger's education and experience do not qualify him to render opinions on the fiduciary responsibility of a homeowner's association board of directors.

19) Mr. Geiger's reading of the BOD minutes does not include an actual analysis of how money was collected and allocated by the BOD. Reports about the lack of funding are related to the total reserves available after expenditures. Large projects, catastrophic events, unforeseeable projects and litigation funding depleted the reserves at times. However, the reserves were adequately budgeted and funded each year. Also, reimbursements from insurance carriers, warranty claims and even the Buildings C & D litigation subsequently replenished the reserves. Mentions of low reserves in the minutes demonstrate that the BOD was vigilant with regard to reserve funding.

20) This allegation is redundant and without merit. See item 12.

21) This allegation is redundant and without merit. See item 7.

22) In 2002, McGee's window study report includes mention of rotten wood structural elements. This is the first report suggesting that serious wall damage was present at the

site. The BOD was restricted in implementing and funding repairs due to reserves being diverted to the litigation fund for Buildings C & D. In addition, the conflicting technical reports made the source of water intrusion unclear; one report cited windows as the source while the other cited stucco. The BOD had authority to take action on the stucco but not the windows. Subsequently, the BOD engaged Absolute Waterproofing to repair areas of the stucco. The BOD also coordinated window repairs between Absolute and the owners. Schneider's 2006 report is the first that suggests serious concrete damage existed. Pursuant to this report, the BOD engaged more qualified consultants and eventually selected SKA to develop and manage the repairs.

23) In this allegation Mr. Geiger is rendering a legal opinion that is beyond his education, training and expertise.

24) In this allegation Mr. Geiger is rendering a legal opinion that is beyond his education, training and expertise.

25) In this allegation Mr. Geiger is rendering a legal opinion that is beyond his education, training and expertise.

26) This allegation is without merit.

27) This item is a statement of facts with regard to the cost of the project. It is informative to note that Geiger does not fault construction professionals such as SKA and SPS for not being able to anticipate the degree of distress in the buildings. However, Geiger believes that the volunteer members of the BOD, who are not construction professionals, had a duty to understand the state of the structural condition of Buildings A & B in a manner above and beyond the information provided to them by construction professionals between 1993 and 2006.

28) A review of the project expenditures since Geiger issued his report would be needed to determine if this is actually an issue.

Re-Allocation of Assessment

There is no justification for re-allocation of assessments. Historically, the HOA has adhered to the principle that all association costs are to be borne by the owners in accordance with the Master Deed. In fact, this issue was addressed with the owners on June 15, 2001 in a letter entitles Urgent Message and Notice of Proxy which stated:

> It is now important for A and B owners to support this year's assessment. We are not competing owners but neighbors protecting our investments and all owners (A, B, C and D) are at risk and responsible for repairs to any buildings in our Association as stated in the Master Deed and By-Laws.

This position was reiterated on April 16, 2005 at the Shipyard Village Council of Co-Owners, Twenty Third Annual Members' Meeting. The following excerpt is from the minutes:

> Joe Henson (B46) asked how the owners in the A and B building will be affected by the lawsuit and repairs needed in C and D. The Board explained that the A, B, C and D buildings are all part of Shipyard Village Council of Co-Owners, Inc. and all expenses, regardless of what building, are shared by all owners based on percentage of ownership.

Given that this policy is in accordance with the Master Deed, and that this policy has historically been enforced, there is no justification for re-allocating the assessments for the recent repairs to Buildings A and B.

Summary

The evidence clearly shows that the Shipyard Village Council of Co-Owners' Board of Directors acted in good faith to preserve and maintain the condition of Buildings A and B. They engaged consultants and professionals to provide input with regard to maintaining the structures and the financial state of the HOA. The BOD responded to these inputs by funding reserves in accordance with recommended schedules and by funding efforts to repair and replace building systems as needed.

There is no evidence that the BOD deliberately withheld information or misled the HOA with regard to the condition of Buildings A and B. Similarly, there is no evidence that the BOD conveniently altered the Master Deed to make fenestration a common element in anticipation of the rehabilitation effort; this decision was made based on a review technical and factual issues which revealed that window maintenance was more appropriately an HOA responsibility.

Finally, the BOD acted within the scope of the Master Deed with respect to the assessments to rehabilitate Buildings A and B. Their interpretation and enforcement of the Master Deed is identical to the manner in which this was done previously when Building A and B owner were assessed to fund the litigation and repairs for Buildings C and D.
Should additional information be made available to me, I reserve the right to consider such information, and to, if necessary, revise my opinions.

Please call with any questions you may have.

Best regards,

APPLIED BUILDING SCIENCES, INC.

J. Lawrence Elkin, PE

SOUTH CAROLINA
REGISTERED PROFESSIONAL ENGINEER
No 16913
J. LAWRENCE ELKIN

SOUTH CAROLINA
APPLIED BUILDING SCIENCES, INC
No. C02897
CERTIFICATE OF AUTHORIZATION

Unit file

J. BEN MORROW, P.A.

ATTORNEY AT LAW
312 SOUTH CHESTER STREET
P.O. BOX 116
GASTONIA, NORTH CAROLINA 28053-0116
TELEPHONE 704/865-2897

J. BEN MORROW

TELECOPIER 704/868-3297

ASSOCIATE
CAROL B. WERTZ
RICHARD P. LEISSNER, JR.

April 14, 2005

VIA FEDERAL EXPRESS

Board of Directors
Shipyard Village Homeowners Association
c/o K. A. Diehl & Associates, Inc.
P.O. Box 2537
Murrells Inlet, SC 29576

Re: Shipyard Village - B28; Katie and Ben Morrow

Dear Board of Directors:

I am writing you to furnish information regarding a continuing water problem in the northwest-facing bedroom of B-28 Shipyard Village (our condominium).

Please find enclosed a Memorandum from Joe W. Hiller, Jr., Architect, dated April 14, 2005, regarding his professional opinion after seeing the photographs I have enclosed. Based on the professional opinion of Joe W. Hiller, Jr., my wife and I contend that the water leakage into our condominium is an association matter and does not require further investigation on our part. We, therefore, respectfully request that you immediately authorize the investigation and repairs needed to alleviate the water problem in our unit; and also possible water problems in the units above and the unit below our condominium. As you can see from the photographs, we are not able to fully use our condominium at this time.

Thank you in advance for your consideration in this matter..

Very truly yours,

J. BEN MORROW, P.A.

J. Ben Morrow

JBM/dbl
Enclosures: 8 Photographs and Hiller Memorandum

EXHIBIT 3

DEFENDANT'S EXHIBIT 19

FROM:

JOE W. HILLER JR ARCHITECT
576 Terrapin Crossing Road
Pickens SC 29671-9688

MEMORANDUM

Thursday, April 14, 2005

Architects. Proj. No.: 2413
Telephone: 864-868-3339
Fax: 864-868-0679

TO:

J. Ben Morrow, P.A.
Attorney at Law
312 South Chester Street
Gastonia, NC 28053-0116

RE: Shipyard Village Condominiums

MEMO:

Dear Mr. Morrow,

I have reviewed the photos that were emailed to me by your family. It seems obvious to me that there is water migration though the exterior wall that is not related to the window sill, jamb or header. What I've seen in the photos leads me to recommend that further study needs to be directed at two places on the exterior of the building. First, an examination of the joint between the exterior insulation finish system (EIFS) and the stuccoed masonry "fin" at the corner of the building. If this joint has failed then water could penetrate the wall in a manner consistent with your photographs. Second, an examination of the flashing and roofing in the area of the "fin". Numerous joints occur in this area and if failed could allow water to penetrate the exterior surfaces and run down the structure in a manner consistent with your photographs.

I hope this helps, Please let me know if I can be of any further assistance.

Thank You,
Joe W. Hiller, Jr.

cc: file

SCHNEIDER AND ASSOCIATES
ARCHITECTS
CHARLESTON, SOUTH CAROLINA

February 7, 2007

Kellie A. Diehl, PCAM
Richard Bennett
Shipyard Village Council of Co-Owners
PO Box 2537
Murrells Inlet, SC 29576

Re: Shipyard Village A&B
Up-grading the window-walls

Kellie & Richard

Dear ~~Ms. Diehl and Mr. Bennett~~,

Schneider and Associates' (S&A) recent and ongoing investigations of the window-wall systems at Shipyard A&B have revealed not-so-surprising conditions, relating to the behaviors of the building envelopes. With the exception of the doors and windows that are near the end of their life expectancy and considering that the buildings are now going on thirty (30) years old, I observe better than average building envelope performance. These buildings are the proud homesteaders of the Litchfield Front Beach Community. Generally, the buildings' architecture is uniquely expressed in the thin-shell concrete "egg crate" style of their era, made famous by the **Bauhaus** in its development of glass-and-concrete architecture.

Shipyard A&B are constructed of reinforced concrete masonry with "tube-slab" floor and roof systems and "curtain wall" window systems. These building systems were leading design elements at the time of A&B's construction. We have confirmed the composition of the wall systems through some recent destructive testing and have related the cause/effect conditions of the building envelopes' behavior. The destructive testing was necessary simply because no Architectural or Structural plans exist today. We have been able, through our destructive testing, to verify the Architectural and Structural systems as described to us by Joe Hiller, AIA, son of the original Architect, with whom I spoke some months ago. Joe still maintains his father's practice and, as a young apprentice, had worked on the Shipyard project.

During the destructive window testing on Ben and Katie Morrow's unit, B-28, we discovered the "stack" of units was leaking from top-to-bottom at the jamb and sill terminations. The existing conditions rely on the window-wall's frame configuration to "turn" the water to the exterior. The spandrel, formed by the slab edge, is insufficient to accomplish this alone. Expanding the vertical dimension of the spandrel will allow space

3690 Bohicket Road, Suite 1-D • John's Island, South Carolina 29455 • (843)768-1333 • (800)522-7663 • FAX (843)768-1716

EXHIBIT 4

for separate flashing assemblies; thus, the "knee-wall" concept. It is not only a functional solution, but also allows for a fresh look and less expensive maintenance costs.

In the mid-80's, "curtain walls" were an up-and-coming leading-edge technology for high-rise buildings; these "curtain walls" were employed in your two buildings and featured large expanses of glass. Glass has many advantages, but also has some disadvantages. Glass readily conducts solar heat; so, on cold days, standing in front of a sunny window is a pleasant experience. On the front beach in August, we may choose to close our blinds in order to assist the windows in reflecting the unwanted heat and take the load off our air conditioning systems. Another advantage of the window-walls is the view. On the beach, we would naturally seek to optimize our visual experience of the views we invested in.

The windows that we are proposing to replace those existing in your buildings are of much higher technology, in that they contain thermal breaks and insulated laminated glass, engineered to resist hurricane-force winds and flying debris. These are also much more energy efficient and stronger to withstand the hurricane-force winds. We considered replacing the window-walls in the bedroom stacks with a "look-a-like", but after studying the problem architecturally, we are proposing to construct a "knee-wall", which is a simple exterior wall that is about knee-high, and then set the window on top of the low wall. Please see the sketch attached. The window-wall construction proposed would consist of a "band" of sliding windows below which will be a low "band" of fixed stuccoed wall. This architecturally produces a much more upscale look. It is far more hurricane resistant; it is far more energy efficient, and it is far more waterproof. It is easy to build and easy to flash; it is easier to integrate into the existing building systems, costs far less to construct than replacing all of the existing windows with a "curtain wall", and less expensive to maintain.

Since the mid-80's, Building Code restrictions have increased significantly, making code-compliant construction more expensive to replicate. The Building Code mandates that all window replacements, not just Shipyard A&B's, must conform to the Code. The new construction proposed will bring these windows into Code compliance. Although we have not concluded that the window design on the ocean-side be changed in this manner, we believe that the windows on the land-side (Courtyard) should employ the "knee-wall" design. They will be far safer and your insurance rates should be favorably impacted. Additionally, this configuration will provide privacy and a low wall space for furniture.

Insurance premiums along all our coasts continue to sky-rocket because of losses due to hurricane damage. Condominium Regimes and other building owners will see significant savings in insurance premiums if the buildings are Code compliant. It is my belief that non-code-compliant condominiums and other multi-family structures along the coasts of Texas, Mississippi, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, and even up as far north as New Jersey, will continue to see higher and higher rates, which will eventually force them to modify their façades to bring the building envelopes into Code compliance.

Architecturally speaking, the reconfiguration of the window stacks in the Courtyards will give the buildings a new look and tie them into the renovations, which have just been completed at Shipyard C&D and will enhance all the property values at Shipyard.

Sincerely,
SCHNEIDER & ASSOCIATES, INC

Kenneth G. Schneider, Jr., AIA, NCARB, RRC

4.0 ASSUMPTIONS

4.1 Roof Failure:

The present rolled roof system is failing and allowing rainwater to penetrate into the concrete below. The salt ions are carried through the concrete to the steel reinforcement. This roof membrane needs to be replaced with a single ply system that is sealed against the weather.

4.2 Façade Failure:

The stucco finish on the exterior of the structure is allowing rainwater to penetrate into the masonry and the concrete. This surface needs to be sealed.

4.3 Edge Beam Failure:

The outside edge of the lanai slabs is cracking away from the hollow core slabs due to rainwater intrusion into the area. Sealing the top and bottom surfaces will prevent this intrusion and stop the corrosion of the steel reinforcement.

4.4 Soffit Failure:

The soffits of the walkways and the lanais are seeing excess rainwater penetration through the slabs. This is noted in 4.3 above. Sealing the top of the slabs and the bottom of the slabs will protect and extend the life of the hollow core slabs.

4.5 Concrete Failure:

The concrete beams that support the floor slabs are also seeing rainwater penetration that is causing the steel reinforcement to corrode and the concrete to spall off.

4.6 Expansion Joint Failure:

The carbon steel expansion joints are corroded and not working. The joints themselves have heaved up enough to become a tripping hazard. The joints need to be replaced with a stainless steel joints.

4.7 Horizontal Surface Failure:

The top and bottom surfaces of the hollow core slabs are allowing rainwater to penetrate the slabs resulting in the corrosion of the steel reinforcement. Both the top and bottom surfaces should be coated to seal the slabs against rainwater intrusion.

4.8 HVAC Anchorage Failure:

The present roof mounted HVAC units are not securely anchored to the roof. There is a sturdy frame system the units are sitting on, but they are attached to this frame with thin gauge flashing and carbon steel self tapping screws. These need to be bolted down using stainless steel or aluminum angles and fasteners.

4.9 Window and Doors:

The present windows and doors have poor to nonexistent flashing to prevent wind driven rain from getting into the units. These obsolete objects need to be replaced.

5.0 RECOMMENDATIONS

5.1 Roof Failure:

The present rolled roof system needs to be replaced with a new EPDM roof system designed for the high wind area. The roof should also be bonded for 20 years.

5.2 Facade Failure:

The stucco finish on the exterior of the structure is allowing rainwater to penetrate into the masonry and the concrete. This surface can be seal by coating with a water proofing compound. It should be noted that these compounds generally last about five years.

5.3 Edge Beam Failure:

The outside edge of the lanai slabs is cracking away from the hollow core slabs due to rainwater intrusion into the area. Sika injection will bond the concrete together. Then sealing the top and bottom surfaces with an epoxy like Polymerica Master Shield NEB or equal will prevent this intrusion and stop the corrosion of the steel reinforcement.

5.4 Soffit Failure:

The soffits of the walkways and the lanais are seeing excess rainwater penetration through the slabs. Sealing the top and bottom surfaces with an epoxy like Polymerica Master Shield NEB or equal will prevent this intrusion and stop the corrosion of the steel reinforcement. The tops can be sloped to provide positive runoff away from the doors. Flashing and drip edge need to be added to force water away from the next lower structure.

5.5 Concrete Failure:

The concrete beams that support the floor slabs need to be repaired. The existing areas need to be sand blasted and coated with an epoxy bonding agent then filled in with microsilica concrete.

5.6 Expansion Joint Failure:

The carbon steel expansion joints need to be replaced with a new stainless steel joints that provide the corrosion resistance and the slide freedom required.

5.7 Horizontal Surface Failure:

Sealing the top and bottom surfaces with an epoxy like Polymerica Master Shield NEB or equal will prevent this intrusion and stop the corrosion of the steel reinforcement.

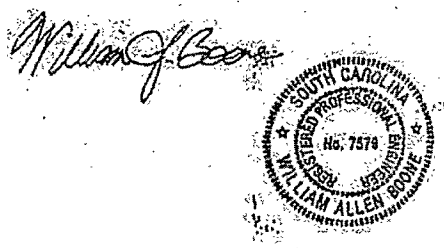
5.8 HVAC Anchorage Failure:

The present roof mounted HVAC units are not securely anchored to the roof. These need to be bolted down using stainless steel hardware and angle.

5.9 Window and Sliding Door Replacement:

The present windows and sliding doors need to be replaced with better system that will resist the high wind loads. The units need to seal better when closed. Enclosed is a quote from Pella Windows who guarantees their windows and doors. Floor to ceiling openings need to have sills and flashing added to decrease water intrusion.

William A. Boone, P. E.



Engineering Services, Inc. 490 Garlington Road • Greenville, South Carolina 29615 • 864-289-0431 • Fax 864-289-0428

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2009-CP-22-00152
Richard Fisher, Platte B. Moring, Jr., Marianne G. Kochinski, and Jim H. Markley, on behalf of all persons situated who owned units in Buildings C and D of the Shipyard Village Property Regime, Plaintiffs, v. Shipyard Village Council of Co-Owners, Inc., Defendant.	AFFIDAVIT OF CHARLES L. ERNEST, JR., P.E.

PERSONALLY APPEARED BEFORE ME, Charles L. Ernest, Jr., who deposes and states as follows:

1. I am a Professional Engineer licensed in South Carolina, and in eight other states. I am a past member of the Board of Directors for Sutton-Kennerly & Associates, Consulting Engineers (hereinafter "SKA"), and am the past Greensboro Branch Manager for SKA.

2. I received a B.S. in Civil Engineering in 1970 from Virginia Tech, and a Master of Science, specializing in structures, from the University of Illinois in 1971.

3. During my first nineteen years at SKA, I performed structural design on numerous large projects. I developed an interest in investigation of failures and distressed structures. In 1990 I started the Building Investigation and Diagnostic Department at SKA. The Building Investigation and Diagnostic Department specializes in water intrusion issues and facade restoration. I managed the Building Investigation and Diagnostic Department until the beginning of 2008, when I was promoted to Branch Manager of the Greensboro office of SKA.

4. I have performed investigative, consulting, and engineering services for a number of multi-storey condominium projects along the coasts of North and South Carolina.

EXHIBIT 6

5. In or about May or June of 2008, SKA was contacted by a member of the Board of Directors of the Shipyard Village Council of Co-Owners relative to certain issues at the Shipyard Village Horizontal Property Regime. In or about June or July of 2008, SKA agreed to review project engineering reports prepared by other engineering firms with respect to water intrusion issues at Buildings A and B at Shipyard Village.

6. SKA reviewed the reports, and concluded based on the reports and information provided to SKA that a different repair approach should be considered. SKA made this recommendation to the Board of Directors for the Shipyard Village Council of Co-Owners.

7. In or about January, 2009, the Board of Directors for the Shipyard Village Council of Co-Owners retained SKA to perform an investigation of Buildings A and B and to recommend a scope of work to repair the water intrusion and other issues at these buildings.

8. SKA has investigated Buildings A and B and has produced and recommended a scope of work for repairs.

9. Part of the scope of work includes the removal and replacement of the windows and sliding glass doors in Buildings A and B. The sliding glass doors on the balconies must be removed in order to repair the concrete slab at the balconies and to replace the stud walls adjacent to the balcony doors. The individual windows in the sidewalls must be removed in order to repair the exposed wood blocking that is decaying at the perimeter of the windows. The window walls must be removed in order to repair the floor slab edges. The current Building Code requires impact resistant glass in all new windows and doors. The buildings were constructed in the 1980's and the original windows do not comply with this requirement. Although it has been reported that some of the original windows were replaced following Hurricane Hugo, these windows would not comply with current Building Code requirements. The Building Code will require that all windows and doors that are removed during the project be upgraded to meet the current Code requirements before being replaced. It is not technically feasible to upgrade the original window and door units; therefore, any window or door that is removed will have to be replaced to meet the current Building Code requirements (Note: References to "door" or "doors" in this Affidavit refer specifically to the sliding glass doors).

10. Aside from Building Code issues, it is not reasonable or feasible to remove and reinstall the existing units during this repair project because:

a. The original windows and doors are approximately 20 to 25 years old and have reached the reasonable service life for coastal environments. There is visual evidence of the need for replacement:

i. Corrosion and deterioration of the securement (fasteners, nailing, flanges, etc);

ii. Leaking as evidenced by interior staining and cracking gypsum;

iii. Corroded frames;

iv. Corroded sills;

v. Deterioration of wood blocking;

vi. Voids and holes;

vii. Failed glazing.

b. Even if the Building Code were to permit the removal and reinstallation of the existing windows and doors, an undetermined number of window and door units would still have to be replaced due to decay and/or other conditions that would not be discovered until construction is underway. There is a very significant lead time required for fabrication of new windows (8 to 12 weeks). It is not reasonable to expect a contractor to commit to a firm completion date for the entire project with an unknown number of windows and doors to be replaced. The condition of the windows and doors would change the schedule of the project dramatically. The risks associated with this approach will, in my experience, make knowledgeable general contractors less likely to bid the work.

c. Even if the Building Code were to allow removal and reinstallation of the existing windows and doors, in my opinion and experience, damage would likely occur to the existing units during the removal and reinstallation process (even with a careful window subcontractor). Aged gaskets and seals will crack or fail during this process, frames will rack and/or warp, etc. The damage may not be apparent until

construction is completed. This potential for damage will cause the subcontractors to be less likely to enter a bid proposal for the work, and those that do would likely exclude all window and door assemblies from warranties. There would be a significant risk that new leaks would be introduced into the building due to damage that occurred during the removal and reinstallation process. The potential for construction disputes would be significantly increased.

d. It is considerably more expensive on a per window/door unit basis to purchase and replace windows and doors in small quantities. There are fixed costs for fabrication, shop drawings, etc. that dramatically increase the cost on a per window/door unit basis. Secondly, general contractors and subcontractors (if any choose to bid) will increase their labor costs significantly on a per window/door unit basis due to the risks described above.

e. Even with new structural repairs, coatings, sealants, etc. a building envelope system is only as good as its weakest link. The window and door openings play a critical role in the building envelope of a structure and how it performs.

11. In addition to the considerations listed above, I note that the perimeter flashing system is critical to the window and door system. If either the window or door unit or the perimeter flashing is compromised, then leakage can occur. Perimeter flashing will need to be redone as part of other repairs regardless of whether window/doors are replaced. It is critical that the perimeter flashing system be coordinated with the window and door systems so that the window and door units and perimeter flashing perform as an effective system.

12. The windows and doors are the most sophisticated components of the exterior wall cladding system. The performance of the window and door systems is a major contributor to the performance of the wall cladding system. In order to provide an effective cladding system, it is critical that the window and door systems (with all associated flashings and water barriers) be coordinated with the cladding system.

13. The most reasonable method for coordinating the window and door systems (with all associated flashings and water barriers) with the cladding system is to have a qualified professional design and review the installation of these systems. This allows for a design to be developed that coordinates the water barriers within the cladding

systems with the perimeter flashing system, coordinates the perimeter flashing system with the window/door unit, and provides specific criteria for the window/door units to ensure compliance with appropriate Code requirements.

FURTHER DEPONENT SAYETH NOT.

Charles L. Ernest, Jr., P.E.
South Carolina No. 13747

SWORN TO and subscribed before me
this 24th day of August, 2009

Notary Public for North Carolina
My Commission expires: 11/2/2009

BETTY H. GIBSON NOTARY PUBLIC GUILFORD COUNTY, N.C.

SKA
CONSULTING ENGINEERS
Sutton-Kennerly & Associates, Inc.
300 Pamona Drive
Greensboro, NC 27407-1620
Telephone: 336-855-0993
Fax 336 855-6066
www.suttonkennedy.com

To: Ms. Vicki Gallagher, CMCA, AMS (vicki.gallagher@kadiehl.com) KA Diehl

From: Stephen P. Robinson

CC: file, cle, thn, dgt, spr - SKA

Date: July 30, 2009

Re: Structural and Facade Repairs for Shipyard Village – Buildings "A" & "B"
SKA Project No. 080489.3

Ms. Gallagher,

Per the request of the Council of Co-owners, SKA has generated the following response to the question "*Why are the windows and doors being replaced?*" with regard to the Structural and Facade Repairs for Shipyard Village – Buildings "A" & "B":

1. The balcony doors must be removed in order to repair the concrete slab at the balconies and to replace the stud walls adjacent to the balcony doors. The individual windows in the sidewalls must be removed in order to repair the exposed wood blocking at the perimeter of the window that is decaying. The window walls must be removed in order to repair the floor slab edges. The current Building Code requires impact resistant glass in all new windows and doors. The original windows do not comply with this requirement. The Building Code official will require all windows and doors that are removed during the project to be upgraded to meet the current Code before being reinstalled. It is not technically feasible to upgrade the original window and door units; therefore, any window or door that is removed will have to be replaced in order to meet the Building Code requirements.

2. Aside from Building Code issues, it is not reasonable or feasible to remove and reinstall the existing units during this repair project because:

   a. The original windows and doors are approximately 20-25 years old and have reached the reasonable service life for coastal environments. There is considerable visual evidence to support the need for replacement:

      - Corrosion and deterioration of the securement (fasteners, nailing flanges, etc.)
      - Leaking as evidenced by interior staining, cracking / split gypsum, peeling gypsum
      - Corroded frames
      - Corroded sill tracks
      - Deterioration of wood blocking

EXHIBIT 7

SYV_004181

- Insect infiltration at the perimeters
- Voids and holes
- Failed glazing

b. Even if the Building Code would allow removal and reinstallation of the existing windows and doors, an undetermined number of windows and door units would still have to be replaced due to decay and/or other conditions that would not be discovered until construction is underway. There is a very significant lead-time required for fabrication of new windows (8 to 12 weeks). It is not reasonable to expect a contractor to commit to a firm completion date (for the project) with an unknown number of windows and doors to be replaced. The condition of the windows and doors would change the schedule of the project dramatically. The risks associated by this approach will make knowledgeable general contractors less likely to bid the work.

c. Even if the Building Code would allow removal and reinstallation of the existing windows and doors, damage would occur to the existing units during the removal and reinstallation process (even with a careful window subcontractor). Aged gaskets and seals will crack or fail during this process, frames will rack and/or warp, etc. The damage may not be apparent until construction is completed. This potential for damage will cause the subcontractors to exclude all window and door assemblies from warranties and to be less likely to enter a bid proposal for the work. There would be a significant risk that new leaks would be introduced into the building due to damage that occurred during the removal and reinstallation process. The potential for dispute would be significantly increased.

d. It is considerably more expensive (on a per window/door unit basis) to purchase and replace windows and doors in limited quantities. There are fixed costs for set-up for fabrication, show drawings, etc. that dramatically increase the cost on a per window/door unit basis. Secondly, general contractors and subcontractors (if choosing to bid) will increase their labor costs significantly (on a per window/door unit basis) due to the risks described previously.

e. Even with new structural repairs, coatings, sealants, etc. an envelope system is only as good as its weakest link. The windows and door openings play a critical role in the building envelope of a structure and how it performs. If not replaced, then leakage will continue.

f. If only portions of the windows and doors were to be replaced, the aesthetic effect on the building could be significant due to the variation in the appearance of the window and door systems.

3. Other key information to consider when addressing window and door issues:

   a. Window and door units are only part of the concern with regard to window and door systems. The perimeter flashing is a part of the window and door system. If either the window/door unit or the perimeter flashing are compromised, then leakage can occur. It is critical that the perimeter flashing system be coordinated with the window and door systems so that the window/door units and perimeter flashing perform as an effective system.

   b. Overall, it is very important to realize that the windows and doors are the most sophisticated components of the exterior wall cladding system. The performance of the window and door systems is a major contributor to the performance of the wall cladding system. In order to provide an effective cladding system, it is critical that the window and door systems (with all associated flashings and water barriers) be coordinated with the cladding system.

   c. The most reasonable method for coordinating the window and door systems (with all associated flashings and water barriers) with the cladding system is to have a qualified professional design and review the installation of these systems. This allows for a design to be developed that coordinates the water barriers within the cladding systems with the perimeter flashing system, coordinates the perimeter flashing system with the window/door unit, and provides specific criteria for the window/door units to insure compliance with appropriate Code requirements.

We hope this information is helpful. Please let us know if we can be of further assistance.

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.

September 26, 2007

Dear Shipyard Village Owners,

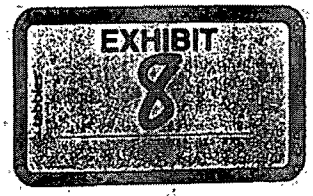
We would like to update you on some issues that are currently before the Board of Directors.

BOARD ACTIONS TAKEN TO REMEDY WATER INTRUSION IN A&B BUILDINGS:

As has been previously reported to you in past updates the Board commissioned Schneider and Associates in September of 2006 to conduct a full evaluation of the A and B buildings in regard to water intrusion in those buildings. The Schneider firm was also to develop plans and specifications for remedial action. We have been very disappointed in the time it has taken to receive those things from Mr. Schneider's firm. Earlier this year a mock-up of deck waterproofing and sliding door replacement was done in the A 14 and the A 55 unit. Those units were chosen because of the immediacy of needed remedial action (the entire sliding door wall of A 55 could be moved three to four inches.) From those two mock-ups the Schneider firm was to furnish plans and bid specifications so that action on future stacks could be put out for bid as finances allowed. Also it was determined that the B 8 stack would be used as a mock-up for courtyard window replacement and application of the Dow All Guard product (that was used on the C and D buildings.) The Schneider firm submitted a price quote for that work which was to have begun in October 2007. The Board had some serious concerns about this project, and as a result of those concerns the Board commissioned Mr. Eddie Stokes, owner of MEC Engineering Services, Inc. to act as owner's representative on the B 8 stack mock-up. Mr. Stokes' engineering background and knowledge of water intrusion problems associated with beach front property led the Board to select him to oversee and manage the B 8 project and future A and B building projects. The Board sincerely hopes that Mr. Stokes can not only help the Board to be good stewards of association money, but also bring the B 8 project to a satisfactory, timely conclusion.

OUTLOOK FOR FUTURE REMEDIAL ACTION:

Because of the restrictive nature of Association by-laws the Board is very limited in its ability to secure the funds that are necessary for the repairs and maintenance of the buildings. Therefore any future repairs, as things stand right now, must be done as finances allow. In other words the remedial action that is necessary to correct the water intrusion will need to be done on a stack by stack basis, with priority



determined by urgency of need based on sound engineering findings. Doing the doors and windows a stack at a time is probably the most costly and least efficient manner to complete our project. The additional expense of staging and cleanup done multiple times, renting lifts and scaffolding cannot be seen as efficient. In addition, at the rate of one to three stacks a year the project could take well over six years or more. In a perfect world the whole A and B correction would be done all at once, but unless the need for an assessment is approved by a majority of the owners unfortunately this is not the case. We expect to discuss bringing this matter before the owners for consideration at our next meeting. We ask for your patience as this unfolds in the future. The Board wishes to remind you that even though the Association assumed responsibility of door and window replacement in July 2006 the problems the A and B buildings are currently experiencing didn't just happen last year--they have been developing over the time when the owners were responsible for their doors and windows. Those buildings were built well over twenty years ago. Studies have shown that repairs made in past years did not really address the water intrusion issue, but were more cosmetic in nature. We trust the owners will support the recommendation by the Board once Mr. Stokes has completed his analysis

WATER PROBLEMS ASSOCIATED WITH THE RECENT RAINS;

The Board has been made aware of acute water leaks into the interior of some of the A and B units during recent rains. The question has been raised as to who is responsible for the interiors of the units. Please refer to Article II, Section 5 © of the amended Master Deed, a copy of which is attached.

This document explains that only the sliding glass doors and the windows are the responsibility of the association. The rest of the unit is the responsibility of the owner and/or the maintenance company hired by the owner, and not the on-site management staff. The Board hopes this clarifies the matter.

ON SITE MANAGEMENT STAFF:

The Board is appreciative of Mr. Richard Bennett and his staff in their efforts to keep our property clean and well ordered. Mr. Bennett has been innovative and hard working during his tenure as on-site manager. He has put the day to day workings of Shipyard on a much more organized and business-like manner than it had been in the past before his arrival. As to inter-personal relations, there are two extremes; there are those that would go to any length to avoid confrontation and please their fellowman, and on the other end of the spectrum there are those who can never get along with anyone. Mr. Bennett, like the vast majority of the rest of us, is somewhere between those two extremes. Mr. Bennett is aware of the Board's desire for a smooth, harmonious relationship between owners and management.

In summary the Board wishes for you to know that we are doing our best to work through the problems that frustrate us all, and that we will continue to do our best

to arrive at solutions that we can all live with and afford. Please bear with us during this time.

Sincerely,

THE SHIPYARD BOARD OF DIRECTORS

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-22-01655
Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC;	**DEFENDANT'S RESPONSE TO "PLAINTIFFS' MOTION IN OPPOSITION TO DEFENDANT SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.'S NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER OR AMEND THE COURT'S ORDER PURSUANT TO RULES 52 AND 59, SCRCP"**

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell; Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean

T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

The Defendant, Shipyard Village Council of Co-Owners, Inc. (hereinafter "Defendant"), in response to Plaintiffs' "Motion In Opposition to Defendant Shipyard Village Council of Co-owners, Inc.'s Notice of Motion and Motion to Reconsider Alter or Amend The Court's Order Pursuant to Rules 52 and 59, SCRCP" (hereinafter "Plaintiffs' Motion") filed on June 18, 2012, hereby incorporates by reference its Notice of Motion, Motion and Memorandum in Support of Motion to Reconsider, Alter or Amend Pursuant to Rules 52 and 59, SCRCP filed and served on June 6, 2012 (hereinafter "Defendant's Motion to Reconsider") and further responds as follows:

Plaintiffs' Motion asserts six (6) reasons why Defendant's Motion should be denied and dismissed (two of which are numbered 4). This Reply will address those reasons in the order set forth in Plaintiffs' Motion.

1. Plaintiffs first allege the "Defendant failed to raise, argue, and have the Court rule at the hearing on May 21, 2012, upon information and belief, on the issue of whether its board exercised reasonable business judgment..." In support of this argument, Plaintiffs claim the Defendant is asserting the Business Judgment Rule for the first time. This is inaccurate and inconsistent with the pleadings, other submissions to the Court, arguments of counsel, and this Court's oral ruling on May 21, 2012. Defendant has at all times claimed protection pursuant to the Business Judgment Rule. The issue was presented to the Court at the hearing on May 21, 2012 and this Court ruled that it did not apply.

Plaintiffs' argument further alleges that the issue of the Business Judgment Rule was not preserved and sets forth four (4) requirements to preserve issues for appellate review. In support of this position, Plaintiffs cite to South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007). Plaintiffs' reliance on this case is misplaced. The case cited by Plaintiffs and the four (4) requirements set forth in their Motion are not applicable to a Motion to Reconsider. The Court held in South Carolina Dep't of Transp. v. First Carolina Corp. of S.C. that "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. Additionally, '[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'" (Internal Citations Omitted). Defendant's Motion to Reconsider respectfully contends that the Court's

ruling on duty and breach failed to give the Board the benefit of the Business Judgment Rule. Specifically, Defendant maintains there was more than one inference to be drawn from the facts presented to the Court. Viewing those facts in the light most favorable to the Defendant, the Board exercised its reasonable business judgment in concluding there was no conclusive evidence on the issue of whether or not any A or B Unit Owner negligently failed to maintain their Unit and thereby caused damage to the Common Elements. Defendant's Motion requests the Court reconsider and vacate its prior Order granting Plaintiffs' Motion for Partial Summary Judgment. Alternatively, the Court should alter or amend its Order to specifically consider the questions, issues, arguments and grounds presented by Defendant and make a ruling thereon.

2. Plaintiffs' second reason alleges that the documents relied upon in opposition to Plaintiffs' Motion for Partial Summary Judgment were not argued, marked or placed into evidence. Plaintiffs claim that they have suffered "extreme undue prejudice under Rule 403" by these submissions and request the exclusion of Exhibits 1-7 attached to Defendant's Motion to Reconsider. It is noteworthy that Exhibit 8 to Defendant's Motion to Reconsider, the September 26, 2007 Letter from the Board of Directors to the Council of Co-Owners, is not requested for exclusion. Plaintiffs' counsel used this same letter when deposing many of the Defendant's Board Members and also submitted it into evidence on May 22, 2012. This was either an oversight by Plaintiffs or, alternatively, it evidences Plaintiffs' attempt to obtain disparate and more favorable evidentiary treatment from the Court. Further to this point is Plaintiffs' reliance in their fourth argument upon eighty preconstruction videos and pictures taken from those videos, none of which were presented to the Court until May 22, 2012.

The only documents from Plaintiffs on file at the time of the hearing on May 21, 2012 in support of their motion was the motion with exhibits. Plaintiffs summarily argued their case (as if in a bench trial) on May 21, 2012 and then requested that thousands of documents be placed into the record on May 22, 2012. In contrast, Defendant referenced the Affidavits of Doris Bray, Charles L. Earnest, Jr., P.E., J. Lawrence Elkin, P.E., all previously filed with the Court, and the reports of J. Lawrence Elkin, P.E. and Gary Bradham marked and identified with the Court in opposition to Plaintiffs' Motion for Partial Summary Judgment. However, to the extent Plaintiffs purported to place the entirety of their trial exhibits into the record, Defendant likewise entered additional documents into the record by consent and with the Court's explicit approval. The Court took the bench on May 22, 2012 and ruled that all documents were in evidence and made a part of the record. Despite this, Plaintiffs claim that they have suffered extreme prejudice under the rules of evidence. Plaintiffs' argument is without merit as all documents attached as exhibits or referenced in Defendant's Motion to Reconsider were a part of the record.

3. Plaintiffs' reason 3 misses the point. It is undisputed that the Defendant's Board did not ask any expert to break out the damages attributable to the alleged failure of a Co-Owner to maintain their windows and sliding glass doors. However, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Alberta Major v. City of Hartsville, 2012 WL 2016429 (S.C.App.). Defendant's Motion to Reconsider goes into extensive detail on the issue of favorable inferences to be drawn from the facts at issue in this case. It should also be noted that Plaintiffs only cite to a portion of

deposition transcripts and fail to include those portions which are favorable to the Defendant.

In reason number three (3), Plaintiffs also claim that "the Defendant's board had to discern what damages were attributed to the leaks around the windows and sliding glass doors that may have gotten into the common elements." That determination is not required by the Master Deed. Section 5.6 of the Master Deed provides as follows:

> "Operation and Maintenance. Each Co-owner (except Co-owners of Time Sharing Units) shall, at his own expense, keep the Limited Common Elements to which his Unit has exclusive use neat and clean. The Limited Common Elements to which any Time Sharing Unit has the exclusive use shall be kept clean and neat by the association or management entity created pursuant to the establishment of a Vacation Time Sharing Plan. Except as specifically provided herein, the maintenance, repair, replacement, management, operation and use of the Common Elements and Limited Common Elements shall be the responsibility of the Board. The expenses incurred for such purpose shall be assessed as Common Expenses except in the case of the negligence of a Co-owner or his tenants or guests, and in the event of such negligence, such expenses or a portion thereof may be assessed as an individual assessment pursuant to the terms of Article XII hereof."

Pursuant to Section 5.6, a unit owner in Building A and Building B could only be charged for their negligence. Leaks around the windows and sliding glass doors do not establish negligence. This is the Defendant's point; there was no conclusive evidence to support a charge of negligence against a Co-Owner. Therefore, the Board should be afforded the protection of the Business Judgment Rule as this conclusion was reached by the Board after the buildings were thoroughly inspected and the source of the problems and potential repairs to the buildings were relayed to the Board. There is no requirement that any specific question be asked; the Board was only required to become reasonably informed to make such a decision. Further, it would be unduly prejudicial to ask an expert to parse out damages related to the "negligence" of a Unit

Owner. A question phrased in such a manner presumes negligence. Instead, it was an entirely appropriate exercise of business judgment to ask the experts to render opinions regarding the source of the problems with the building and possible remediation. Armed with the answers to these questions, a decision regarding any potential negligence claim can be made without the prejudicial impact of framing a question which assumes negligence from the outset. That is exactly what the Defendant's Board did and why the Court's Order granting Plaintiffs' Motion for Partial Summary Judgment should be vacated.

In summary, there are two inferences to be drawn from the facts: 1) the Defendant's Board acted within its authority, with full regard to its duties, without corrupt motives and in good faith and therefore is protected by the Business Judgment Rule; or 2) the Defendant's Board acted outside its authority, without regard to its duties, with corrupt motives and in bad faith and thus is not afforded the protection of the Business Judgment Rule. Viewing the facts and the inferences to be drawn therefrom in the light most favorable to the Defendant, the Board's actions were reasonable and should be afforded protection under the Business Judgment Rule.

4. Plaintiffs' allege in their fourth reason that it was undisputed that there were leaks "into the units' interior, also, into and around the common elements of Buildings A and B." Plaintiffs further assert that Defendant's Board had knowledge of this water intrusion problem. Plaintiffs overstate the facts at issue in this case. Defendant proffered evidence to support the fact that not all windows and sliding glass doors were leaking. Defendant further disputes the extent of the knowledge Plaintiffs attempt to impart on its Board. Granted, it is undisputed that there were serious water intrusion problems with the buildings and some of the windows and sliding glass doors

were leaking. However, as set forth in Defendant's Motion to Reconsider, there are favorable inferences to be drawn from these facts. Simply because a leak manifested itself at the windows and doors does not mean that such leak was a result of the failure of a Unit Owner to maintain his/her/its windows and doors. The record before the Court contains factual information to support that maintenance and repair of the windows and doors was performed. A jury could find that the Board reasonably believed the damage to the A and B Buildings was not a result of any failure on the part of a Unit Owner to maintain his, her or its unit, but rather the result of systemic building problems and conditions related to the age of the buildings, the oceanfront environment, and original construction conditions.

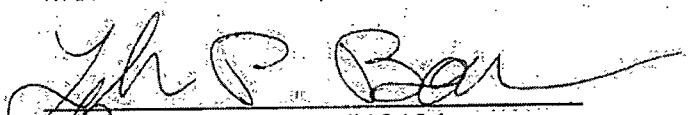
5. Plaintiffs' Fifth reason (also numbered 4) claims that the Court's "finding and conclusion" granting the Plaintiffs' Motion for Partial Summary Judgment is controlled by the transcribed record of the hearing on May 21, 2012. Defendant does not dispute that the record transcribed from both May 21, 2012 and May 22, 2012 are relevant. However, Plaintiffs again miss the point of Defendant's Motion to Reconsider. As previously stated, Defendant's Motion requests the Court reconsider and vacate its prior Order granting Plaintiffs' Motion for Partial Summary Judgment. Alternatively, the Court should alter or amend its Order to specifically clarify its ruling on the questions, issues, arguments and grounds presented by Defendant.

6. Plaintiffs sixth reason claims Defendant's motion was not timely filed. This argument is not supported under Rule 59(e), SCRCP. Rule 59(e) provides as follows:

> Motion to Alter or Amend a Judgment. "A Motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

The only written order received to date is this court's Form 4 Order executed by the Honorable Larry B. Hyman on May 23, 2012 and received by Defendant via regular mail on May 29, 2012. Defendant filed and served its Motion to Reconsider on June 6, 2012, less than 10 days from the date the written order was received. Thus, there is no foundation for Plaintiffs' argument and Defendant met the time constraints provided under Rule 59(e) SCRCP. Plaintiffs' claims that Defendant should have filed its Motion after receiving "adequate" notice from the Court's oral ruling on May 22, 2012 is not supported under the SCRCP. Rule 59(e), SCRCP is clear as to the timeliness requirement and the Defendant has complied with all requirements as prescribed by the Rules.

MCNAIR LAW FIRM, P.A.



David J. Mills, SC Bar #10194
Leigh P. Boan, SC Bar #68300
11019 Ocean Highway
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 235-4100 – Telephone
(843) 235-4101 – Facsimile
dmills@mcnair.net
lboan@mcnair.net

Attorneys for Defendant

July 12 2012

ORIGINAL

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GEORGETOWN	)	**2009-CP-22-01655**
RICHARD A. FISHER, PLATTE B. MORING, JR., TRUSTEE OF THE PLATTE B. MORING, JR. LIVING TRUST DATED MARCH 13, 2001; MARIANNE KOCHANSKI, AND JIM H. MARKLEY, III, INDIVIDUALLY, AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF ALL PERSONS SIMILARLY SITUATED WHO OWNED UNITS IN BUILDING C AND D OF THE SHIPYARD VILLAGE HORIZONTAL PROPERTY REGIME; ET AL.,	)	
Plaintiffs,	)	**Transcript of Record** (Motion Hearing)
vs.	)	
SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.	)	December 9, 2011
Defendant.	)	

B E F O R E:

Honorable Larry B. Hyman
Georgetown County Courthouse
Georgetown, South Carolina

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

Howell Vaught Bellamy, III, Esquire
Attorney for Plaintiffs

David J. Mills, Esquire
Leigh Powers Boan, Esquire
George H. Kafalos, Esquire
Andrew Steven Halio, Esquire
Attorney for Defendant

Kay H. Richardson, CVR
Circuit Court Reporter

INDEX

	Pg.
Motions	3
Ruling of the Court	42
Certificate of Court Reporter	45

EXHIBITS

No.		ID	EV
P1	Amendment to the Master Deed of Shipyard Village Horizontal Property Regime	11	44
P2	Correction and Clarification of Amendment to Master Deed	11	44
D1	Notebook of Defendant's Exhibits	15	44

THE COURT: Okay. Shipwatch -- looks like we have a number of motions; any of them been resolved?

MR. BELLAMY: Your Honor, we have resolved the one, our last motion regarding requesting injunctive relief from the Court. We're gonna withdraw that motion at this time.

THE COURT: Okay. Temporary injunction, okay; that'd be Number 11, been withdrawn. Okay.

MR. BELLAMY: Your Honor, we've got -- at this time we've got a motion -- I think we've kind of got it worked out. We've got a motion to amend. I've sent a copy of the amended -- Third Amended Complaint to Mr. Mills, Leigh Boan, and also sent it to George Kefalos. I haven't really had -- Mr. Kefalos has looked at it and I think one of the purposes that we amended that we added a cause of action of negligent misrepresentation for purposes of trying to, you know, get more coverage involved in the matter. I've also showed it David -- again, David Mills and Leigh Boan but I don't think they have any specific objections to any of the causes of action for negligent misrepresentation or any other additions that I made to it but we would ask the Court to go ahead and approve that under Rule 15 because as the Court has always said it's very liberal about making amendments and ---

THE COURT: Tell me about that. Do you have any objections to the amendment?

MR. MILLS: If we may, Your Honor, David Mills and Leigh

Boan.

THE COURT: Yes, of course.

MR. MILLS: If I may introduce, Your Honor, Mr. Halio from Charleston and has recently been brought in by additional carriers.

THE COURT: And Ms. Boan, how have you been? No one has asked you but ---

MS. BOAN: Well, thank you, I appreciate that; good.

THE COURT: Okay, good. I'm glad you're getting along.

MS. BOAN: I'm still with us, still in...

MR. MILLS: Mr. Halio is with us this morning, as is Mr. Kafalos, his coverage ---

THE COURT: Has that coverage issue been resolved?

MR. MILLS: Good news on that front, Your Honor, we are slated to appear -- convene a second mediation with Judge Cooper on January 23rd and 24th.

THE COURT: Wonderful.

MR. MILLS: Yes, sir. So, we have pulled that together. Additionally, not only are all parties and all counsel available, Judge Cooper is available and we've had additional carriers appear. They're all represented and they will be present for the mediation.

THE COURT: Wonderful.

MR. MILLS: Yes, sir. Commercial General Liability Carrier, a excess umbrella carrier and Mr. Kafalos is still

working on even additional coverage to that, so...

THE COURT: Mr. Kefalos, it's good to see you.

MR. KEFALOS: Nice to see you, Judge; how are you?

THE COURT: I'm wonderful. I've heard a lot about you. I'm glad to see your face here now.

MR. BELLAMY: Making this thing work -- bringing everything together, Your Honor.

THE COURT: Okay, wonderful, wonderful; that's what we've been pushing for. Okay. So, the -- I take it there's no objection to the amendment?

MR. MILLS: There's no consent to the amendment, Your Honor. We understand ---

THE COURT: Okay, all right.

MR. MILLS: We've just gotten ---

THE COURT: I'm going to allow him to amend then if you don't have anything specific you want to put on this record. Okay.

MR. BELLAMY: Your Honor, the next issue is regarding amending the scheduling order. Ms. Boan sent me a proposed amended scheduling order, we signed off and consented to it and sent it to Your Honor. My understanding is that now she's got an objection to a trial date sometime on or about May 28th if we're not able to resolve it in mediation. What I would ask to do if you would schedule a day certain trial date. Through my communications with David and Leigh, they indicate

that it may take -- our case would probably take less than a week but they indicated it may take a week and a half to present both sides and it would help if we could get a day certain and it may obviously force resolution of the case knowing there's a day certain trial date.

THE COURT: Well, I -- and I would like to accommodate you in that regard and probably will accommodate you in that regard; however, it will be difficult for me to do so now because I'm in the process of having my schedule for the next six months modified. I know that you may have heard me say that I have a capital case for the last of January. That's -- I'm actually scheduled for Common Pleas those weeks. Court Administration is moving things around right now so that I will be General Sessions those weeks. I anticipate that there may be some other changes, some General Sessions weeks and some adding of some Commons Pleas weeks. I'd like to address that after mediation. Okay?

MR. BELLAMY: Your Honor, that'll be fine. Is it -- would it be possible just to go ahead and ask you for a proposed scheduling order. I think the way that Leigh worded it on sometime May 28 or after that specific date.

MS. BOAN: Your Honor, I've submitted just a -- my problem is I have a 2008 case that has been slated for trial May 21st and May 28th in front of Judge Cooper. It's an arbitration, Judge Cooper, Judge Breeden and Mike -- so I'd

just ask after May 28th.

MR. BELLAMY: That would be fine, Your Honor.

THE COURT: Okay. Well, that will be fine. We can -- I can still -- it's been designated as complex and I -- it's assigned to me. So I have it and I can adjust the trial date after that. Okay?

MR. BELLAMY: Your Honor, we appreciate the Court's consideration because our -- we've got fifty clients that keep calling each day saying have we got a day certain. Having something at least, you know, documented somewhere about would help us out.

THE COURT: Just tell them to be patient. We're gonna try to get them as soon as possible.

MR. BELLAMY: Okay.

THE COURT: All right. And so that would be -- that would take care of Number 9, the amendment of the scheduling order, right?

MR. BELLAMY: Yes, sir. Your Honor, the next motion that we want to address is a motion for partial summary judgment and then following that, Your Honor, we've got a motion to compel that hopefully won't be too lengthy but we've got a -- it's very specific about what we're asking for and I think Your Honor -- hopefully, there are some things that they have objected to that Your Honor is gonna have to resolve either ---

THE COURT: You want a motion for -- to -- for summary judgment before a motion to compel?

MR. BELLAMY: (Indicates affirmatively.)

THE COURT: Okay. All right. All right.

You want to be heard on your motion for summary judgment now. Okay.

MR. BELLAMY: Partial summary judgment, yes, sir, Your Honor.

THE COURT: All right.

MR. BELLAMY: Your Honor, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Plaintiffs have filed a motion for partial summary judgment asserting that the third amendment to the Shipyard Village Horizontal Property Regime, which is known as the window amendment and the correction, clarification and correction amendment which is also known as the sliding glass door amendment are invalid and unenforceable as a matter of law because both amendments were improperly adopted by the Defendant.

THE COURT: You're talking about the defenses, their amended answers -- you lost me right there.

MR. BELLAMY: Okay.

THE COURT: What I understand is we just agreed to an amendment of the complaint, right?

MR. BELLAMY: Correct.

THE COURT: And you're moving for summary judgment on the

amendment ---

MR. BELLAMY: No, no, no, no. Your Honor, there is what we call -- let me explain something. There is what they call the third amendment which was allegedly adopted by the Board and it was filed ---

THE COURT: Oh, amendment of the bylaws.

MR. BELLAMY: Well, the master deed. We've got a -- what they did was ---

THE COURT: Master deed, whatever you want to call them, articles.

MR. BELLAMY: It took windows -- it took the windows, the window glasses, the screens, the frames and the casings and the part that -- the part of the window, it formed a part of the -- as far as the unit what they did was ---

THE COURT: I thought that there was some agreement as to that already, that that had been unamended.

MR. MILLS: What we've discussed with the Court in chambers is that it's of no practical affect because in assessing this particular project, the Board of Directors actually charged the A and B members, unit owners, for the windows and doors as if the amendment had never happened, so kind of sort of a moot point.

MR. BELLAMY: That would -- I'd appreciate that if they would concede that because what happens is on the July 8 special meeting minutes where the Board acknowledges that

they're going to directly assess the A and B unit owners for the hard costs, the hard costs and expenses for the -- replacing the windows and the sliding glass doors. However, they say they reserved the right to come back and assess as a common expense or the pro rata share of the C and D owners depending upon how the, you know, as far as litigation or how the Court rules on this particular matter.

THE COURT: What's your position?

MR. MILLS: Yes, sir. The problem is not with the motion as it pertains to the amendment, it's the boldly forward that the Plaintiffs are making that and because of this, the treatment of this amendment, you have to go back, Board, and charge the A and B members not only for the windows and doors as you've done, you must also charge them a pro rata share of the soft costs where they ---

THE COURT: And that's a big issue here is the soft costs.

MR. MILLS: It's huge, yes, sir.

MR. BELLAMY: Your Honor, we understand that's gonna be a factual issue. We're not moving forward on that. We're trying to simplify the legal issue. What we're basically wanting the Court to make a determination is that if the window amendment, the third amendment also known as the window amendment is invalid as a matter of law because it's in direct violation of the provisions of the master deed and bylaws.

Further the correction of the amendment, if Your Honor have looked and I've marked as Exhibits One and Two, Exhibit One is the third amendment, window amendment and the Exhibit Two, as far as for our motion for partial summary judgment is the correction amendment.

THE COURT: I have it.

PLAINTIFFS' EXHIBIT NUMBERS ONE AND TWO IDENTIFIED FOR THE RECORD.

MR. BELLAMY: What we're moving is that the Court and without very specific, there's no factual issues in dispute. What we're saying is that the -- both amendments violate, violate Section 14 of the master deed. For example, under the correction amendment, let me deal with that first, the correction amendment was basically -- it was never voted on and prior -- and then -- let me back up for a second. Okay. Let me put it this way. Your Honor, what happens is is that in the -- going back to in April of 2006, there was a -- what they call the window amendment was submitted to -- at an annual meeting submitted to the membership to vote on. What they were doing is they were taking the windows and sliding glass doors, the windows, making them limited common elements which would've been the responsibility of the Association instead of the individual unit owner. At that particular meeting -- it was an annual meeting, they had the vote. The vote was less than sixty-six percent. If -- in order to amend

the master deed, you have to have an affirmative vote of the co-owners holding two-thirds or more total interest in the common elements, that particular vote did not -- you know, was not greater than the sixty-percent required. There was a second revote -- and what's interesting about the second revote, a meeting was not held. What they did was they sent out written proxies and they returned them and came back and allegedly that the vote passed by a required sixty-six percent, two-thirds interest.

THE COURT: And that was the Correction and Clarification Amendment.

MR. BELLAMY: Okay. All right. Then what happens is -- that's just the third amendment. Then at some point in time, there is nothing in the meeting minutes, there's nothing about the -- as far as the correction and clarification amendment that we're aware of and what happens is is that in the window amendment, they didn't include the specific language regarding the sliding glass doors. So they come back and amend the window amendment on November 14, 2007. And let me back up for a second. The window amendment was filed on, I think, September 26th, 2006 and then what happens is the Board subsequently files the correction and clarification amendment known as the sliding glass door amendment. That was filed on November 14th of 2007. What's interesting about that is prior to filing it no vote occurred on the correction and

clarification amendment. It was never submitted to the membership to vote on. And what's interesting about the correction and clarification amendment, it's in direct -- directly contradicts the window amendment. Let me explain why. When they passed the window amendment, they made -- if I may walk over here -- for example, Your Honor, like this is -- for example purposes what they did is they took the casings, the window glasses, the frames and the screens ---

THE COURT: And they didn't -- they didn't consider adjoining damage.

MR. BELLAMY: Right, right. They -- what they did is they made that all part of -- they made it a limited common element. They made it the responsibility of the Association. So right now if you go back and look at the specific language -- and let me read it to you. I'm referring to Plaintiffs' Exhibit Number One, it's -- let me right here, it says -- let me start right there. Your Honor, it's about the end of the page, it says, Now, therefore, know all men by these presents that the master deed of Shipyard Village Horizontal Property Regime is amended as follows: And it say the following language is -- what they did is hereby deleted what is the legal language of what the definition of unit is. If I could for second right here -- what they did is they made the limited common elements. The limited common elements is -- shall include the window glasses, screens, the frames and the

casings which are a part of the window openings.

Now, in the correction and clarification amendment, which was never submitted to a vote of membership, what they did is they filed it and reported it, nobody voted on it. But the interesting -- when we filed a lawsuit in January of 2009 challenging the window amendment, there was a second revote on the clarification and correction amendment which did not pass.

THE COURT: Let me just stop you right there.

MR. BELLAMY: Okay.

THE COURT: Mr. Mills?

MR. MILLS: Yes, sir.

THE COURT: Is there a material issue of fact as to the validity of these two amendments?

MR. MILLS: There is, Your Honor.

THE COURT: Okay. And explain it to me.

MR. MILLS: Yes, sir. I'll explain my story with this, this is the second time it's before this court. What you have in front of you on the bench are materials that were submitted to Judge Culbertson thoroughly argued in brief and that's what's in the notebook in front of you. And there was a substantial difference of interpretation about the master deed we're talking about and the bylaws. The Plaintiffs' position is you got to have a meeting if you're gonna have a vote. That's in the bylaws. We're talking about amending the master deed. The master deed itself has no such requirement. It

requires a super majority -- you've got have sixty-six percent. We held a vote and we got sixty-three to sixty-five. It fell a little bit short. Did a mailer and said folks, let's try this again; overwhelmingly voted in favor. That's the difference though -- to answer the Court's question, there is the disparity in the positions. The Plaintiffs view the bylaws as governing the bylaws and master deed; our position is you don't have to have ---

DEFENDANT'S EXHIBIT NUMBER ONE
IDENTIFIED FOR THE RECORD.

THE COURT: All right. Mr. Bellamy, I mean, that's the issue whether there's a material issue of fact. Now, they tell me that there is. So how do I grant summary judgment then?

MR. BELLAMY: Your Honor, there's not a material issue of fact. It's an issue of law and Your Honor if you would give me a second and let me refer to something...

THE COURT: And did Judge Culbertson already rule on this?

MR. MILLS: He denied summary judgment, Your Honor.

In fact ---

THE COURT: On this same one?

MR. MILLS: On the exact same issue, he denied cross motions -- both sides moved and he denied them both and said there's an issue of fact. And another issue we raised was

laches and that's a -- that's what we believe actually creates the more sticky issue of fact for the Court in this case that's gonna be tried anyway. We have an affidavit that tells the Court that sixteen of the very C and D members, who are suing now to invalidate the amendment, themselves got windows and doors in their C and D units paid for by the Association pursuant to the amendment. That's just not fair and enough to create an issue of fact on that point besides the different interpretation of the master deed.

MR. BELLAMY: Your Honor, there is not an issue of fact. In ---

THE COURT: But talk to me about Judge Culbertson.

MR. BELLAMY: Okay. Your Honor, what we have -- Kim Campbell who was representing Shipyard Village Counsel of Co-Owners in the -- what we call the window amendment lawsuit which was filed in January of 2009, she filed a motion for summary judgment for the Court to declare that the window amendment is valid as a matter of law. Okay? We filed a motion in opposition of her motion for summary judgment for the Court to find that the window amendment is invalid as a matter of law. The correction and clarification amendment was not argued at that particular hearing. Your Honor has the right to -- and this is kind of a hybrid motion -- it is a motion to reconsider, our motion that the window amendment is invalid as a matter of law ---

THE COURT: Wouldn't that have to be before Judge Culbertson?

MR. BELLAMY: No.

THE COURT: The motion to reconsider?

MR. BELLAMY: No, no, it doesn't, Your Honor. And I've got a case right on point where two different judges, an earlier judge ruled denying the motion for summary judgment and it's -- and a subsequent judge heard it on a motion to reconsider pursuant to Rule 54 of the South Carolina Rules of Civil Procedures, a denial of a motion for partial summary judgment is interlocutory, it's not appealable. Your Honor has the right to revisit or reconsider it because, Your Honor, if we go to trial you're going to have to rule as a matter of law at the directed verdict stage whether the window amendment is valid or invalid and whether the clarification and correction amendment is valid or invalid. And that there's not -- and Your Honor, I -- as an Officer of the Court, I'm telling you there's not a material fact in issue, there's not material fact in dispute and I'll explain why. The -- if you go to -- and I'm gonna read this right here. This is Section 7.4 and it says Bylaws and Regulations. It says counsel and administration regime shall be governed the bylaws attached to the master deed in Exhibit E, hereby incorporated and referenced. So, the master deed provides that the Shipyard Village Horizontal Property Regime is governed by the bylaws.

All right. Your Honor, if you're going to amend the master deed, you can do it one or two ways. You can do it at a vote, you have to have like, for example, 1.3 and if Your Honor -- if you want me to bring up a copy to you.

THE COURT: That's all right. Go ahead.

MR. BELLAMY: All right. You can do it one or two ways. First -- in the bylaws is 1.3, all votes, any votes, this is what I'm saying, votes can only -- 1.3 provides that votes can be cast only at member meetings convened in accordance with the bylaws. The second vote on the window amendment did not -- did not -- a meeting did not occur. They've acknowledged that in our request to admit, they acknowledged of it in their affidavits, Vicki Gallagher acknowledged in her affidavit that a meeting was not held. If a meeting is not held the only way that you can validate the amendment is -- the second process was under 1.5 it provides that any action which -- any action which a vote -- any action of the co-owners was a vote made for -- may also take place by a written consent to such actions signed by all the co-owners. So, translation is, if there's not a meeting and they do written consent without a meeting, it has to be unanimous under 1.5. And what we're arguing is when the second revote occurred, they sent out -- they sent out written proxies, I think was on or about April 24th, 2006 and they mailed them out to the co-owners, record co-owners and they sent them back and allegedly they had over

the two-thirds majority issue required under the Section 4.1 of the master deed. We've asked for the proxies at this point in time and Leigh tells me that they no longer exist or they cannot locate them. The point being is that, Your Honor, the only two ways pursuant to the master -- pursuant to the bylaws, and the master deed basically the bylaws govern, govern the administration of the regime property. The only way that you can amend the master deed or the bylaws is by one of -- having a meeting and having the co-owners vote, get an affirmatively vote of the co-owners with two-thirds -- holding two-thirds or more of a total interest in the common elements or in the alternative if you have a vote without a meeting it has to be unanimous consent. And 1.5 clearly under the -- 1.3 clearly and unambiguously provides that and 1.5 clearly and unambiguously provides that. That's the law and there's no issue of fact in the case.

THE COURT: Let me ask Mr. Mills.

MR. MILLS: Yes, sir.

THE COURT: How do you -- what's your position on how the master deed could be amended? If it's not pursuant to the bylaws, how can it be amended?

MR. MILLS: If I may, from Section 14.1 of the master deed, Your Honor, this master deed and all exhibits incorporated by reference herein including the bylaws may be amended from time to time by resolution adopted by the

affirmative vote of the co-owners at two-thirds of the total interest in the common elements subject to the following conditions: No amendment by the co-owners shall be in violation of the Act. And so that's how -- that's how you amend it by affirmative vote, two-thirds ---

THE COURT: How about that, Mr. Bellamy? I mean, he said that in the master deed it says this is how you amend this.

MR. BELLAMY: Right, Your Honor, you know what I'm saying is when you -- from a standpoint of this -- the master deed is a contract between the Association and the individual unit owners and you strictly construe the more specific controls. And if you go and look at the bylaws 1.3 and look at 1.5 of the bylaws, they're more restricted and you have to ---

THE COURT: But do they specifically refer to the master deed?

MR. BELLAMY: Your Honor, what's that?

THE COURT: Do the bylaws specific ---

MR. BELLAMY: Yes, yes, sir.

THE COURT: Does it specifically say this is how you do the master deed?

MR. BELLAMY: Well, as I said, at 7.4, the master deed says -- and this is 7.4 of the master deed, I'm not talking about the bylaws right now, specifically provides that the administration of the regime property is governed by the bylaws. So, right there, and Your Honor, more importantly, if

you go back and look at the South Carolina Horizontal Property Act under Section 27-31-150, it specifically provides that the Horizontal Property Regime such as Shipyard Village is governed by -- governed by the bylaws. And the bylaws specifically provide, if you're going to vote -- what I'm saying is, Your Honor, if they -- if a vote occurs at a meeting, then what the standard is, it's the two-thirds total interest, affirmative vote of co-owners holding two-thirds or more total interest in the common elements. However, if you're going to have a vote where there's no meeting, because the point is what's happening is if you don't have the meeting, there are certain protections that, you know, as far as, you know, qualifying and make sure the proxies comply with the -- you know, comply with the master deed and follow certain provisions and going through a certain litany of things that they do. The point I'm trying to make is, Your Honor, the bylaws are very specific, either one or two ways, you can have a meeting which requires two-thirds total interest of the -- in the common elements or in the alternative if it's done by written consent, it has to be unanimous. Now, there's -- there's nothing in the master deed that says -- and the point I want to make is, Mr. Mills did mention in the 14.1 of the master deed it says that if you do -- that an amendment shall not be violation of the master deed, I mean, shall not be in violation of the Act. My point,

Your Honor, is if, if they're not complying with provisions of the bylaws to amend the master deed, they are violating the South Carolina Horizontal Property Act. The South Carolina Horizontal Property Act specifically provides that when you administer the regime property is done through the bylaws and I've got -- Your Honor, I've got a couple of cases on point right here that I would like to hand up. Your Honor, I've highlighted this portion of the Ortega v. The Kingfisher case right there.

MS. BOAN: What case is was that?

MR. BELLAMY: That's Ortega v. Kingfisher and I'll hand you a copy of it in a second. Your Honor, this is ---

THE COURT: '94 case. This says the Horizontal Property Regimes are administered by the bylaws incorporated into the master deed or lease. Each co-owner must comply with the bylaws and with the administrative rules and regulations set forth in the master deed. So, must comply with the bylaws and with the administrative rules and regulations set forth in the master deed and would seem to me here there's some conflict.

MR. BELLAMY: Your Honor, the other thing I wanted is the case of Kneale v. Bonds, let me hand you this and let you get a look at that real quick.

THE COURT: And it says, in Kneale v. Bonds, however the South Carolina Court of Appeals says that the South Carolina Horizontal Properties Act provides that master deeds should be

strictly enforced. So, I mean, it's telling me there ---

MR. BELLAMY: It's strictly -- basically, you strictly interpret -- it's strictly construed when you ---

THE COURT: The master deed.

MR. MILLS: And that's where we part ways, Your Honor. There's a big difference between strictly interpret and strictly enforced because we've cited in 2009 when Judge Culbertson heard this case and denied summary judgment, he did so based on Ms. Campbell's submissions and her brief of the Baumann v. Long Cove case. It says, you don't have to perfect, you don't have to, you don't have to have strict technical compliance; you've got to act in good faith and that's basically our position. We want to leave this issue alive for trial, Judge, and let me tell you why. It matters because the Plaintiffs are not just contending, hey, we just want it stricken to make the record clear, no. They're claiming it was an ultra vires act which involves self-dealing, fraud, deceit, bad faith. That's the kind of issue we need to be able to fight back on trial. That's why I raised the issue of laches, waiver and estoppel.

THE COURT: How about that? How about laches and waivers, laches and waivers? I mean, doesn't that create issues of fact to have to be determined?

MR. BELLAMY: Your Honor, it would be the Plaintiffs' positions it does not create issue of fact, that the issue is

whether the amendment if valid or invalid. That's -- it's -- the point is -- it's a legal interpretation by the Court. Now as far as the -- and I've asked Mr. Mills and Leigh Boan to provide documentation of the alleged sixteen plaintiffs that have not been -- that had the windows replaced and or -- in the -- in the -- had their windows replaced and was paid by the Association because for example, Dick Fisher, one of our clients has indicated when the -- when he contacted the management and said, look, I need to have -- I got some problems with my windows and then because you have to go through a process if you're going to replace your windows, you have to go through protocol and procedure to get somebody like a general contractor has got to come in there and designate what type of windows and they've got to come up with a plan or a specification to install, to replace -- to remove and reinstall new windows and that he specifically, once the windows were replaced, he lives -- let me back up a second -- Mr. Fisher lives in Kentucky and he basically said he's got some problems with water infiltration issues with respect to his windows. He notified the Board. The Board comes in and replaces his windows and he -- he comes back and says wait a minute, you need to invoice me from that and the management company refuses to invoice him. Our position is if there are people, we represent fifty people, Your Honor, and it's not a class action lawsuit, it's basically, there are fifty

individual people and our position is that if there's an issue regarding those sixteen people, there may be an estoppel issue with respect to the alleged sixteen people and they haven't provided the information of which ones allegedly had their windows replaced and the Association paid for it or didn't pay for it. We've asked them but they haven't provided it but there would be an -- there may be an estoppel issue with respect to those sixteen people but it wouldn't be in respect to the remaining Plaintiffs. Our position is, clearly, that the issue before your court, what we're trying to do is narrow the issue, is the window amendment valid or invalid. And Your Honor, pursuant to the strictly construing 1.3 and 1.5 of the bylaws, it's inexplicable that the window amendment is invalid. And the master deed specifically provides that -- this master deed specifically provides that the regime property is governed by the bylaws, so that's clear. And more importantly, again, the Horizontal Property Act provides under 27-31-150 that the regime, the horizontal property regime is governed by the bylaws. So, you go to the bylaws and it specifically provides and, Your Honor, if you've got and I -- if you're doing contract construction, this is basic Hornbook Law, if you've got two provisions in a contract and let's say the master deed is a contract, the Board specific controls over the general, that's basic in -- and Mr. Mills knows that. Mr. Mills graduated from law school probably summa cum laude,

excellent scholar, brilliant attorney, he knows that. So, if you look at it from the ---

THE COURT: Congratulations, Mr. Mills.

MR. MILLS: I object and move to strike those last comments, Judge.

MR. BELLAMY: But, Your Honor, if there is a conflict, which we allege there is not, the more specific provision 1.5, 1.3 would control over -- it would be controlling. And more importantly, getting back to Section ---

THE COURT: But isn't the provision in the master deed more specific? Doesn't it identify an amendment of the master deed where it's in the bylaws it does not specifically state that this is how we amend the master deed?

MR. BELLAMY: Let me back up a second. If you go back to Section 14 of the master deed provides, the master deed may be amended from time to time by resolution adopted by the affirmative vote of the co-owners holding two-thirds or more of the total interest in the common elements subject to the following conditions: That the amendment shall not violate the Horizontal Property Act. Our position is failing to file the 1.3 and 1.5 of the bylaws they violate the Horizontal Property Act. That would be -- that's one of our arguments because clearly, Your Honor, the master deed provides -- this master deeds provides, it clearly provides unequivocally -- clearly provides that the Horizontal -- Shipyard Village

Horizontal Property Regime is governed by the bylaws. And you go to the bylaws, and it says if you're going to vote, if you're going to vote to amend on a certain act -- whether it be to amend, to amend, you know, the master deed or vote on some act to elect a director or an officer, this is the procedure that you have to use. And, Your Honor, it -- and also for the Court's edification is the Board, the Board, there's other evidence that the Board knew they didn't comply with bylaws and specifically they complied with the master deed. For example, once we filed the lawsuit in 2009, and Judge Culbertson heard our motion or prior to Judge Culbertson hearing our motion, there was a third vote on the window amendment and, guess what, it failed to pass.

THE COURT: Well, it's -- is the amendment -- what about that, Mr. Mills? I mean that's a mysterious thing to me.

MR. MILLS: Yes, sir.

THE COURT: Why would they vote again and if it didn't pass the second, the third time, third time, where does that leave the amendment?

MR. BELLAMY: Right and that's another issue. If -- because they can't have their cake and eat it too, Your Honor. Well, if it passes then it's enforceable but if it fails, oh, no, it's of no force and effect.

MR. MILLS: To answer your question, it leaves it -- it's still there, it still exists. We submitted an affidavit from

our board member who voted on it. Her name is Doris Bray and she tells you in there it had nothing to do with the courts or pending lawsuits. It was -- let's not wait, let's see what --

THE COURT: Sort of a ratification vote

MR. MILLS: Let's see what the people say. Let's see what they say about it. Now, in the meantime, we're going to do this under our business judgment, we're gonna assess the way we think we should assess irrespective of the validity or invalidity of the amendment. So, that's where we are. We do think there is a substantial disparity and arguable positions on the difference between the language in the master deed and the bylaws. The master deed, one would think, when you're talking about amending the master deed and it has its own specific provision on amendments, Section 14.1 I read you, it would say, you gotta have a meeting; it doesn't, it doesn't, that's in a different document. But that's our position, Your Honor.

MR. BELLAMY: You know, the other thing is is that the other evidence that the Board -- acknowledgment that the window amendment is invalid is when they direct assessed the A and B unit owners for the hard costs of the windows and sliding glass doors. However, they preserved the right to come back if -- how it all shakes out, depending on how Your Honor rules or if it goes to trial, you come back and assess

the C and D unit owners. For example, if they came back and for whatever reason that -- if Your Honor ruled against us or if we went to trial and the jury did not find in our favor, they would have right to come back and assess the three-bedroom 8,000 and the four-bedroom 9,000. They haven't given up that right. And the point of -- Your Honor, another thing I want to add is not to waste the Court's time but if you look at the window amendment, it's the third, fourth paragraph going down, it says after proper and timely notice to the association members, a special meeting was held on April 15th, 2006 for the purpose of voting on this amendment to the master deed. And then it goes on to say at that special meeting, this amendment was adopted by the affirmative vote of the co-owners and two-thirds of the total interest of the common elements. That's a falsehood; that's totally incorrect. It -- the first vote occurred at April 15 and the window amendment did not pass. So, the question I've got is if you look at that language, that language is totally incorrect and you've got the President of the Board acknowledging it and you've got Vicki Gallagher also notarizing and acknowledging and attesting that's a true statement of fact. That's not a scrivener's error. And which -- which causes our clients then to basically sit there and say well how could they -- because the first vote occurred on April 15th, 2006, it failed. The second vote was by written proxy. And the point is why isn't

that in there that it passed by written proxy on the second vote. My point is then you have the correction amendment which was filed November 14th, 2007. It's supposed to correct the window amendment and it never goes back and says, oops, we made a mistake, that language is incorrect, actually the vote took place on or about April 24th, 2006 when we sent out written proxies. And, you know, I hate to say this but, you know, are they trying to mislead somebody because, you know, the people who are buying the units have a right to rely upon that, it's constructive knowledge. Then we need to look at the correction and clarification amendment, they don't correct that, they don't -- they don't even deal with that. More importantly, they come back and say in the correction and clarification amendment which was not voted on and I would ask -- propose to David Mills and Leigh Boan how this is a valid amendment if it was not voted on. But more importantly -- but the correction amendment does, it comes back and says, well, what we -- basically, what we assumed responsibility for as far as the -- as far as basically the screens, window screens, we now taketh away, saying we're no longer responsible for the window screens, you are as the individual unit owner. If -- Your Honor, if that's how due process -- due process violation, I don't know what is because our clients never knew this document even existed much less they never had the opportunity to vote on it. And what is more disturbing is is

under the window amendment, there's no mention about sliding glass doors, there's nothing in there about that. However, in the correction and clarification amendment, it mentions sliding glass doors which our clients never voted on.

THE COURT: It might've been a clarification.

MR. BELLAMY: So -- right. But it's not a -- the point being is it's something that should've been submitted to a vote under Section 14 of the master deed and it wasn't submitted to a vote. And Your Honor, let me -- hold a second, let me correct that -- prior to being filed in the RMC Office on November 14th, 2007, it was not submitted to a vote. However, after we filed the lawsuit on March 21st, 2009, it was submitted to a vote and it failed to pass. On the -- and let me make a point, Your Honor, let me -- if I can get some water real quick.

THE COURT: While he's doing that, Mr. Mills ---

MR. MILLS: Yes, sir.

THE COURT: Tell me what your position is on my entertaining what is apparently a motion to reconsider Judge Culbertson's order.

MR. MILLS: In spite of my purported academic reputation, I ---

THE COURT: I mean, you are the expert; let me hear from you.

MR. MILLS: I may be far wrong. I have always believed

that that's tantamount to one circuit court judge overruling another circuit court judge and that was the position we intend to espouse today that we're ---

THE COURT: He says that there is a -- some case law that says that I can do that.

MS. BOAN: I don't have it right in front of me, but my understanding was that it --- if there is the right to do it it would be a discretionary right to do it.

THE COURT: Let me see that, Mr. ---

MR. BELLAMY: Your Honor, I've got a case right on point, this is the case of Brown v. Pearson, the cite is 326 South Carolina 409 and the facts are almost identical.

THE COURT: Thank you. I think the key here is in Section 3 where it says here, Judge McKellar asked if there had been additional discovery since Judge Simons' order that would allow us to get to the bottom of this question. Respondent stated there had been and appellants did not indicate otherwise. Appellants acknowledged and a motion filed with the Court in connection with the defendants' motion for summary judgment that substantial discovery has been conducted since the time -- that time by the defendants. We therefore find that Judge McKellar did not abuse his discretion by considering the renewed motion. And I think what they're talking about there is if there is a situation where for lack of a better of word, there is later discovered

evidence, later discovered material that would cast the, the issue in a different light. In this case, I mean, aren't we talking about a situation where it is what it is. It's exactly as it was when it went before Judge Culbertson.

MR. BELLAMY: With one exception, Your Honor, one exception, we did not argue about the clarification amendment. The sole motion for partial summary judgment dealt solely with the window amendment. So ---

THE COURT: But wasn't it there?

MR. BELLAMY: What's that, Your Honor?

THE COURT: But wasn't the clarification amendment there?

MR. BELLAMY: That was not argued.

THE COURT: But was it there? I mean, this case, the case you provide for me ---

MR. BELLAMY: Right.

THE COURT: --- says that it is discretionary, first of all, and secondly, in this Brown case, they talk about additional discovery in matters that have come up -- in fact, it says substantial discovery.

MR. BELLAMY: We've had substantial discovery. I mean, Your Honor, we have over 2 ---

THE COURT: But has there been any change, any change in the posture of these two amendments or the amendment and the clarification amendment ---

MR. MILLS: They were recorded just as they were when

this was argued before Judge Culbertson. So ---

THE COURT: I mean, aren't they -- aren't they exactly the same issues being argued here that were argued there?

MR. BELLAMY: Well, first, let me say with respect to the window amendment, yes; with respect to the clarification, it was not argued on April 19th -- April 19th, 2009 was not argued but more importantly other factual issues that have come to light through going through and getting over -- I would say greater than, you know, almost 200,000 pieces of paper, from all the documents we've gotten ---

THE COURT: But what, what, Mr. Bellamy, what has changed -- you're arguing that it is invalid on its face because -- or not on its face but because of the way it was passed, for lack of a better word, the way it was passed. Wasn't that all part of the argument that comes before Judge Culbertson, this idea of whether the master deed or the bylaws cover the amendment? I mean, wasn't all that before Judge Culbertson, wasn't the issue of laches and waiver, weren't those all issues that were ruled on by Judge Culbertson and is there anything come -- has anything come to light that would change the information we have today germane to those issues that Judge Culbertson didn't have before him?

MR. BELLAMY: Well, I can assure Your Honor as to respect to the window amendment but with the clarification ---

THE COURT: I mean, it is what it is.

MR. BELLAMY: But with respect to the clarification and correction amendment, that was not argued, Your Honor, and the point is ---

THE COURT: I understand.

MR. BELLAMY: --- we further learned that that was never voted on by the co-owners which would be a direct violation of 14.1.

THE COURT: Is that true, Mr. Mills, that the correction amendment was never even addressed by Judge Culbertson?

MR. BELLAMY: Your Honor, I ---

THE COURT: Ms. Boan ---

MS. BOAN: Your Honor, it was my understanding that the amendment in its entirety was addressed by Judge Culbertson and was before Judge Culbertson and whether they argued what they're now attempting to argue now is not what the case law seems to support its saying if there is new evidence that's been discovered that couldn't have been put before that Judge previously then it's within the Court's discretion to rehear the motion. What I'm hearing Plaintiffs' counsel say is, well, we just didn't argue it like that.

MR. BELLAMY: That's not true, Your Honor.

MS. BOAN: The amendment in its entirety was placed before Judge Culbertson was available at that time.

MR. BELLAMY: Your Honor, I was at the hearing, they were not at the hearing, okay. And Your Honor, as an officer of

the court, I'm saying that our motion for partial summary judgment that we argued before Judge Culbertson on October of 2009 dealt solely with the window amendment.

THE COURT: But was the -- the clarification was never ---

MR. BELLAMY: It was -- that was, Your Honor ---

THE COURT: It was never voted on, was it?

MR. BELLAMY: I was not aware of the -- I was not aware of the clarification amendment, okay.

THE COURT: Was that ever voted on by anyone, though?

MR. BELLAMY: Your Honor, our position, it was never voted on by anybody.

MS. BOAN: And, Your Honor, it was just that, a clarification. If you look at the meeting ---

THE COURT: Well, that's what I'm talking about. It was nothing or it is nothing more than the Board saying, well, let's clarify this -- we passed the amendment but here's a clarification of it. The amendment that they proposed to have enacted that should've ---

MR. BELLAMY: Your Honor, it was ---

THE COURT: --- come into effect was the window amendment, wasn't it?

MR. BELLAMY: Your Honor, let me explain something, the clarification amendment was never mentioned in the meeting minutes and it was never -- it was never voted on.

THE COURT: That's what I'm ---

MR. BELLAMY: And what Your Honor needs to understand is it directly -- the clarification amendment directly conflicts with the third amendment because under the third amendment it said window screens ---

THE COURT: Well, are you asking me to find as a matter of law that that has never been voted on and that is not an amendment?

MR. BELLAMY: Correct.

THE COURT: The clarification amendment?

MR. BELLAMY: Right. And Your Honor, if they want to submit to a revote ---

THE COURT: Isn't that -- isn't that -- isn't that reasonable, Mr. Mills, as to the clarification was never voted on and it is not an amendment in and of itself, it's a ---

MS. BOAN: Your Honor, actually, we would take the position that it is an amendment because the minutes of the meeting where the vote was first put forward specifically say that windows and doors were voted on as part of this amendment. What happened is when the actual document got filed, it did not have the sliding glass doors in it and that wasn't discovered until later and so subsequently ---

THE COURT: It's just an addendum, isn't it?

MS. BOAN: And so it doesn't require a new vote ---

MR. BELLAMY: Your Honor, it is not an addendum because

the language of the clarification amendment is almost directly -- it is -- there's a huge contrast about it.

THE COURT: Do you want me to rule ---

MR. BELLAMY: That it's invalid as a matter of law.

THE COURT: That it is not an amendment, a valid amendment in and of itself that it is an addendum to, to ---

MS. BOAN: I certainly ---

THE COURT: That it is nothing more than an addendum or a clarification of the windows unit, that it was not voted on, that it standing alone is not an amendment? I mean, I could do that.

MR. BELLAMY: Well, Your Honor, what I want is that it's not an amendment but it's also not an addendum because, let me tell you want it does. In the clarification amendment, it says -- this is what's important -- it says -- first, let me clarify something, the window amendment provides that screens, is that the window glasses, the frames, the casings and the screens ---

THE COURT: I understand what it does, I understand what it does, but what I'm saying, if I say that is not a separate amendment, it was never voted on under the requirements of the master deed, the act or the bylaws. Anything more than that, then is that not a factual question as to what it really is whether or not it's an explanation, it's an addendum to or whatever it was, if I say as a matter of law it standing alone

is not an amendment?

THE COURT: Your Honor, then I would ask you to question Mr. Mills and Leigh Boan and find out in the master deed and bylaws which allows them to do that. There's nothing that provides they can do an addendum like that. If you strictly construe ---

THE COURT: Isn't like the annotations that we see to the code?

MR. BELLAMY: But it's --

MS. BOAN: Or to a deed, Your Honor; you file a deed and if you have to have a correction, that's all that it is. It doesn't require a new vote and it's as Mr. Bellamy says, it doesn't speak to how you do that but I think the Board was well within their rights just to file a clarification and your ruling would cover it.

MR. BELLAMY: Your Honor, let me say one last thing. On March 21st, 2009, the Board submitted a clarification amendment to a revote ---

THE COURT: I understand that.

MR. BELLAMY: --- and it failed to pass.

THE COURT: And it didn't pass. So, tell me what is it now?

MR. BELLAMY: I think it is of no force and effect; it is invalid and so it's unenforceable as a matter of law as well as the window amendment. I understand Your Honor is reserving

judgment on that but clearly the clarification amendment is invalid as a matter of law because it was never voted on. But more importantly, it contradicts what was previously passed in the window amendment.

THE COURT: Let me tell you what I'm going to do. I going to first of all exercise my discretion and I don't think that it would be appropriate for me to revisit the window issue or the window amendment. I will find that the -- what is purported to be a clarification and amendment was never voted upon under the requirements of the master deed or the bylaws and standing alone is not a valid amendment. Okay? And I'm going to leave it alone there. As to what it is, I think that would be a matter of fact that is gonna have to be hashed out at trial. Whether or not it's just a FYI that the Board put out or whether or not the Board has tried to attach it as an addendum, I don't know, or an annotation, don't know. That will have to discussed or hashed out in trial.

But I will make a finding that it standing alone has never been properly submitted to the membership under the bylaws, the master deed provisions or the Act and it does not constitute a valid amendment standing alone. Okay?

MR. BELLAMY: Your Honor, I respect Your Honor -- for clarification purposes, the jury will have to make a decision what force and effect it has, is that ---

THE COURT: What it is, whether it has any.

MR. BELLAMY: Thank you, Your Honor.

THE COURT: All right. Now, the next matter that we have is a Motion to Compel; is that right?

MR. BELLAMY: That's correct, Your Honor. Can we take a five-minute break and then ---

THE COURT: Certainly.

MR. BELLAMY: I'll -- what I'd like to do is see if I can meet with Leigh Boan and David to try and resolve and shorten the process because -- if that's possible, Your Honor.

THE COURT: Okay. That's fine. All right. We'll take a quick break.

Mr. Bellamy, share that order with Mr. Mills and Ms. Boan before you submit it to me.

MR. BELLAMY: I will do that.

*******OFF THE RECORD*******

(On the Record.)

THE COURT: All right. You've had a moment to discuss the remaining issues?

MR. BELLAMY: Your Honor ---

THE COURT: Yes, sir.

MR. BELLAMY: I think -- I've been sitting here talking to Leigh, I just got -- we had filed our Motion to Compel and Leigh obviously has been busy and she sent us a letter on December 6th and -- regarding responses to specific documentation we've requested. We're going through it and I

think, Your Honor, we can work it out and come up with a consent agreement and submit it to Your Honor.

THE COURT: Very well.

MR. BELLAMY: I don't think it's necessary to waste the Court's time to argue ---

THE COURT: Okay. All right. Let me just for the record be clear as to my ruling on the summary judgment motion. Judge Culbertson at an earlier proceeding declined a motion or denied a motion for summary judgment as to the validity of the windows amendment and that is my understanding.

MR. BELLAMY: Both ways, that it was ---

THE COURT: Both ways, I understand, whether it was valid or invalid. I decline to disturb his ruling based on the Brown case. I think that I could exercise discretion in doing so but in the Brown case there were substantial other discovery and other matters that came to the attention of the Court to justify Judge McKellar's reconsideration of Judge Simons' ruling. I don't think that is the situation here and I decline to reconsider that.

As to the what is purported to be a clarification and amendment of that windows amendment, without going to or addressing the validity of that initial amendment would say that it is undisputed that that was never -- the clarification amendment was never submitted to a vote and as a matter of law does not in and of itself constitute a new amendment or an

amendment of the windows amendment. I make no findings as to what it is, what evidentiary value it may have, whether it simply clarifies and correctly reflects what transpired when the windows amendment was voted on validly or invalidly and that will be left for another, another day. It may correctly -- it may be evidenced and correct evidence of what was validly passed or what was considered with the initial window unit, I mean, window amendment. And when I say validly I don't know whether it was validly passed or not. That will be another issue. I do not know and I make no ruling whatsoever about that. It's effect, weight, value is not addressed by this Court. The only thing that is addressed by this Court is whether or not it standing alone constitutes an amendment of the windows amendment or a new amendment of the bylaws. Okay? And that's what I want my order to reflect. Okay?

Thank you and you gentlemen have worked out the other; is that correct?

MR. BELLAMY: That's correct.

THE COURT: All right. Thank you very much. That concludes the business of this Court for this term and we are sine die.

MR. BELLAMY: Your Honor, you want me to draft that and I'll submit it to Mr. Mills and Ms. Boan?

THE COURT: Yes, yes, if you would. Okay?

I have some materials here that you may want to collect

or you may -- the Clerk tells me she'd much rather have you collect them. There were two exhibits that I'm going to hand up to the Court Reporter.

MR. BELLAMY: Your Honor, if I could -- if I may -- I don't need to do that, that's fine.

COURT REPORTER: We marked these.

MR. BELLAMY: Can I just go ahead and make them a part of the record?

THE COURT: Right, they are a part of the record, I thought, they were handed up as exhibits.

MR. BELLAMY: Okay. Yes, sir.

PLAINTIFFS' EXHIBITS ONE AND TWO
ADMITTED INTO EVIDENCE.

COURT REPORTER: That notebook was also ---

THE COURT: Yes, that's marked.

DEFENDANT'S EXHIBIT NUMBER ONE
ADMITTED INTO EVIDENCE.

THE COURT: Is that it?

MR. BELLAMY: That's it, Your Honor.

THE COURT: Thank you.

MR. MILLS: Thank you.

MR. BELLAMY: Thank you, Your Honor,

(Adjourned.)

C E R T I F I C A T E

ORIGINAL

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of the motion hearings held in the case of Richard A. Fisher, et al v. Shipyard Village Council of Co-Owners, held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Conway, South Carolina, on December 9, 2011.

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

Kay H. Richardson, CVR
Official Reporter

December 20, 2011.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2009-CP-22-01655

COUNTY OF GEORGETOWN

RICHARD A. FISHER, ET AL,)
)
-vs-)
)
SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.,)
)
Defendant.)

May 21, 2012

B E F O R E:

HONORABLE LARRY B. HYMAN

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

HOWELL V. BELLAMY, JR., Esquire
HOWELL V. BELLAMY, III, Esquire
Attorneys for the Plaintiffs

DAVID J. MILLS, Esquire
LEIGH P. BOAN, Esquire
Attorneys for the Defendants

Henry P. Young
Court Reporter

P-R-O-C-E-E-D-I-N-G-S

(Convened at 1:14 p.m., May 21, 2012).

THE COURT: Mr. Bellamy, are we ready?

MR. BELLAMY, JR: Yes.

THE COURT: All right.

MR. BELLAMY, JR: May it please the Court.

THE COURT: Yes, sir.

MR. BELLAMY, JR: Howell and I represent the unit owners, the plaintiffs in this action, C and D unit owners.

THE COURT: Right.

MR. BELLAMY, JR: Fifteen in nature and what I would like to do, if the Court will permit, is to give you a little background of how this came about and how it started.

THE COURT: Certainly.

MR. BELLAMY, JR: I know you have been monitoring the case.

THE COURT: I feel fairly comfortable with it but go ahead and tell me anyway.

MR. BELLAMY, JR: All right. The important thing, I think, to begin is to know that this started in 1982. In 1982 a condominium was developed at Litchfield by the Sea to build buildings A and B which was comprised of 40 units

each or a total of 80 units.

THE COURT: That was Litchfield that did that?

MR. BELLAMY, JR: Yes, sir. This is Shipyard Village. At that point in time the master deed was adopted and it was what we call an expandable master deed and it provided that later dates they could add more phases. During that course of time from 1982 up until 1998 buildings A and B were self contained. The owners of A and B were the homeowners association, they formed the Board of Directors and they had full and complete control of the property. The developer elected in 1998 to expand, to add buildings C and D. Interestingly, A and B were stucco, C and D were and EIFS type system.

When that occurred, when C and D came on board shortly thereafter in 1999, and let me point out at this point that the way the documents were drawn on Exhibit C, the master deed which we handed up to the Court, it was clearly apparent that A and B would remain in control of the Board of Directors and --

THE COURT: Add more units.

MR. BELLAMY, JR: Add more units. They would

have 54 percent, the C add D folks would have 46 percent. That is the way the trend went since '98, since '82 and from '98 forward, A and B have control of the Board of Directors of the association.

THE COURT: And that has also been referred to as the Council of Co-Owners.

MR. BELLAMY, JR: Council of Co-Owners, that's right. It appears you have done some homework.

THE COURT: Yes, sir.

MR. BELLAMY, JR: What I want to say now, because this is a case where basically after C and D came on board, and this is during the term of Leon Jennings who was the president of the Board at that time.

THE COURT: Dr. Jennings, that's correct.

MR. BELLAMY, JR: And he was there and we have Doris Bray, all of them were in buildings A and B.

The Board set about to undertake to figure out some way, we submit, our clients submit, to have C and D pay for the longstanding problems that had been occurring in buildings A and B.

THE COURT: That's the windows and doors.

MR. BELLAMY, JR: The windows and doors and common elements.

THE COURT: In 2006.

MR. BELLAMY, JR: And what had occurred, they attempted in '99 to have some waterproofing and painting assessments, $300,000, done. The A and B and C and D, because nobody really knew what was going on, or had any information, that didn't pass but later they went back and took out the jambs for the windows and some things like that and it passed for $214,600. Our people at that point in time thought that there had been a resolution with the problems with A and B.

THE COURT: And it was all up to standard, that is your position.

MR. BELLAMY, JR: Yes. We have depositions that will confirm that.

What happened following that is then the A and B Board decided, "Well, we're having these problems with the windows in A and B and there is a litany of information, and we'll move to put all these depositions in evidence for your consideration, a move to amend the limited common element provision in the master deed, which we think changed --

THE COURT: Which specifically places the windows and doors under the authority of the unit owner.

MR. BELLAMY, JR: Of the unit owner and to be honest with you, I don't see that very often but in this case it was the responsibility, and I will submit to the Court and represent to the Court that what occurred and what went forward was then the Board attempts to amend 3.6 of the master deed, which I will read to you in a minute, so that the association then becomes responsible for the windows and doors.

THE COURT: Which would essentially relieve the owners.

MR. BELLAMY, JR: A and B owners.

THE COURT: For the damage caused by leaking windows.

MR. BELLAMY, JR: You've got it, relieve them. Well, the first time it came up for a vote at the meetings it was voted down. Well, then the Board attempted to mail out proxies which clearly are in violation, and I will go through these in detail, because you can't mail a proxy out because if you mail it out by mail it has to be a hundred percent vote, that is in the master deed and

bylaws. But they ignore that.

Don Johnson comes on as president in 2008, as I recall, and he owns a unit in the C and D buildings and was initially a participant with our crowd but when he came on the Board he got out of it. I will cover that later.

But what happened was he again submits it to the vote of the association on March 21, '09, and that time the Board, the full membership in attendance at a meeting, at a called meeting which clearly is set out in the master deed and bylaws, voted it down.

THE COURT: In the meantime hadn't the proxy vote been recorded?

MR. BELLAMY, JR: They had recorded it and it was erroneous, the information, they said the vote occurred on April 15 of 2000, that was erroneous, they have admitted that was erroneous. They also know that the doors were not included in the proxy vote and they tried to do that as a scrivener's error.

THE COURT: Correct the clarification, correct.

MR. BELLAMY, JR: But in any case, it was voted on at a meeting on March 21, '09, and the

membership voted it down.

Now, interestingly, I took the deposition of Leon Jennings who served on the Board from 1997, which was a year before A and B came on, until 2008 and he resigned.

THE COURT: You meant C and D came on.

MR. BELLAMY, JR: Yes, sir, excuse me. At that point in time, Dr. Jennings in his deposition told me, and I asked him clearly about this, was his, were the bylaws, was the amended prospective of going forward, because I was concerned and my position has always been that the way the amendment was drafted and presented, it was so that the Board of the association would take ongoing forward responsibility for windows and doors. Well, Dr. Jennings told me that was right, told me that it was prospective in its application.

Then that raised the question of the negligence of the Board and the breach of fiduciary duty on the part of the Board because the C and D folks are saying, "Look," and this is set out in Jeff King's letter to the Board back in June of '08, "Let's be fair, let's be reasonable, let's work this out." And what we had said to them was, "Look, we would like to sit down and negotiate

because you have not considered what part of the damage to the common elemants that the leaking windows," and nobody denies, Your Honor, I represent to you all these depositions clearly indicate the windows in A and B are leaking like a sieve, they are going in the units downstairs, they are going everywhere, and at that point in time we thought that the Board would go back and instruct Sutton-Kennerly, who was an expert they brought on to look at the damage, the total damages, and they have clearly told us in their depositions that they did not instruct Sutton-Kennerly to go back and look and see what part A and B should pay for damages to the common elements which abutt the windows.

THE COURT: By that, you mean the individual owners of the unit?

MR. BELLAMY, JR: That's right, to go back in and assess them, because we were saying if the bylaws say what they say and they require A and B to maintain the windows and doors you can't pass that cost on to us.

THE COURT: Don't the bylaws also say that they're responsible for, specifically say they're responsible for damages that result to the common

elements from the negligence and the maintenance of the limited elements or the elements that are part of the --

MR. BELLAMY, JR: They are, they have got to pick it up. I will get to the master deed because the master deed says if A and B people don't act the Board has the duty to go in and fix it, and that is going from '82, forward to 1998, up until '09.

THE COURT: Mr. Bellamy, tell me this, and it is something I have been unsure about since the inception of this matter, and that is when did it become apparent, was it before 2006, when did it become apparent that you had stucco or substucco damage as a result of water intrusion resulting from leaking windows and doors?

MR. BELLAMY, JR: Let me see if I can answer that for you. In 1993 ProCon, Gallagher, was employed by the Board to come and look at the buildings A and B, C and D aren't there now. He wrote the Board a letter and it is a part of the record in this case.

THE COURT: In '93?

MR. BELLAMY, JR: '93. He wrote a letter to the Board and said, "I recommend that you get a

structural engineer on board to investigate because there is evidence that there is some cracking in the stucco." They disregarded that, they didn't pay any attention, they kicked the can on down the road.

He came back again in '94 and said, "I recommend that you get a corrosion engineer because there is evidence of the maintenance problems there," and all the time they are also talking about windows and doors. And when I, this is interesting, when I deposed each member of the Board, Miss Bray, Mr. Poag, Dr. Jennings, Mr. Johnson, Dr. Eblin and others, we deposed all the members of the Board who claimed to be the active members, and I asked them, I said, "When you came on board, as a part of your fiduciary responsibility was it not your obligation to go back and to review, going forward from 1992, what the Board of Directors was doing with dealing with buildings A and B?" And to the person, including Doris Bray who is a lawyer, none of them bothered or took the time to go find out what the reserve schedules were, because we submit that the reserves never were adequate to take care of going forward with repairs.

THE COURT: And that is reserves that came from the annual assessment?

MR. BELLAMY, JR: Yes, sir, the reserves. And then we found out that none of them, and it was almost as if they were proud of it, "I didn't look, I wasn't interested in what prior Boards did," but had they looked they could have seen that Gallagher who they hired and, Your Honor, let me just say to you we are trying this lawsuit based on the witnesses and the documents this association generated, we're here because we're assessed --

THE COURT: I understand.

MR. BELLAMY, JR: -- we're assessed for something we had nothing to do with, but to the person, everyone we deposed said, "I didn't go back and look, I didn't do it," and the effect of it was, "When I got on the Board I started looking forward." Well, the problem with this lawsuit and this assessment was that the Board, had they looked back, they would have seen Bob Gallagher's letter in '93, this letter in '94, and then they had the assessment in 1999, so waterproofing and painting, and our people paid finally, and there is no record that that document was ever voted on but my folks went ahead and paid that in 1999. We had just come

on the property, just gotten in the business and here this assessment starts. So, at that point in time we paid it. As far as our people are concerned they are, they think the problem is theirs because they don't know anything about it, the Board isn't telling them everything. They are playing it close to the vest. Why do I say that? After the assessment comes down and they pay their part in 1999 you have little or no activity going forward until you get to 2007 and at that point they hire an architect, I can't think of his name, Ken Schenider, and they bring Eddie Stokes, and that is the first time that a construction engineer was brought on board, to our knowledge, and that is what we gather from the depositions.

THE COURT: In 2007 or shortly thereafter no question there are serious problems.

MR. BELLAMY, JR: Yes, sir.

THE COURT: Nobody doubts that.

MR. BELLAMY, JR: It had really gotten serious. The windows are leaking like a sieve, the Board has not enforced the action against them, they are still taking the position, and I thought it was interesting, even though they voted down the amendment, the membership, on March 21, '09, the

Board sends out a memorandum and says, "We're going to move for summary judgment because we think that the proxy amendment passed." Well, it violates every section of the bylaws.

THE COURT: Let me ask you this, Mr. Bellamy, about the amendment of the bylaws, period. I'm sure you asked this question when you took the deposition of the council members. Why was the amendment proposed?

MR. BELLAMY, JR: Well --

THE COURT: Tell me what the purpose of that amendment was.

MR. BELLAMY, JR: Well, from reading the document, this is what I have discerned.

THE COURT: Who came up with the idea, "We need to get this thing changed?" There is always a reason for something.

MR. BELLAMY, JR: Well, what was happening, and I understand what was happening was the Board was having a hard time getting the A and B people to keep their windows maintained even though they are writing them letters and telling them that. They did not bring a lawsuit, they did not go in and fix deficient windows, they didn't go in and deal with any of this and then they decide, "Well,

it would be a lot easier if that became a common element."

Well, the problem with the amendment is it probably changes the percentage interest and you can't do that without a hundred percent of the voters, but be that as it may, their idea was the association will take over the maintenance of the windows and doors even though they had clear evidence that they were leaking and causing damage in the common elements, and we've got an expert, Steve Geiger, who will come and tell you about the damage that occurred from the windows, and of course there was other damages --

THE COURT: Did they not understand they might be buying the repairs?

MR. BELLAMY, JR: Well, what they did do is after we brought the first suit in January of '09 challenging the amendment the Board basically took the position that it was the expense, or common expense which should be shared by C and D along with A and B.

THE COURT: So you think that they just said, "We need to spread this out and this is the only way to do it"?

MR. BELLAMY, JR: Yes, sir, they were going

to spread it out and we were going to pay our part.

THE COURT: As an option or alternative to pursuing each unit owner in A and B?

MR. BELLAMY, JR: Yes, sir. What really had happened was, and I will read you a letter I think that was interesting, from Kelly Dill.

THE COURT: Let me interrupt you, just hold your thought right there. Let me ask Mr. Mills something.

Mr. Mills, is there any question that if there had never been any attempt, if we looked just at the original bylaws and the original master deed, we go back to 2005, say, when we know there was no amendment, we go back to there, would this damage, if there was any damage, if there was, if there was damage caused by water intrusion and from failure to maintain windows and doors, is there any question that the Council of Co-Owners or the homeowners association could have pursued the remediation of that damage from the individual unit owners based upon whatever damage was caused by the, if the unit owner didn't have any leaking windows and he kept his up he wouldn't have to pay, if you had another one didn't keep theirs up and you had a lot of damage they would have to pay? Is

there any question, from the bylaws, that is how it would have went?

MR. MILLS: If you can prove it, Your Honor.

THE COURT: And that is what I said, if there was any damage.

MR. MILLS: And we have an expert witness who says, "This is what I do, I'm an engineer, I deal with moisture intrusion issues and there is no way you can quantify or tell what is attributable to the building conditions, common elements, and what is attributable to windows, what is attributable to the 26 year old age of the buildings. Therein lies the dispute between us. It can't be sorted out.

THE COURT: Okay. But there is no question that if, if it could have been determined that you had a window issue involving unit 326 in building number A and there was water damage there and it could be attributed to it, that prior, at least prior to, say, 2006 where there was some attempt to amend the bylaws, at least up to that point in time you could pursue it against the individual unit owner if it could be shown that that was the damage and it was caused by the owner's failure to maintain that window?

MR. MILLS: The A and B members, if you could

prove --

THE COURT: Or the C and D members, for that matter, across the board?

MR. MILLS: That's true, it's consistent as to A, B, C and D, as was the amendment, Your Honor.

THE COURT: All right.

MR. MILLS: And may I speak to that?

THE COURT: Sure. I'm going to give you a chance to fully respond. I just wanted to just make sure that we're all in agreement that, that was my reading of the bylaws and I thought that is what it said and I can certainly appreciate the issue, I have tried one of these cases myself so I know exactly what you're talking about, it is always an issue. I just wanted to make sure we're on the same page as far as our understanding of what the bylaws said, okay?

Okay, Mr. Bellamy.

MR. BELLAMY, JR: Interestingly, they hired an expert named Larry Elkin who made one visit to the site, didn't talk to anybody on the Board, didn't talk to the property mangers, didn't do it, and all he did was comment on the fact -- in fact he said in his report that the Board didn't have any knowledge of the problems with buildings, that

is how ludicrous it was in 2006. That is their expert.

THE COURT: That was in 2000?

MR. BELLAMY, JR: No, 2009 or 2010, he just came on board.

THE COURT: In anticipation or during this litigation?

MR. BELLAMY, JR: He came on after we brought in, he came on, we hired Steve Geiger early on because my people wanted to have a resolution with the Board because it was obvious they were going to control the Board of Directors, in fact Miss Bray testified at one of the meetings of the homeowners, "We can out vote you anytime." That is the attitude that is going on with the C and D people, they've got 50 people that can now help pay for their negligence.

What is clear and I think the most representative thing about the Board and the lack of knowledge of saying, "I didn't bother to find out what the problems were when I came on the Board, I'm just looking forward," well, we're paying for what came on behind because I think, this Exhibit 3 to the deposition of Don Johnson who was president of the homeowners association, this

is Kelly Dill to the Board, not to the homeowners association, not to the C and D members, but to them and I think this pretty well sums up where she is. It says, "Hello all. Richard is working on leaks in A and B from recent rains." Wonder where. "Please understand that many of these units were leaking previously and because windows were the homeowners' responsibility the issue was thrown back on the owners who most ended up doing nothing and now this is the association's responsibility. Owners are important, especially Karen Davis who handles many multiple owner units. We know she's hit from all sides and wants a resolution but she must be patient and go through the process. If anyone wants more specifics on this please call Richard. Most of you were not on the Board," this is to the Board in 2007, "to remember," and she was hired in 2002, "But I tried to bring this up after I was here for awhile and got my hand slapped big time by Bobby Warner," who is the maintenance guy, "and some of the Board members because this was the owners' responsibility. Bobby Warner only did cosmetic stucco repairs to these buildings for 20 plus or minus years and kept pushing back to the owners. We clearly could not handle and needed

help." This tells you the history. Kelly Dill was the managing agent that came on in 2002, Miss Dill is sick but we have taken Vickie Gallagher's deposition, who is is the managing agent for the association Board of Directors, and the Board of Directors has basically said, "We're not going to be fair, we're not going to look and have an expert," and they have told us that when they hired Sutton-Kennerly in 2009 to come in and deal with the problem, and their attitude is, "We did something," but the Board is the Board, it's the Board of '82 until today.

What they had, if the amendment is voted down on March 21, '09, surely, surely the Board would go back to Kelly Dill or to their lawyers, and of course you know, you ruled that all executive sessions that have been going on are privileged and we can't see them but I think Miss Gallagher opened the door. But they go back to the Board and say, "We need to come up with some reasonable estimate of how much A and B ought to pay," and admittedly after we brought the lawsuit and the amendment was voted down they made A and B pay for the frames, the window itself but it was only after we brought the lawsuit but as we sit here today with them

saying, "We're going to still try to maintain that amendment was valid," we spent a lot of money disputing that.

Now, what we have is, is the Board, to the person, told me in their deposition, "We did not do that, we did not ask Sutton-Kennerly to go back and take a look." Early on, if you look at Jeff King's letter of June 8th of '08, June 30 of '08, he put out the hand of compromise to the Board, he says to the Board, "We don't want to fuss about this but you're not being fair, you are assessing us for problems that were the responsibility of A and B and you refuse, you refuse to go back and assess them."

Now, whether they had a statute of limitations problem against A and B, I don't know, but the point is they are trying to dump all of this stuff on my people because they started out with $85,000 of assessment for each unit. They finally assessed us $60,000 and $64,000 for three and four bedrooms. But what we were dealing with is the outright stubborness on the part of the Board of Directors to not even bother to find out. We even proposed to them, "You get an expert and go up there and let's figure out how we can reduce our

assessment. This is not fair, we come on board in '98 and you start assessing immediately in '99."

Now, to make that clear and make it come home and really become important, when the special amendment failed, and I guess they are going to sit here and tell you it is still valid but I asked Mr. Johnson in his deposition and he told me it was over, I don't think the lawyers understand that, but when the amendment, three runs, didn't pass, the Board didn't get it, C and D said, "Look, we're willing to pay something but you've got to be fair, you've got to go back and collect from A and B," and wonder why? Well, the control of the Board was with the A and B crowd, they had control and as Doris Bray said, "We can out vote you when we need to."

So, the attitude of the Board is, "We don't think you can prove that there is water coming in." Their own documents, Your Honor, say the windows are leaking, their own documents say it's going into the unit below, it's going here, it's going there. But they said, to the person, "We didn't ask Sutton-Kennerly to do this, we're not going to do this, we're going to hang on our right," and I say then our clear reading of the master deed,

which they have not said it was ambiguous or unclear, it clearly requires that the Board undertake, if A and B or C and D don't maintain their windows and their doors, that the Board has an absolute right to go in and assess them and do it.

THE COURT: Let me stop you right there again, okay, and let me jump back to Mr. Miller just so I can keep everything running smooth and we can keep the facts on the table.

Mr. Miller.

MR. MILLS: Mills, Your Honor.

THE COURT: Mills, I'm sorry.

MR. MILLS: There is a David Miller with the Bellamy firm, it happens all the time.

THE COURT: I'm constantly doing that.

Mr. Mills. I'm sorry.

MR. MILLS: That's all right.

THE COURT: Was there any attempt by the Board to make any determination of there was any damage, obviously there was leaking windows, I don't think anybody disputes that, there is some leaking windows somewhere but was there any attempt to determine if there was any way you could quantify those damages as a result of that leakage

and do a special assessment against those owners, or was it all just done up in this $10,000,000 assessment or $10,000,000 repair? Did you just say, "Okay, we're going to have, we're going to assess everybody their share of this," I think it was $65,000 for a bedroom unit and $84,000 for four bedroom unit, "we're just going to hit everybody with this," did the Board just abandon the idea of going back, you told me you had the right to do it but did the Board just not attempt to go back and sort this thing out and determine whether or not some of these owners should have been assessed for water leakage? Was that done at all?

MR. MILLS: There was such a systemic problem with the building envelope system that it had to be stripped and reclad and all the windows had to come off, decks and walkways had to be treated, the Board was dealing with a hellish nightmare on what to do about these buildings.

THE COURT: Was there, I haven't heard this but it is usually hand in hand with different cladding, were there any termintes or anything in it?

MR. MILLS: No, sir. I believe that's the one issue we didn't confront but it was a stem to

stern problem. To go back, Your Honor, this starts in 2006.

THE COURT: I understand.

MR. MILLS: We're in 2012 now.

THE COURT: I understand, way back.

MR. MILLS: There is quite a history here of the Board trying to get guidance, trying to get advice. The first person they talked to was Ken Schenider, an architect out of Charleston. The first letter he wrote them said, "Well, the building envelope system seems to be performing better than I would expect." Then he got into it further, as did M.E.C. Engineering and ultimately SKA and decided, "We've got a stem to stern issue we've got to deal with."

THE COURT: Everything from concrete, rebar, all kind of problems.

MR. MILLS: Corrosion, the balconies, about everything you could imagine that had to be addressed.

THE COURT: Let me just ask you this. Is it your clinet's position that there is at this time a valid amendment of the bylaws of this homeowners association that would place upon the Council of Co-Owners the responsibility for damages as a

result of deficiencies in the windows or doors? Are you there now?

MR. MILLS: Yes, sir. As we have argued, this is the third time, you will recall, Your Honor, we're arguing this.

THE COURT: I understand and it is kind of vacillating, one meeting it seems like you all are conceding, "No, we don't have a valid amendment," and now I'm kind of hearing that you do, and I'm a little bit confused.

MR. MILLS: Okay. Here is our position on that. If you where to ask my Board members, Mr. Johnson, Mr. Poag, Miss Bray, "Do you consider this amendment valid," they would tell you, "That's behind us, I don't know, that's for a judge, that's for lawyers. The people have spoken, that is what matters to us, we put it back up to a vote, we're not waiting on Judge Culbertson --"

THE COURT: Now it is a no vote, right?

MR. MILLS: Absolutely, unequivocally the people have said, "We don't want this," and the Board assessed accordingly. That is why the A and B owners pay 88,000 and the C and D owners otherwise.

THE COURT: There you go, there you go. That

is what I'm looking for now, that is what I'm looking for. There was, and that is what I wanted you to say to me, I knew there was some difference in the assessment.

MR. MILLS: There is.

THE COURT: Okay. How did that come about?

MR. MILLS: That came about by direction of our project manager and architect, architect/engineers Sutton-Kennerly & Associates, we asked them, okay, we the Board asked, "If we split it all up what does it cost? Okay, do this. Now charge all the A and B members the cost of their windows and doors and tell us what that cost would be," and that cost was 88,000 for the A and B, 64 to 68 for the C and D. That is how that came about, by cost break out. We have a substantial dispute between the experts. For example, you have heard this before, some of the costs, engineering fees, design --

THE COURT: I understand, it runs about 15 to 20 percent.

MR. MILLS: Yes, and there is a substantial disagreement. Our expert says, "You can't do that, you've got to break into the skin of the building in order to put the windows and doors in, you can't

pretend that they are issolated, segregated components."

THE COURT: All right. This is what I'm looking for. Tell me, was the difference in the assessment in any form or fashion based upon an equitable apportionment of damages that may have been caused by water intrusion to the A and B owners? Did anybody say, "Let's be fair, you all haven't kept your windows up, you need to pay a little bit more, we're going to stick you with another 10 or 15 thousand dollars, we need to declad anyway, we have had some other issues, but during reclad if you have leaking windows and it costs a little bit more we're going to have to hit you, we wouldn't have had to do as much, we're going to hit you with about 10 or 15 thousand dollars apiece more," was there anything like that?

MISS BOAN: Your Honor, David would say that the answer is no and I would say to Your Honor it is yes and this is the reason why, and I make perfect sense and it is supported and I stand firmly behind the assessment this Board made and I think the jury will as well.

THE COURT: That is what I'm trying to get at.

MISS BOAN: Let me explain. There is a fact missing here. When the Board received Jeff King's letter and they are faced with, "What do we do, this amendment is not valid," that is what they're considering. "We're going to assess as if windows and doors are the owners' responsibility." So, they did the assessment based on it being the owners' responsibility but they did not assess for any collateral damage, which is the word the plaintiffs would use to describe damage that would have come from windows and doors. The reason they did not assess for collateral damage is twofold. Number one, there was no way to sort out the collateral damage.

THE COURT: Let me ask you --

MISS BOAN: Number two, the master deed supported that if you do repairs to the general common element, repairs that are incident to repairs to the general common element are common expenses. Let's say there are no leaky windows at all, none, all this was was a common element repair.

THE COURT: Right.

MISS BOAN: At that point in time A and B doesn't have to pay anything extra, even though

they didn't do windows, they get new windows.

THE COURT: I understand that but tell me how did you come up with the number, how much did they pay extra? Wasn't it about 10,000.

MISS BOAN: 22,000.

MR. MILLS: 64 to 68 to 88, plus, give or take.

THE COURT: How did you arrive at that number?

MISS BOAN: They had to make a decision, "What do we charge A and B for? We cannot charge them for repairs that would have otherwise had to have been done as a result of the common element repairs, so what can we charge them for, how can we give effect to as much of the master deed as possible," and that is A and B are getting the benefit of any windows, they are getting the useful life of what is otherwise their responsibility, "We can charge them for the hard costs but since the work had to be done anyway," assuming there would be no leaky windows and you had to do this work to the common element that would have required removal and reinstallation and new windows. There is an argument on behalf of A and B that they shouldn't have had to pay for windows.

THE COURT: Let me ask you. To some extent are you telling me you disagree, Mr. Mills, when I ask him if a window is part of my unit?

MR. MILLS: Yes, sir.

THE COURT: And it leaks and I damage a common element, are you saying that I could not be assessed if all I damaged was part of the common element? Is that what Miss Boan is telling me?

MR. MILLS: In the narrow circumstances His Honor just described you could be. That is not what we're dealing with here. It's because of what she just argued. The master deed also says that repairs incident to damages to common elements are the responsibility of the association. My point being if there is a crack in the wall and water migrates to your window the association is responsible for that, and that is the dispute here, that's the thought process.

THE COURT: I understand. There is all sort of ways to look at the damage and there is a million different ways to, a million different fingers you can point, let me say that.

Going back to you, Mr. Bellamy, I'll let you finish.

MR. BELLAMY, JR: There were 80 videos taken,

40 of building A and 40 of building B that clearly show the damage to the common elements emanating from the windows.

THE COURT: Was that after the declad or during the declad?

MR. BELLAMY, JR: While we were there,

MR. BELLAMY, III: Prior to construction.

MR. BELLAMY, JR: Prior to the construction. We had to get Judge Culbertson to give us a court order so we could go down and look at what was there. They wouldn't agree --

MR. MILLS: I object to that, that is factually inaccurate.

MR. BELLAMY, JR: Well, I'll stand by what I said.

THE COURT: I'm going to let you address it.

MR. MILLS: Okay.

MR. BELLAMY, JR: There are 80 videos of these buildings and these units and this is what Steve Geiger, our expert, has done. He has gone and looked at them and it clearly shows spoiling, leaking, rotted windows. In fact Dr. Jennings' unit, 54, he was the president, it is probably the worst one around. Miss Bray, I think she did a little better job with hers.

But the point is the bylaws, the master deed provides, "Default by co-owners. In the event any co-owner failes to perform the maintenance required of him by these bylaws or any lawful regulation and such failure creates or permits conditions which is hazardous to life, health or property or which unreasonably interferes with the rights of another co-owner or which substantially detracts from the value or appearance of the regime property, the Board of Directors shall," it doesn't say may, it says, "shall after giving such co-owner reasonable notice and opportunity to perform such maintenance cause such maintenance to be performed and charge all expenses to such co-owner by an individual assessment."

MR. BELLAMY, III: Read the next one.

MR. BELLAMY, JR: And then on expenses. "The expenses," under 6.4, "The expenses of all maintenance, repair and replacement provided by the manager or the Board of Directors, including losses by storms, fire or other casualty insurance by the council shall be a common expense except that when such expenses are not fully reimbursed by insurance proceeds and when they are predated by, one, failure of a co-owner to perform the maintenance

required by these bylaws and by any lawful regulation, and two, willful act, neglect or abuse of the co-owner, they shall be charged to such co-owner at an individual assessment."

The point is, from '82, until we came on board in '98, there is no record other than maybe some little fines they charged A and B, but there is no lawsuit brought, there is no assessment made, there is nothing that they, the Board from '82, forward, charged A and B.

Now, they are being told by the shade tree mechanics that they were using at that time that, "You need to look, you need to look at the windows, you need to look at the doors." But what the Board decided is, "We have a right to disregard the clear language of what is in the master deed, we have the clear right to decide," and the thing that they, you've got two answers from over here, but what they really, what really happened is it got out of hand and there is no question that the buildings got in terrible shape but what they have not answered was, and what we said to the Board when we held our hand out in compromise, "Get Sutton-Kennerly to look at it and decide if in fact any additional assessments should go to A and B

unit owners for their leaking windows and doors." The response, to the person, of the Board was, "We didn't do that and we made the decision."

My point is how do you violate as a matter of law what you are charged with in the master deed because all of them tell you, "We're bound by the master deed, we're bound by the master deed," yet they ignore that and then they clearly say, "Well, we don't think you can prove the damage."

If you look at those 80 videos, and I hope in due course you can do that, but if you look at the 80 videos it is clear what is going on with the windows and doors in buildings A and B. And Mr. Elkin, did he go out there and do that? He spent a half a day with David Mills. His report basically says, "I just don't agree with Steve Geiger." He didn't do any testing, he's a mechanical engineer, not a structural engineer. Our expert is an expert in the field of systems and failing systems and repairs.

It was obvious that the Board had not arranged for an adequate assessment or reserve fund, they were out of money and lo and behold in 2005, 2005, Buildings C and D got in trouble. The Board, and the Board hires Finkel & Altman to bring

a lawsuit against C and D to recover, and they sue the developer, the contractor, the subcontractor and everybody else.

THE COURT: They got a million and five in settlement.

MR. BELLAMY, JR: They got $3,000,000. You know what they did? They had an engineering report as to what they should do with the building, what they should do to the building to fix it, McGee Engineering, we didn't even know about that report until we got in the lawsuit.

MR. BELLAMY, III: Four weeks ago.

MR. BELLAMY, JR: Four weeks ago. They wouldn't hand that over to us. And McGee recommended to spend the money to fix C and D and remove all the windows. They don't reclad, they don't do anything and they take a million and a half dollars of C and D's money, which I argue a constructive trust was imposed on them because it was to fix C and D, and to show you how this Board takes that money and puts it in the general reserve and but for this lawsuit and but for this controversy they would have already spent it on A and B. We have Mike Pardee who will come in and testify that of all the money has been coming in,

90 percent of it has been spent on A and B, 10 percent on C.

So, my people are scared to death. There are problems with C and D, the money that has been set aside, the million and a half dollars, the Board says it don't belong to fix C and D, but for $600,000 for ten years down the road. So now we've got this situation going on and then the Board comes along and says, "Well, the amendment, the amendment failed." Well, it failed because it was a lack of communication, it was a lack of forthrightness, lack of transparency. It failed, and finally Mr. Mills said it's over, and I'm glad to hear that because they sure have continued until today in this case.

What we were faced with then is they decide they are going to do a special assessment and they called for a vote on August 1 of '09. They are going to call for a vote to spend this 11, 12 or 13 million dollars that Sutton-Kennerly had come up with. What I can tell you is they had Schenider & Assoicates come there in '07, they brought Sutton-Kennerly in because they didn't like Schenider, so they came in and looked at it. But one thing that was interesting in 2007, they

brought Bob Gallagher back, he writes them a letter and says, "I recommeded all this stuff to you in '93 and '94 to do on these buildings." Bob Gallagher would testify had they done it they would have saved $3,000,000 in cost. "You have allowed these buildings to deteriorate, you have allowed the buildings to come down."

In fact Mr. Poag basically said, here is a letter to Shipyard unit owners from the Board and it says, "Faced with the prospect of valid distress, unsafe and arguably uninhabitable buildings in our regime your Board instructed the general contractor to move forward with repairs to be funded as a component of the 2002 operating fund." It goes on to talk about that. And I read you Kelly Dill's letter, her frustration the Board wasn't doing anything, they were doing cosmetic repairs, so the issue becomes if they wanted to be fair they could have said to Sutton-Kennerly, which they didn't, they didn't instruct Sutton-Kennerly to go look at these videos, and you are tearing all this stuff out and to be fair, some of this damage has to be as a result of the leaking windows that the A and B unit owners weren't maintaining. And the Board knows there is a responsibility, they

have a fiduciary responsibility to enforce these bylaws and they just decided it was too much trouble, I would submit, to do that so the easy thing to do was to say to Sutton-Kennerly, "Treat it all as a common element, we'll make them pay for the windows," but I promise you this, they didn't deduct the windows until we brought the lawsuit and that wouldn't have happened had we not brought the lawsuit. They were going to cram it down full-time.

Then what did they do? They are going to do a special assessment. Well, so as to prevent C and D from having any real say in it because as Miss Bray said, "We can out vote you anytime we need to," what did they attempt to do? They attempted to do a special assessment, so they sent out a notice there was going to be a special assessment, about $11,000,000, and they are going to vote on it August 1, '09. By this time Don Johnson is telling them the condition of the buildings was acute. It was in terrible shape and they are still talking about windows and doors and the leaks around the windows and doors. But nothing from Sutton and Kennerly about this Board saying, "At least go look and tell us if you can do it." Then they say,

"We'll do a special assessment on August 1, '09, $11,000,000."

THE COURT: Well, couldn't you have torn down 40 units and rebuild them new if you owned the land, for that?

MR. BELLAMY, JR: yes, sir.

THE COURT: That's $275,000 a unit.

MR. BELLAMY, JR: Judge, you have hit upon a very valid point. There is a provision in the master deed and bylaws that says if it's reconstruction or building back you can only assess one percent and we'll have some testimony about that, but effectively what they did, they would have done better to take a bulldozer and go level the buildings, the condition it was in. I mean, when you've got a Board member that writes a letter that says that, then you know somebody has dropped the ball, and when you've got an $11,000,000 assessment somebody dropped the ball, and what this Board is saying is, "Well, we hired some experts, we hired some people to do these things but we're not going to go back and be fair to C and D with regard to the windows and doors and to the common elements." And they have got testimony, "We've got the record that the water is coming in under the

doors, which is the responsibility of the unit owner, and it is going down into the unit below them."

MR. BELLAMY, III: Videos showing where it is coming in under the threshold.

MR. BELLAMY, JR: They didn't even bother to deal with that. We have spent a lot of money trying to prove, trying to get them to be reasonable.

Now, the assessment comes up and they are going to assess everybody a pile of money. That's voted down. Well, do you think they would get the message if somebody would have whispered in their ear, you know, "Maybe you ought to start being a little fair." No, they didn't do that. They said, "By the way, if the the assessment doesn't pass," and it takes a two-thirds vote to do that, "we're going to get part of the budget," and how do they do that? Well, the way the Board manipulates, the A and B Board manipulates the positions on the Board, they are the nominating committee, they deal with who effectively is nominated to get on the Board and they say, "Well, we're going to have an assessment."

Now, the master deed and the bylaws on the

schedule of the meeting says you have to have a meeting and an agenda, item number six of that section of the master deed, it says you are required to present a budget. Not one word is brought up in '09, '10 or '11, and I'm not sure how many years past that, because the Board didn't want the budget to come on line because, and they knew that it would take a two-thirds vote of the homeowners to amend the budget, so it was what we call on my side of the street cram down, there was a cram down and what the Board has said at this point in time is that the budget is there and we're there and we say if you look at the requirements of what it is it was an ultra vires act, they never presented a budget to the homeowners.

Now, if they wanted to be fair they could have said, "Here's the budget, here is what is here, here is what is here." They didn't want C and D to say anything but they never have at this point in time made any attempt on the part of the A and B board to hold out a hand of friendship to these people over here and say, "Let's work this out, maybe yes we were wrong, A and B should have been assessed for more damages for the windows and doors." The documents require it, we're not

pleading ambiguity, we're not saying it's confusing, the documents require it and they just ignore it, they say, "We're not going to follow what we're charged with." I mean, here it is, I just read what Howell gave me, they are charged with assessing these people. Never, not one document in the course of anything we have seen did the Board ever even attempt to go back and get from A and B what they should have gotten, and had they done that we wouldn't be here, obviously.

He has something else for me to read here, 7.3, enforcement. "The Board of Directors shall enforce the terms of the master deed and the bylaws and the regulations promulgated," and there is not one document that we have gotten in discovery that they have done anything to enforce that covenant against A and B other than they've gotten a little bit of penalty out of somebody that didn't respond as far as fixing the windows.

But there is, but there is something else I want to say. When I took Vickie Gallagher's deposition I was concerned because as you know we have had a big fight over the executive sessions the Board had even before we became involved and I took Vickie Gallagher's deposition, took her

deposition, or Howell did, excuse me, Howell got it, I apologize, and he asked her, "Well, why didn't you recommend to the Board that they submit this matter or reconsider this matter on a reassessment of A and B," and she said, "That wasn't my job." She says Kim Campbell advised them on that.

Well, let me go back and represent to the Court this Board has hid behind executive sessions for a long time. You told us we could not look at what went on in executive sessions unless they got advice from a lawyer. Well, lo and behold, their property manager Vickie Gallagher who was their spokesperson said that the Board took up the fact when that amendment failed, took up with the Board, didn't tell me what they said, but the Board got advice and yet they have represented to you in sessions in your courtroom that they didn't get any advice from any lawyer. I will let you decide, you were there, but the point is that went on, they have hidden behind it.

But the point is, where we are, the bottom line of where we are is the master deed is clear as a clear day what the obligations of the Board are and what our obligations are, and they just can't

choose to ignore it. What this lawsuit is about, or their defense to it is, "We didn't have to do that." That is what the problem is, why we're here.

And the problem is this. We talked about dissolution when we were last in chambers and you bifurcated that, I know you recall what we have tried to structure, and we can't even get them to agree to this, is let's get a separation, because my people are scared to death because they control the Board, that it ain't going to get no better going down the line.

I think the problem, I think one of the most pathetic things said is Don Johnson, who is president of the Board, contributes to the defense, to the plaintiffs' fund until he gets on the Board, then he wants his money back. Now, I don't know what more these people can do. They are being asked to pay 64 and 68 thousand dollars for a problem that they had not one thing to do with. They didn't have one thing to do with it but it is funny, when the buildings came on in '98 they started going together. We have got Mike Parades who has been qualified as an expert in a case in Mt. Pleasant, who will tell you, if you don't rule

as a matter of law because I would submit to the Court the question set out in the master deed, which they have admitted in their request to admit, it took us a long time to get here, but the question set out in the master deed is there is no ambiguity in the master deed. It basically says and we would move to submit the depositions of all the Board members, we brought the originals here, to make them a part of the record, Leon Jennings, Don Johnson, Doris Bray, Jim Poag, Jack Eblin and Clinton Carter, make those a part of the record because if a Board of what I think are, should be reasonably intelligent persons and they even have a lawyer on there, can't read the master deed and figure out what the requirement are, if they weren't going to assess for the windows and doors, for the collateral damage to collateral damage, they should have given you a reason under the master deed they excused them for it. There has been no waiver, their's been no estoppel, there has been none of that. They just didn't follow it and now I think that frankly this trial could be a lot shorter and a lot quicker --

THE COURT: Tell me precisely what you are seeking by way of summary judgment here.

MR. BELLAMY, JR: Liability as a matter of law based on the master deed, that master deed clearly sets out the obligations of everybody but particularly the Board and the unit owners and we're asking the Court to rule as a matter of law that the master deed --

THE COURT: On your negligence cause?

MR. BELLAMY, JR: Yes, sir, on my negligence and breach of fiduciary duty. I'm asking you to rule on that because the evidence is clear, based upon the documentation that we have in these exhibits to these depositions of these Board members that we're offering in evidence, that it was clear the windows and doors were leaking. In fact Leon Jennings said in one of his memos, "I want to remind the A and B people that you're responsible for the flange and the side," because he wanted to be sure, if you read, and they are attached to their depositions, it is clear the Board knew, they just weren't going to assess themselves, it is A and B assessing A and B, "Let's wait until we get old C and D on board, we'll hit them."

So, what I'm asking for is a direction by this Court of partial summary judgment on the

question that the, as to what the master deed provides and based upon the documentation, that there was never any, that they knew the problem was there, they knew there were leaking windows there, they knew these things were there and they didn't do anything about it and I just say it is a question of law at that point in time. We've got to prove what the damages are, but what we have basically said to start out with was we tried, again, when they came with the assessment, we asked Steve Geiger who has testified as an expert all around the State in these kind of cases --

THE COURT: Let me just back up a minute and tell you what problem I'm having right now, okay? In my mind at least it seems to be no doubt as to what the master deed required of the Council of Co-Owners or Board of Directors, whatever you want to call them. The case law requires that not only they obey the Horizontal Regime Act but the bylaws themselves be strictly construed. I think it is clear and unambiguous what the, I'm going to hear from Mr. Mills, he may convince me otherwise, but at this juncture, listening to you and having read the file, I think it is fairly clear what the duty of the Board was, okay? And I think it is fairly

clear what the Board has done. All right?

But on your negligence cause, one of the elements is there must be damages, and Mr. Mills is telling me that he has an expert that will say there was no, we have been calling them collateral damages, there was no collateral damages. What would you say about that? If you failed on an element of your cause, if there was evidence of a material issue of fact --

MR. BELLAMY, JR: Just a second. Howell just said, in the Sutton-Kennerly letter assessment they make the general assessment, damages for $326,000 to the interior of the units, which is clearly their responsibility. What I'm saying is simply this.

THE COURT: I know you're going to have evidence there was collateral damage and it can be determined, it can be quantified and if they had followed their duty under the bylaws that should have been assessed as an additional assessment against the unit owners, you've got 80 videos that show the damage, you've got an expert that is going to say there are damages, but the question is whether or not, on summary judgment, whether or not there is any material issue of fact.

Now, Mr. Mills I'm sure is going to come up with at least an expert that says they could not determine if any of this damage was caused by water leakage around the windows or attributable to, and he has several other issues which I'm going to let you come back to, okay, I know he is going to argue statute of limitations and things of that nature that we're going to hear but doesn't that, doesn't that give me an issue here?

MR. BELLAMY, JR: Let me tell you why it isn't an issue. The minutes of the Board of Directors we got after this lawsuit was instituted clearly indicate that their position was that the windows and doors were the responsibility of the A and B unit owners, it clearly says that.

THE COURT: Are you saying the Board --

MR. BELLAMY, JR: Has the knowledge it is the --

THE COURT: It is their understanding it was?

MR. BELLAMY, JR: Yes. There is no dispute the Board says it was their responsibility. The problem is the Board didn't do anything about it. The Board found out --

THE COURT: I'm sorry, you're saying that the Board was remiss when it took no action?

MR. BELLAMY, JR: That's exactly right, you've got it.

THE COURT: If it had taken action before the fact and determined that there was no damage there wouldn't be an issue?

MR. BELLAMY, JR: We wouldn't be talking about an $11,000,000 fix.

THE COURT: And you're saying that it was a matter of inaction?

MR. BELLAMY, JR: Inaction on the part of the Board to carry out the directions and responsibilities they were charged with. It doesn't say may, it says they shall, and it is clear, this is their document, we're trying this case on their documents, and it is clear that the Board -- now, this Board doesn't know what happened prior to the time they came on but when Leon Jennings was there they were writing letters and they were, like that letter from Kelly Dill, they punted the can down the road, they didn't do anything about it when they knew there was a problem, they knew there was leaking around the windows and doors and that it was getting into the units. So, they breached their duty when they did nothing. They did nothing and there is nothing to

indicate that they ever undertook to even deal with the windows and doors until they brought Schenider on board in 2007.

THE COURT: All right.

MR. BELLAMY, JR: They bring Schenider on board in 2007 and he tells them a little bit, maybe it is not as bad, they fire him. Then they bring in S & K, and S & K goes and looks at it and tells them what they already knew, the building is an abomination, it is a lack of maintenance and repair. Well, you know, you could argue that they had an opportunity to maintain A and B in such a state that when C and D came on board in 1998 there was no problem.

THE COURT: So you're looking for partial summary judgment on your negligence cause and your negligent representation?

MR. BELLAMY, JR: Breach of fiduciary duty.

THE COURT: Breach of fiduciary duty. And you want me to determine on a partial summary judgment that a duty existed and the duty was breached?

MR. BELLAMY, JR: Was breached, that's exactly right.

THE COURT: And that would leave the issue of

whether there was any damages?

MR. BELLAMY, JR: That's right, whether there is any damages.

THE COURT: Okay. All right, I'm going to come back to you in a minute, in an hour or whenever, because I know Mr. Mills is wanting to talk to me about statute of limitations and some other things. He has sixteen defenses, estoppel, everything else.

MR. MILLS: Yes, sir.

THE COURT: Okay, Mr. Mills.

MR. MILLS: Thank you, Your Honor. Before I do, I have to respond, not for long, but to certain portions of Mr. Bellamy's jury argument.

THE COURT: I'm going to let you do that and then you can go into your motion.

MR. MILLS: Very good.

THE COURT: I think you have a motion for summary judgment.

MR. MILLS: We have several motions, actually. But, yes, sir, we do have a matter I may have the smarter member of the team address.

THE COURT: I will be glad to hear from Miss Boan.

MR. MILLS: A few things, Your Honor,

factually, okay? The motion for partial summary judgment is so broad based, so many allegations of negligence we weren't quite sure what would be focused on but I made a few note as Mr. Bellamy spoke and a couple things I want to, just a couple things I want to disabuse the Court's mind of.

Mr. Bellamy made the statement the Board was playing it close to the vest.

THE COURT: Let me, maybe this will help you, you have no, or you don't disagree that the Board does have a duty?

MR. MILLS: Oh, absolutely.

THE COURT: So the existence of a duty is not what I have to worry about here?

MR. MILLS: No, sir.

THE COURT: All right.

MR. MILLS: No, sir. The Board, and we're talking about the Board, Mr. Bellamy says they are playing it close to the vest. It is important I talk about that because what I'm hearing now, it is amorphusing into some sort of civil claim and that is not what happened.

THE COURT: I don't need that one.

MR. MILLS: That's one that I'm listening for a Rule 15 motion to conform to the proof at the end

of the evidence, the Board playing it close to the vest. I want to make sure the Court understands it consists of four A and B members and three C and D members, okay? Every act they took, every act they took relating to the amendment, the assessment, what has been done in this lawsuit has been seven to zero. I could see the argument.

THE COURT: But weren't the C and D members of the Board nominated by the A and B's?

MR. MILLS: Yes, there is a nominating committee.

THE COURT: And it is made up of the A and B's?

MR. MILLS: No, it is made up of the current Board which consists of C and D members, and more importantly, as has happened in the past, people can vote an alternative slate. There is your remedy, if you don't like them vote them off, and that is why we find it so ironic the notion that the Board did this --

THE COURT: I read somewhere in there that several times people tried to put up alternative slates and they never end up on the ballot.

MR. MILLS: I'm not sure that happened.

THE COURT: I don't know. That is somewhere

in this 40 pounds of documents that I have been reading.

MR. MILLS: My Board members will tell you when they testify and our HOA expert says it's as if the A and B members are clamoring to take over the Board. It is like pulling teeth, getting people to serve on these boards. It is a thankless job and that is what we'll tell the jury. It's a volunteer position. Mr. Bellamy stands before you and argues like we're talking about Google or Microsoft. It's a nonprofit Board. These are unit owners, they are charged with reasonable business judgment, that is the standard under South Carolina law.

Now, let's talk about who served on the Board. His Honor had some questions about the windows and doors and amendments, "Well, that one should be easy, can't we just decide whether it is valid or not?" Let me tell you why it is not so easy. Brian Nisbet, the president of the Board of Directors, the same Brian Nisbet who is a D building unit owner who is now a plaintiff in the lawsuit suing us to declare the amendment invalid and suing us for damages. I think that is enough.

THE COURT: But we're past that.

MR. MILLS: Well, past --

THE COURT: The issue of whether or not that amendment is valid, aren't we past that?

MR. MILLS: No, sir, not when you're talking about --

THE COURT: We're not?

MR. MILLS: No, sir, not when you're talking about the Board's conduct, which is an issue here. They're asking, they are trying to make it look like this was a conspiracy to shove down the throat of the membership something that would relieve the A and B owners of responsibility for the windows and doors.

THE COURT: Let me ask you this. If I lived in unit A, if I live in unit B, I live in unit C or I live in unit D, it makes no difference, am I responsible for my windows and doors as we sit here today?

MR. MILLS: Yes, sir.

THE COURT: Okay, good.

MR. MILLS: You are.

THE COURT: That answers a question for me. All right.

MR. MILLS: But I must address the issue of the notion that, the kind of thing we talk about

when we talk about damages, it relieved the A and B owners but also relieved the C and D owners. We went back and looked and we found it blindly ironic that the lead plaintiff Mr. Fisher received windows and doors in his C unit at association expense. I deposed Mr. Parades, their HOA expert, and he was good enough to have created a list showing that actually more C and D owners got windows than A and B did, thousands of dollars worth of windows during the time of the 2006 windows and doors amendment, so there is no conspiracy afoot, there is no bad faith.

You asked a question, Your Honor, and again this bears on motive, you asked why was the amendment passed. What Dr. Jennings would tell you, what Miss Bray would tell you is that we're having real problems with architectural disparity, okay, if people responsible for their own windows and doors, they are going to put in their own windows and doors, number one, they have no consistency.

Number two, you've got no guarantee of code compliance.

And Number three, you have to break into the skin of the building to put in a window, so the

notion that this was somehow done to slip one past the C and D owners is just wrong. Again, Mr. Nisbet supported the amendment, was part of the Board that proposed it and signed off on it and I think it is important for the Court to know that.

THE COURT: As I read the letters concerning the meetings about the windows and doors, particularly the letter that came out where they, I just get the sense of urgency like, "There is something afoot here and we need to do something quick, this is the most important thing we have had in a while," I just get that sense of urgency and I just wondered if it was, as you say, something that came up in the normal course of business where they said, "Look, let's try to get a handle on this window stuff and make sure we have consistency, so let's take over the windows," or was it a situation where some of the Board members were saying, "We need to spread the cost of this by putting it over on C and D"? You know, either one could be a logical, I guess, explanation of what happened but the urgency leads me to think that it was going to be a bunch of money spent real soon and it needed to get spread out.

MR. MILLS: Fair question, Your Honor, a fair

observation, and Dr. Jennings would tell you, "I can answer that, I can tell you why it took until 2006 to do something about this because as Board president I was up to my neck, although I'm a B building owner, I'm up to my neck slugging it out against the developer, the general contractor, the architect, all the subs in construction litigation over this C and D building. Our membership would only stomach so much at one time. I have to deal with the political realities, the financial realities of assessing these people to get monies to pursue that litigation, we finally got it settled in 2005, 2006, then we were turned to the A and B buildings." Is that reasonable judgment? We believe so. There is a factual issue on that, we understand it.

THE COURT: I understand that.

MR. MILLS: But that is the historical context. There was a lot going on in this association.

Back to '99. He talked about that the C and D members rejected the proposed assessment in '99. There is the irony we're facing, we're now being sued for not reserving enough money, we're now being sued for not dealing with the windows and

doors. Dr. Jennings will tell you that, "When we tried to raise money it was hurled back at us by the C and D owners," including Mr. Fisher.

There is a direct conflict in the master deed, no ambiguity, a factual conflict between where the moisture migration comes from. Okay? The Court has asked a number of questions about if it comes from a window into the common elements. What if it comes from the common elements into the window? That is what Larry Elkin, our expert, will testify to. He will say, "This is what I do and I can tell you you can't quantify, this is what I do and I could not go in and say 37.2 percent of the moisture around this window is attributable to you, Mr. B building unit owner, but 63.8 percent is attributable to cracks in the common elements." He says that can't be done, that doesn't happen in the real world, these buildings are too old, they are too ocean front, they have been exposed to too much salt spray.

THE COURT: What if the Board had just said, "Look, we can't precisely tell you how much damage was caused by your leaking window, how much damage was caused by cracks in the stucco?" I understand A and B were just stucco clad, they were not EIFS,

is that right?

MR. MILLS: That's right.

THE COURT: We don't know what was where but as a matter of compromise why don't we just say 30 percent, why don't we just say 20 percent, why don't we just say 25 percent? Now we've got C and D to deal with, they are going to be expecting you all to pick up the tab for any water intrusion, there is no question you've got water intrusion, and I would almost as a matter of judicial notice find that if you've got a 25 year old buildings, with stucco clad buildings you've got window water intrusion, I'm not going to go that far but I would go almost that far, you're going to have some. It is just the nature of the beast. But why didn't the Board just say, you know, "C and D is going to be clamoring for us to do something, we want to be fair to them, we want to be fair to you, we're going to stick this number out there," 25 percent or 30 percent, "we're going to assess it to you." My understanding is Mr. Elkin didn't come on board until way after litigation was going on, did he?

MR. MILLS: Just like Mr. Geiger.

MR. BELLAMY, III: 2011.

THE COURT: So, up until that time nobody

tried to determine whether or not you could pick out the water damage, did they? Did you have somebody else go do it? Mr. Elkin had just come on since this litigation. How did you know you couldn't attribute a percentage to the water damage?

MR. MILLS: I haven't heard from Steven Robinson.

THE COURT: Okay. That is what I want to hear, tell me about Mr. Robinson.

MR. MILLS: He is an engineer with SKA who would have been there in real time, okay?

THE COURT: He would have been there when it was going on?

MR. MILLS: When the decision was made, yes, sir.

THE COURT: Okay.

MR. MILLS: Might not a fair response to the judge's question be, faced with this decision, knowing, knowing that your A and B members were assessed back in 2002, 2003 to pay the legal costs, expert fees, lawyer fees to pursue the C and D litigation, okay, they chipped in, it had nothing to do with their building, you know that as a Board member, all right? Armed with that knowledge you

also know, "I've got a situation on my hand here, is somebody going to sue?" Are not the A and B members going to say to you, "Wait a minute, it is our turn, when they needed money to support a lawsuit we chipped in, there was no rejection of an assessment."

THE COURT: I understand but despite the equities of it didn't the Board have an obligation, don't the bylaws say they shall seek reimbursement of any damages to the common elements caused by failure of the unit owner, whether it be A, B, C or D, to maintain their units?

MISS BOAN: That assumes that A and B unit owners were negligent, that assumes they were negligent.

THE COURT: And there again --

MISS BOAN: And there is no proof that they were negligent.

THE COURT: But where I'm going is this. There is no proof that they weren't. We know they had water intrusion, we know there was damage, that is two things that were known at that time.

MR. MILLS: Yes, sir.

THE COURT: That there was intrusion and that there was damage. Did anybody try to determine if

that water intrusion had a connection to the damage? Did anybody go out there and declad a spot and say, "Let's see how it runs, let's see where the water is going, let's see where it's holding?" Did they do a window test on it?

MISS BOAN: Your Honor, no. What happened, you're looking at a span of many years, many people presenting different issues about what's going on with A and B, conflicting issues. Some say it's the windows, say some say no, it's not the windows. In fact, in one unit, the Morrow unit, who attempted to fix their unit at the Board's request, their windows, to them, have them repaired, have them tested, and it is not leaking, the window is not leaking, yet they are still experiencing leaks that is coming from another source, coming from the common element.

THE COURT: Sure.

MISS BOAN: That is something that the Board was faced with, a conflict between what is going on, and they're receiving information from different experts, so when they get down here to make the assessment what has the Board been told? That is how we need to look at this, not what did they ask at the time of the assessment, but what

did they know at the time of the assessment.

THE COURT: I understand the business judgment rule applies here, no question about that.

MISS BOAN: What did they do at the time of the assessment? They knew they were faced with the situation that no one could, that they had consulted with, could make a determination as to what the cause was with the problem, it was a systemic problem, that is what they had been told, that is how they made their decision, the decision to assess was based upon the master deed, it is supported under the master deed, there is no breach here.

THE COURT: Miss Boan, you're telling me they are getting all sort of conflicting information about what caused the damage?

MISS BOAN: Yes.

THE COURT: Did anybody say, "It looks to me like the windows are leaking and caused this"? Did anybody tell them that?

MISS BOAN: They had both, Your Honor, they had both.

THE COURT: That is what I'm getting at. They had both?

MISS BOAN: Then they had, "There is no way

to go back and do it."

MR. BELLAMY, III: Your Honor, can I address the Court, a couple points? The first thing, they brought up Steven Robinson, and this is kind of a sore point because back in 2010 we sent a subpoena to SKA trying to get all their documentation and David and Leigh took the position, "He is not our expert," so we had to go up to North Carolina and get a court order from a North Carolina judge to get Sutton-Kennerly's documents. We had a status conference with you back in 2011, dad was in there, David and Leigh, they said, "We're going to call Steven Robinson as an expert regarding repair or replacement." They said nothing about whether or not water intrusion originated in the windows or came in from the cladding. That is news to us, and I sent -- let me read what Sutton-Kennerly would say. It says Sutton-Kennerly Associates was retained by the Board to review and repair, dash, dash, dash, buildings A and B. They have not sent us a supplemental discovery response saying he is going to testify as an expert regarding A, B, C and D.

I will admit that in the status conference they only said that if we took the position that

the repairs were an improvement over, as far as being an improvement and not a repair he would have testimony to that but nothing about specifically he was going to opine where the water was coming from. That is the sole reason why they hired Larry Elkin.

THE COURT: We're not in trial yet. I just want to put this one question to you, Miss Boan. If you're on the Board and you've got a problem and you've got people giving you two or three causes for the problem, okay, there is one of them you can get some money for, and that is why you attribute it to these homeowners, these unit owners not maintaining their building, under the bylaws they are supposed to pay for it, shouldn't you, and the other two everybody is going to have to share, don't you have a duty to these other members to go back and at least check on the theory of whether or not the individual owners of the A and B units, where you had leak problems, should have paid?

MISS BOAN: I think, Your Honor, to answer your question, yes, I think you do look into it and I think this Board did. I think this Board considered it and that is how --

THE COURT: Well, what do you have, do you have minutes or anything, or depositions or

anything to show me that is what the Board did?

MISS BOAN: We do. You have an affidavit from Doris Bray that is in the court's record, that was previously filed in the past summary judgment motion when this issue was submitted by the plaintiffs on the record to be a factual issue, which I guess they are saying it is not anymore, but in the record is an affidavit from Doris Bray that specifically says that is exactly what they did. They got to the point of they were faced with conflicting information about whether there were, whether there was the, the windows were the source. I think the plaintiffs would admit the windows were not the only source, they have already said that, so given that --

THE COURT: Without doubt, but what if once it starts going it goes all to pieces?

MISS BOAN: We have an additional duty under the master deed that hasn't been pointed out to Your Honor, specifically it is under the definition of common element, under the definition of a common element. It specifically says those expenses that arise as a result of a repair to the common element, so expenses incident to the common element shall be treated as a common expense, so we have --

THE COURT: If you have to replace part of the stucco and you have to tear out my window to do it you're going to replace my window?

MISS BOAN: And A and B has an argument back to the Board to say, "You had to do this anyway, why am I having to pay for anything more than my windows and doors?" I think the real problem here is it goes to our motion to dismiss, the plaintiffs are talking constantly about A and B members and their negligence, and the Board was faced with a conflicting situation of, "What do we do? We're going to get sued here, we're going to get sued there, what makes the most practical sense?"

THE COURT: What makes the most practical sense is do what is right because if anybody sues you you're going to prevail, more than likely.

MISS BOAN: And we believe what they did was right and we believe it is supported under the master deed.

THE COURT: All right. Let me go back to Mr. Mills. Mr. Mills was responding to Mr. Bellamy's argument and he is not even to his motions yet.

MR. MILLS: Your Honor --

THE COURT: So, go ahead.

MR. MILLS: Thank you, Your Honor.

THE COURT: We just trampled on you, Mr. Mills.

MR. MILLS: I work with Miss Boan, I'm used to it, Your Honor.

There is considerable discussion about letters back and forth prelitigation. I don't even know that those are admissible and if they are, I believe they are offers in compromise and if they are, then the letters back from Kim Campbell are equally admissible, and our view of it is it was not a cram down, it was an evenly distributed assessment or proposed assessment under the exercise --

THE COURT: A budget cram down. Go ahead.

MR. MILLS: It was not done as an afterthought, "Oh heck, we don't know what to do so we'll just put it out there." There was considerable thought given to that. We have the whole issue of how much it was going to be while that was going on. And I'm at a loss to figure out how they get into evidence, offers of compromise, without us getting in our response. Our view was not, "Oh, just talk to us," our view was what we were being threatened with by the C and D members was, "If you don't change this, if you don't heed

to our demand we're going to sue." There you are as a board member and you go back to the A member and shift the cost there, you get sued there, you have a duty to the entire association, A, B, C and D, you want to try to make the best call you can based on information you have from experts, and we believe there is factual issues here whether they did. Our expert says it was a fair call, our expert says you're not held to a standard of the profession. We think that is enough.

There was a reference to the budget, as His Honor just mentioend, we categorically reject the notion we somehow withheld something from the membership. Our expert Mr. Brock Lamb tells you this is unique among master deeds. a very different master deed, all the way back from 1982, it had the windows and doors as a responsibility and it also allows some things he hadn't seen before, it allows the membership to propose an alternative budget and the notion it was never presented to them is simply wrong, we have testimony from Miss Gallagher, we have an affidavit we submitted that not only was it presented to them, it was presented to them on line, everybody gets a mail-out copy of it and if they want to propose an alternative assessment they

can. There is the basis of our waiver and estoppel argument. You can't go 13 years or 14 years as a C and D owner never proposing an alternative budget, never raising any complaint about the presentation of the budget and them come in and say, "You breached a fiduciary duty by not presenting the budget to us."

THE COURT: Was this a special assessment or was it a budget item?

MR. MILLS: This was a budget item.

MR. BELLAMY, JR: It came about as a result of the special assessment being voted down. I disagree with what Mr. Mills said, that it was budget items. The master deed and bylaws clearly say at the annual meeting of the homeowners association the Board will present a budget. Why? Because if it ain't on the agenda you can't talk about it, and the budget was not on the agenda because the Board chose not to put it on the agenda because they didn't want any conversation about it.

THE COURT: All right.

Mr. Mills?

MR. MILLS: We absolutely believe the facts are different and Miss Gallagher's affidavit shows that. There was always consistently since 1982 or

whatever before C and D came on the presentation of the fiscal year's budget at the annual meeting. There was in 2009, too. Are the plaintiffs seriously contending that with everything that was going on in 2008, where we're getting letters from the Bellamy law firm threatening suit, that we would, "We'll pull a fast one on them, we'll just leave that off the budget and they'll never catch it"? That's absurd, Judge, Miss Bray will tell you that, Miss Gallagher has told you that, it's the way we have always done it, we have always presented it at the annual meeting, we have all put it on.

MR. BELLAMY, III: Your Honor --

THE COURT: Let him get a little farther. I will come back back to you, Mr. Bellamy.

MR. MILLS: Is that all the Court wants to hear on --

THE COURT: You just wanted to make some comment before you got into your full response to Mr. Bellamy's motion, as I recall, you said, "I just had to make a few preliminary comments." I'm just waiting on you.

MR. MILLS: Okay. Your Honor, I will be glad to address the specific point of plaintiff's motion

for summary judgment and specifically I will go point by point down their motion.

THE COURT: Okay.

MISS BOAN: Number one, the plaintiffs contend that the Shipyard Village Horizontal Property Regime by and through its Board of Directors has an affirmative duty to maintain and replace and repair the common element. And they cite two sections.

We agree and have from the beginning of this that we're bound by the master deed and bylaws. I don't agree that section 5.5 stands for this proposition. Section 5.5 didn't deal with maintenance, it was --

THE COURT: Well, it doesn't make any difference.

MISS BOAN: Well, I agree, correct, so I can move past that point.

Number two, the defendant in the administration of the regime shall be governed by the bylaws.

We agree, again, that the defendant is bound by the master deed and the bylaws.

Point three, the Horizontal Property Regime is governed by the defendant and incorporated

association which acts by and through its elected Board. That is the wrong language, Your Honor, the Horizontal Property Regime is not governed by the defendant, the defendant is the Horizontal Property Regime and is incorporated.

Section 7.1 of the master deed says it will be administered by the Council of Co-Owners and incorporated association which shall act by and through its elected Board, so the Council of Co-Owners is the association.

THE COURT: Board of Directors.

MISS BOAN: No, sir, the Board of Directors is separate. This Council of Co-Owners is what the association is called and everyone is a member of it.

THE COURT: All right. Okay.

MISS BOAN: Number four, defendant failed to require defaulting co-owners to comply with the provisions of the master deed.

This is what we have been arguing where the plaintiffs have been saying we should have had them assessed for their collateral damage. The first point I would like to make on that, it was previously submitted to Your Honor in plaintiff's motion that was filed August 31st, 2011, and it was

heard by Your Honor 12/9/2011. Page 13 of the 15 page motion reads, "A and B co-owners are responsible for all the collateral water intrusion damage caused by their leaking windows and sliding glass doors."

THE COURT: If in fact there is any.

MISS BOAN: We would agree that the provision does but that particular point on their motion goes a step farther because it is actually asking the Court to rule that the defendant failed to require the defaulting co-owners. We do not agree with that, Your Honor, we agree to the duty, we dispute strongly whether there was a breach and we further dispute the damages. The damages and the breach on this argument go hand in hand.

Your Honor was asking well, if nobody can do it why didn't they just say that? Well, that is what our argument is, that is what Miss Bray presented to you in her affidavit, was as we're being presented with expert after expert on the condition of these buildings we're faced with conflicting provisions within the Master Deed. We have a provision that says, for example -- let me back up one second.

The duty of enforcing, making a co-owner pay

for them, it flows the other way as well. If a common element causes a problem to an individual homeowner's unit the association is responsible for that. So, A and B in this situation could have a unique argument against the association, "no, no, it is not our windows and doors that caused the problem, it's your common element that caused the problems and therefore the association should share in that expense." That is the conflict that this Board was dealing with and so the Board made a business decision that is supported within the master deed to assess those repairs that are incident to the general common element as a common expense and then it made the decision to assess the windows and doors, since those are a unit owner's, responsibility to the unit owner.

We believe that we complied, we don't believe that there was a breach of any of those duties. We further believe, we further would assert that to the extent that was presented to Your Honor in the last motion Mr. Bellamy, III, said in open court that that was factually in dispute and, Your Honor, we moved on beyond it. To the extent that they are claiming it is not in dispute anymore we would agree and I won't repeat the argument we have

already gone through.

MR. BELLAMY, JR: Can I --

MISS BOAN: We have --

THE COURT: Wait a minute, Miss Boan. Did you say something, Mr. Bellamy?

MR. BELLAMY, JR: I just thought she was through.

THE COURT: All right. She's not through, let her finish.

MISS BOAN: One last point before I move to the next one. To succeed on this argument, to succeed on the argument that the defendant failed to require the defaulting co-owner to comply with the provision, the plaintiff must prove that the co-owner did not maintain their unit in good condition. This is hotly contested. The Board has letters from A and B owners saying this this isn't us, this isn't us, it's hotly contested. That is what is going to be presented at trial, there is a dispute here.

MR. BELLAMY, JR: I challenge their right now to present that evidence.

MR. MILLS: Okay, unit B-28.

MR. BELLAMY, JR: I'm asking the Board to do it and the Board wrote her back and said, "It's

your responsibility, you're responsible for maintaining the windows and doors and the leaks."

MISS BOAN: She had an attorney that contacted the Board, that said, "No, it is not me, I had it fixed." It was part of the argument that, that, "We led this board down this path and said what are we going to do with this situation, we're faced with problems about who's responsible for the building envelope, is it the windows, is it the common element?" Is it factually in dispute?

MR. BELLAMY, JR: No.

MISS BOAN: There you go, he says no, I say yes.

Point five. Defendant is required to rebate excess assessment. That is not part of this litigation, I'm not sure what that point was in the summary judgment.

MR. BELLAMY, III: It was, Your Honor, under the articles of incorporation, what we're dealing with, let me explain something, under the Shipyard Villege Council, Co-Council articles of incorporation it specifically provides in there that any excess assessment, the unit owners are entitled to a rebate. Their own articles of incorporation provide that.

THE COURT: Okay.

MR. BELLAMY, III: I'm just saying --

MISS BOAN: It say rebate excess assessment, is what the motion read.

MR. BELLAMY, III: Your Honor, we incorporated that exact, our articles of incorporation are part of the motion, incorporated by reference. I would stand by what that language says in the articles of incorporation which have been certified by the Secretary of State.

THE COURT: I understand.

MISS BOAN: I don't dispute it is in the articles of incorporation, I dispute the point they were making with it.

One thing, Your Honor, I want to make sure it's clear on the record, back on point four we were just talking about, it is not only Doris Bray's affidavit that is in support of our position that this is in dispute but it is also Larry Elkins' affidavit and Charles Ernest's affidavit that was all previously submitted at the last hearing to Your Honor.

Point six in the motion, the defendant shall keep accurate and detailed records in chronological order.

We don't dispute that there is an obligation to keep our records. We don't believe that is a part of the plaintiff's claim, I'm not sure where they are going with that point on summary judgment. I don't think that is a point that --

MR. BELLAMY, III: It is part of the plaintiffs'. What we're saying is their failure to review records and keep timely records. During the depositions all the Board members said they never went back, one, they didn't read the master deed and bylaws.

Two, they didn't think it was important to go back and look at the previous financial records or previous minutes to make a determination of what they should do. For example, if Your Honor goes to, let's say, I'm trying to think of one of those, what is the name, place where you have your oil changed and you get your oil changed and they come back and say, "Mr. Bellamy, another 20 miles you need to come back and have this changed, differential, another 30 miles you need to go do this and this and this." The point we're trying to make is when they came on the Board none of the Board members during their deposition testimony thought it was their fiduciary duty or

responsibility to go back and look at what the previous Board members did. If they had done that we wouldn't be here today. They could have gone back and looked at '93, '94. Bob Gallagher's letter was attached to the minutes, which said, "You need to get a structural engineer to look at the cracking," and the Board tabled it, they said they didn't have enough money to go forward and they basically tabled it and didn't do anything about it.

None of the Board, current Board members said they knew anything about Bob Gallagher's letter, never read it, never heard about it, and Bob Gallagher comes back in October, 2007, he is hired by one of the Board's experts, Eddie Stokes, a mechanical engineer, he says, "Bob, you know a lot about concrete." Bob went out there and did a complete investigation on buildings A and B and he writes a report that states specifically that, "The prior Board failed to follow any of my recommendations and if they would have done that they would have saved at less two or three million dollars regarding just concrete repairs," and the point we're trying to make is, that is one of our motions for partial summary, that if they would

have followed the advice of Bob Gallagher back in '93, '94 we wouldn't be sitting here today, if they would have hired a structural engineer the structural engineer would have come in there and said, "You've got these problems," they would have come about and sued the developer like they did in building C and D, sued the developer, sued the architect, sued the general contractor.

THE COURT: How about that, Miss Boan, what about Mr. Gallagher's report, "Why didn't you follow my advice, you bring me in now, why didn't you follow what I told you?"

MISS BOAN: Because that is not what his document says, Your Honor. His document, he does recommend to the Board to look at the structural engineer. There is testimony that, number one, that that is a provision that he included in many of his documents in order to make sure that he is protected.

Number two, the minutes reflect that the Board did take action with regard to what ProCon recommended. Did they hire a structural engineer, no, they did not but did they do the repairs that ProCon recommended, yes. Who performed the repairs? ProCon. Is that part of the cosmetic

repairs the plaintiffs are complaining about? If he is such a great construction person and was doing such good work, then how come they are now complaining it is a cosmetic repair?

MR. BELLAMY, III: ProCon did not perform the repairs.

MISS BOAN: ProCon did some of the repairs at the Shipyard Village.

MR. BELLAMY, III: What are you talking about?

MISS BOAN: In '93 and '94, when he came in in '91 and did some repairs, yes, he came back later in '99 and put a proposal in for the waterproofing project that has been discussed earlier, that is where an assessment was made to C and D unit owners who had just come on board, to help with rusted rebar, cracks in the stucco, waterproofing the building, all the repairs that was listed in a letter to all co-owners who all admit that they, excuse me, Mr. Fisher specifically admits that he knew and questioned --

MR. BELLAMY, III: That is a misstatement.

THE COURT: I'm getting off this point. I think it is best that we stick to their motion.

MISS BOAN: Number six, as far as keeping

accurate records, we dispute whether, if they are challenging they were kept, we believe they were. To the extent they are trying to argue some type of obstructive notion, those records are freely accessible to the plaintiffs, to any member of the association, they would have as much right to look at those documents as we would.

THE COURT: You are complaining they are not there?

MR. BELLAMY, III: Right. For example, the problems I note from the second vote on the windows, I simply asked Miss Boan if we could get a copy of them. She indicated they no longer exist or in the alternative that they couldn't find them.

MISS BOAN: What other records are there other than the proxy vote? What is it missing? You are saying you're trying your case on our records, you obviously have something.

MR. MILLS: Your Honor --

MR. BELLAMY, III: An example, Your Honor, one point I want to make, I went by and got the records from Georgetown County Building Department and what is important is until, the building that was built, the construction records showing what they used, the contractors, and as far as how they

constructed the buildings, from that standpoint, up to 2007 they had never hired a structural engineer. More importantly, at the time they were making repairs in 1999 and going forward until 2007 there is no permit for structural repairs.

And that is important because if they want to come back and say that the 1999 letter, as far as the special assessment for $300,000, put our people on notice there was a problem, number one, they assessed our people, or the A, B, C and D $216,000 to fix the problem. We assume they fixed the problem. More importantly, during 1999, I have some notes I made --

THE COURT: All right, we're getting too far afield.

MS. BOAN: I can move on, I can address those later.

THE COURT: Go ahead.

MS. BOAN: Number seven, point seven in the motion, defendant had a legal and affirmative duty to reasonably fund the reserves for future common expenses. We don't disagree that there is a duty to do that. We would disagree there has been any breach of that.

Number eight, defendant has a legal and

affirmative duty to timely maintain, replace and repair the common element. Your Honor, timely is in dispute and this is in dispute whether or not we did things appropriately or timely. We are talking about 30 your old ocean front buildings that were built in the eighties before we have the technology we have today to help with the longevity of them.

Number nine, point nine, defendant has a legal and affirmative duty to enforce the Act and master deed and bylaws by taking prompt and appropriate action to correct any violations.

Again, Your Honor, the same argument, we dispute what they are talking about if they are trying to make an implication that something wasn't appropriate or timely. I think once we get down to their later point that is when they are actually making the motion we have been hearing today.

Number ten, defendant has legal and affirmative duty to prepare, adopt and present a plan. Your Honor, you have already heard the argument on that. We did that appropriately, we substantially complied with the master deed on that issue and the plaintiff should not be able to sit back and let that process go without complaining for year after year after year and then all of a

sudden now attempt to use that. We believe a substantial compliance is sufficient on that issue and we have the Gallagher affidavit that has been filed with the Court on that issue.

Number eleven, the defendant has a legal and affirmative duty to pursue recovery for alleged construction defect in the common elements which it maintains by taking prompt and appropriate action. I believe what the plaintiffs are saying there somehow we should have sued.

Well, whether or not we decided to sue is protected under the business judgment rule and it is in dispute as to the timeliness of when anything was discovered by the Board and whether or not there was a violation. In fact there will be testimony presented that Finkel & Altman told the Board that there was not, they did not want to take this case, they didn't believe that there could be money to be recovered. The Board sent a letter to all the co-owners to that effect and letting them know if they wanted to pursue it it would be up to them to pursue individually. If Finkel & Altman had thought there was money to be had or a suit to be made there it would have been made.

THE COURT: When was that?

MISS BOAN: That was 2002, Your Honor.

MR. BELLAMY, III: Your Honor, that was regarding just the windows.

THE COURT: Okay.

MR. BELLAMY, III: It was not, nobody was aware of the distressed concrete issues regarding the corrosion of the --

THE COURT: That occurred later?

MR. BELLAMY, III: That occurred later.

THE COURT: All right.

MISS BOAN: Number twelve, defendant was negligent and breached fiduciary duty by failing to fund the reserves.

We have previously addressed that. We dispute that. Larry Elkin, we have marked as Defendant's Exhibit 1 and Defendant's Exhibit 2, the deposition of Larry Elkin with his report as well as the deposition of Gary Brabham with his report. Both of our experts disagree that the reserve funds were not adequately funded. They were reasonably funded and their reports and their testimony support that.

THE COURT: Well, the fund speaks for itself.

MR. BELLAMY, III: Your Honor, if I could comment?

MISS BOAN: The fund speaks for itself, the reserve fund, and the purpose of a reserve fund is not to pay for every single repair that is going to come down the line. It is very similar to a savings --

THE COURT: That's right, because some of them are to be paid by the homeowner whose unit caused damage to the common areas.

MISS BOAN: That's the case, Your Honor, but also a reserve fund is something that the association is obligated to reasonably fund and not every single year can you fund it at 100 percent. For example, a retirement account. Prior to having children I funded my retirement account at the full percent, the maximum percent. Now that I have children and I have daycare expenses I have to make a more reasonable decision to help with my overall budget and that decision is to cut it back to at least get some benefit that the company provides. I think that is a perfect example as to what the Board can or cannot do with regard to reserve funding and what would be considered reasonable. That would certainly be something that would be up to a jury to determine.

THE COURT: All right. I think we're on

fourteen.

MISS BOAN: I have number thirteen, the assessment is an ultra vires act, failure to comply with the bylaws.

Your Honor, that goes back to the original argument I was making where we have provisions within the master deed that specifically said that if there are repairs that are incident to the general common element that this Board shall assess those as a common expense faced with the conflict of whether or not we caused damage to the unit or the windows and doors caused damage. We believe the assessment as rendered by the Board is supported and is an ultra vires act that should be afforded under the business judgment rule and we believe Doris Bray's affidavit, Larry Elkins' affidavit would support that.

Number fourteen, plaintiff would show that by a planned scheme of operation the defendant attempted to deny them the legal right to object to the imposition of the assessment.

Your Honor, they didn't plead conspiracy. That is not appropriate for summary judgment.

Number fifteen, defendant was negligent, breached the duty of care and failed to assess the

A and B co-owners for water intrusion to the inside of their units and the common element caused by their failur to maintain waterproofing around the thresholds of their unit, windows and doors.

Your Honor, there is substantial evidence within the association records that the windows and doors were being maintained, that they were being caulked, they were being painted. That goes directly to the heart of what they are saying there. We have evidence that they are maintaining it, so we believe that that is in dispute, along with our other arguments about the collateral damage and that the Board did what, did the best they could do, given the conflicting situation.

Number sixteen, the defendant was grossly negligent in discharging the duty. We believe whether or not we were grossly negligent --

THE COURT: Let me go back to fifteen. Who was your engineer on the declad?

MS. BOAN: SKA.

THE COURT: Didn't you, did you ask them to give you an opinion?

MISS BOAN: Your Honor, there is a correspondence I believe --

THE COURT: Did you decide not to ask them to

give you an opinion when they were decladding it? I mean, that would be the best time to inspect it. Did you ask them, say, "Hey, how much of this was caused by leaking windows, if any?" I mean, do we have them on record?

MISS BOAN: Judge, what we have is we have, I believe it is, I believe it is Eddie Stokes who says to the Board in an action list, "Board, it is for you to determine the assessment, we're going to handle this, this and this."

THE COURT: I mean, you have them tearing it down, you have an engineer on site.

MISS BOAN: Who is telling us --

THE COURT: Did you ask him to do it? It is not too late, you could still after the job is done. I saw nothing in the bylaws that said that you couldn't come back to the unit owners and say, "We decladed this thing and our engineers having taken off the stucco, replaced your windows, fully inspected it, have decided this was coming from your window, not from somewhere else, and we want, we're going to have to assess you for a portion of this damage." Wouldn't that be real easy to have done?

MISS BOAN: No, Your Honor.

THE COURT: I mean, we're looking at C and D, and other, other owners of A and B, you have A and B owners who did everything they were supposed to and maintained their unit and weren't responsible for a dime of this damage, but you have all those folks and you're saying we should let them pay for it or pay three-quarters of it, whatever, rather than assess this owner over here for what he did wrong? I mean, wasn't there an obligation to at least explore it?

MISS BOAN: Your Honor, that obligation was explored. The question, because the question --

THE COURT: Wait. You're telling me that before you undertook the work there were conflicting reports or people saying, "Well, it's caused by cracks in the stucco, it's caused by windows leaking, we didn't know what to do or we didn't know where it was coming from"?

MISS BOAN: Correct.

THE COURT: But when I had this construction company came in and said, "This is what we've got to do," and you say, "Go ahead and do it," couldn't you have just said, "Let us know whether this was from the windows or from some other other source?" Couldn't you just do that? I mean, when they tear

it off they can tell, they can tell where it's coming from.

MR. MILLS: We could have. We had no duty to do so and if we did not do so we have not failed in the exercise --

THE COURT: Mr. Mills, I disagree with you there.

MR. MILLS: Yes, sir.

THE COURT: You had a duty under the bylaws, it says that you shall assess them and that tells me that if the information is available to you and it appears to me that this group over here is going to bring in folks that can say you can say it is water intrusion damage, they hope they can.

MR. MILLS: We haven't seen it.

THE COURT: They are going to need to.

MR. MILLS: We haven't seen it.

THE COURT: If they can do it when it was being torn off, certainly, I mean, you had the perfect opportunity to inspect it. Didn't you have a duty to do that if it was -- I mean, how would you not have a duty to do that?

MISS BOAN: My position is that that was being done. Maybe what I'm telling the Court isn't coming across the right way,.

THE COURT: If you've got the contractor who is doing the work and he says, "I can't tell --"

MISS BOAN: And he does say that, Your Honor.

MR. BELLAMY, III: Your Honor --

THE COURT: Did the Board members ask the question of SKA, "Can you apportion this or tell us how to apportion this with A and B?"

MS. BOAN: I think the answer to that is no.

THE COURT: What I'm saying, did you ask them to do that?

MR. BELLAMY, JR: They said, "We didn't ask them to do that."

MISS BOAN: Because we didn't ask that question, he --

THE COURT: Did the other side ask you to do it?

MR. MILLS: After the lawsuit was instituted, in a meeting in my office.

THE COURT: But it is going on.

MR. BELLAMY, III: Your Honor, we asked them to do that, Steven Geiger and I went back and we looked at about 20 videos from building A before they started the repair and reconstruction. We could document the water was coming in through the windows, under the thresholds. We actually had

videos that we got from the association, their expert as far as -- we have a video showing water on a rainy day coming under the threshold into the unit and we've got that documented, that is their document and we have that we're proving our case through.

THE COURT: My point is this. Nobody had a better chance, no one had a better chance to determine where this damage was coming from and to apportion it out than the man with the sledge hammer.

MISS BOAN: Your Honor, do you know how expensive -- it wouldn't have been worth it to the association to do it.

THE COURT: If 90 percent of the damage was assessable to leaking windows, then it would have been certainly, would have certainly been worthwhile.

MISS BOAN: We could certainly bring Mr. Robinson who was the person that was on the scene and he would be the one to testify to what he saw and --

THE COURT: It seems like he's the guy that could say whether it was damage from windows or not.

MISS BOAN: He will say it wasn't.

THE COURT: How do we try this case without it?

MR. MILLS: Our expert says --

THE COURT: Wait a minute, Mr. Bellamy.

MR. MILLS: Our expert says you can't do that it is too far gone, you can't say this percentage is attributable to this, this percentage is attributable to that. That is our point of Larry Elkin, slow down the project, you cost more money and nobody is satisfied. There is no certainty.

THE COURT: Mr. Elkin wasn't there.

MR. BELLAMY, III: Your Honor, I've got to call a guy named Tim White, Your Honor, I called him on the phone about two months ago and he now resides in Mechanicsville, Virginia, he was the guy that went in there and videotaped all the units in building A. He was also the guy that removed the window assemblies and the sliding glass door assemblies, and guess what, he will testify that the water was coming in and damaging the interior of the unit and pretty extensive damage. If we can locate him within about two months time, surely over a period of years they could have found somebody like we did with Tim White.

THE COURT: All right. I'm getting off the subject. I interrupted Miss Boan. I don't think she was through. Which one were you on?

MISS BOAN: I finished fifteen and Your Honor called me back.

THE COURT: You're on sixteen?

MISS BOAN: Sixteen, defendant was grossly negligent, that the defendant was grossly negligent in discharging it duties, and there were four provisions. One, failure to timely hire a structural engineer.

Your Honor, that is what our expert opinions are about, that we submitted to Your Honor, that is factually in dispute, what is considered timely of a structural engineer, whether or not that is a breach of any duty, that is hotly contested in this suit.

B, failed to timely repair the defect. We also contest that. That is clearly whether or not we did something that was a breach of our duty. We contest what they consider to be timely, they want to argue that we kicked the can down the road, we want to present that we were doing the best we could with what we were faced with at the time and making repairs that we were advised would be

suitable.

As to C, failing to file lawsuit regarding defect. Your Honor, I addressed that. I believe what they are talking about there is the lawsuit against the developer. The issue would be, number one, when did the Board know and did the Board know in time to file any kind of defect claim, and then also protection under the business judgment rule not to sue and --

THE COURT: I don't know if you had a claim, I don't even know if you had a claim.

MISS BOAN: Correct. And number D, failing to reassess the A and B for damages created to common elements of regime property, for their failure to keep up windows and doors. That is an interesting one, Your Honor, because that sort of dovetails into our motion to dismiss.

THE COURT: Okay.

MR. MILLS: The final point on the point raised by Mr. Bellamy, we do not agree that the Court has bifurcated a new claim for judicial dissolution. We would like to be heard on that when the Court is ready.

THE COURT: I'm ready.

MR. BELLAMY, JR: I guess what you say in

chambers and everybody agrees to doesn't mean anything and that has been part of the problem with this lawsuit.

THE COURT: I thought that is what we had done.

MR. MILLS: No, sir.

MR. BELLAMY, III: That is what we agreed to.

MR. MILLS: A different time, different context, we were talking about setting the case up to see if it could be settled. It couldn't be.

THE COURT: I thought we agreed to that.

MR. MILLS: Absolutely we could not, we moved, we actually filed a motion to dismiss. We told you we can't do that, we discussed with His Honor, because you don't have all the A and B members there.

THE COURT: Well, there is no order, so I guess --

MR. MILLS: There is no motion for bifurcation, no order. You absolutely indicated that you were not inclined to do that. I want to be perfectly clear on that, we did not and could not consent because we urged strenously to His Honor that you cannot blow up an association, which a judicial dissolution is, you cannot do that in

the absence of the very members whose property rights are being impaired. You have a minority, 50 out of 140 who are moving for dissolution and it is important, well, in ordering it right now, "I'm going to bifurcate" which His Honor can certainly do, but when you push that down the road the problem with it is if the A and B owners are not in this lawsuit they are not bound.

THE COURT: I understand.

MR. MILLS: It is not res judicata.

THE COURT: I understand. I recall the conversations that we had. Certainly we don't want to argue that in this lawsuit. Do we want to go there?

MR. BELLAMY, JR: I thought we agreed.

MR. MILLS: I want it dismissed, that is what our motion is.

MISS BOAN: Otherwise, Your Honor, we're faced with two trials.

MR. MILLS: We don't mind.

THE COURT: You're going to be faced with another trial if they bring it back.

MR. MILLS: Oh, of course, but the game would be before the Court, you can rule on --

THE COURT: I think that is something we've

got to do, Mr. Bellamy, if you're seeking judicial dissolution, are we going to have to make all the members parties?

MR. BELLAMY, III: The statute doesn't require that.

MR. BELLAMY, JR: I thought it was clear in chambers but I guess I'm going to have to get a court reporter when I go in chambers with them because I thought it was clear, I thought it was clear that we talked about, if I recall George Cafollis was there, let's just get the cards on the table, he's the counsel that was brought in to represent the Board.

THE COURT: I know a good way to handle this. I'm going to bifurcate it and reserve ruling on the motion to dismiss.

MR. BELLAMY, JR: All right, sir.

MR. MILLS: Our motion is denied?

THE COURT: No, it's --

MR. MILLS: It's not ruled upon?

THE COURT: Not ruled upon.

MR. MILLS: Okay.

THE COURT: I'm going to reserve a ruling on that.

MR. MILLS: I understand.

THE COURT: What I'm saying is we're not going to try it in this case.

MR. MILLS: And I fully understand that and expected that. The issue is, we want to preserve all our issues raised in our motion to dismiss.

THE COURT: And you have reserved them, that will still be on the table and I will consider the motion to dismiss it, sounds like the best motion you have made but we'll proceed.

MISS BOAN: For the record, Your Honor, on that issue, to the extent that we would be subjected to another case, another trial on the same issue, to the extent that plaintiffs will be trying to get judicial dissolution based on oppressiveness and based on the negligence they are asserting in this case, there is a risk of inconsistent verdict that is subjecting us to and --

THE COURT: Isn't that an equity matter and it is going to be heard by me?

MR. MILLS: Yes, sir.

MR. BELLAMY, JR: That's right.

THE COURT: There you go. You won't have inconsistent verdicts.

MR. MILLS: Well, you will be bound, Your

Honor, by the factual findings --

THE COURT: Look, the way I see it is this. One of two things. There can be a motion made now that I have reserved my ruling on judicial dissolution, there may be a motion made to add parties, in which event it just continues. Fail that, there is probably going to be a granting of your motion to dismiss but it will be without prejudice and then you will have the action brought back again, so let's look at it from the the viewpoint of judicial economy and hope that we're not going to try it tomorrow or the rest of this week but somewhere along the line you all can work that one out and decide what is the best way to proceed. I agree with you, without ruling, that we will have to make everybody a party.

MR. BELLAMY, JR: Your Honor I just want to make one comment. It kind of burns me. When we were in your office and George Cafollis was there we talked about judicial dissolution and you said, "I won't bifurcate that." You signed an order on April 9 of this year that says the plaintiffs shall have the right to amend their pleadings to add another cause of action for judicial dissolution and also plead other related matters no later than

March 30, 2012.

Now, what happened, if you remember, in your office was we were again trying to attempt to find a way short of a dissolution of the association and we were to send to defense counsel a recommendation, which we did. We were told by defense counsel Doris Bray wouldn't approve it. Okay. Now, the point is every time we have tried to come to the well and tried to resolve this thing they don't want to do it.

Let me just get back to the question of the duty. They have danced all around the question of did they breach a duty. You have asked them, depending on which one of these layers respond, I have asked them did they not have a duty to investigate whether or not they should charge A and B based on the evidence that was in front of them, and bear in mind it is coming from the eighties, forward, we don't know it, but they know it.

Now, interestingly, Mr. Bradham in his deposition told me that that question was a question of law for you, what the duty was, because I asked him and he said it was a question of law for the Court, he wasn't going to delve into it.

Let's go back. We talked to Brian Nisbet,

and Brian Nisbet was the president of the Board and he basically said in his deposition, they listed him as a witness, too, and he told Mr. Mills I guess what he didn't want to hear, he told him that he was a pawn, he was manipulated by Leon Jennings, that Leon Jennings had manipulated him and he resigned from the Board. That is what he told him in his deposition. Mr. Mills didn't like that.

But the problem, the thing that they just can't seem to understand from our perspective, the master deed and the bylaws said that A and B had the responsibility under 3.6 of the master deed to maintain the windows and doors and it further provides under the articles of the master deed that the Board shall enforce the terms of the Act.

The question you asked a minute ago was a very valid question. Well, if they had the duty, once they were put on notice that there was a problem, and they can't say they didn't have plenty of notice that the windows and doors were leaking, why didn't they commission somebody to go take a look? Because early on they told us that they knew they had the responsibility to go figure that out. If they would have done their duty and not breached their duty they would have charged Sutton-Kennerly

to go in and make an assessment of how do you determine whether there was damages from the windows and doors to the exterior of the unit. They have told you they didn't do that and they have told you they didn't have to do that. They have told you they weren't required to do that. Well, if that is not a breach of the duty I don't know what it is.

The documents that have been generated in the course of discovery, and it ain't been easy, here is a letter from Leon Jennings dated March 28, 2013, 2003, excuse me. "You are correct that the owners are," this is the president of the Board, "You are correct that the owners are responsible for window repairs due to age, leaks, breakage and that's covered in the master deed. The real kicker is whether McGee, David Dill and our attorney are correct in saying that the leakage, that the leakage many units have experienced is due to improper window, improper windows incorrectly sized and installed that make it the association's liability issue and force you to take action or at least to have the owners make the decision. It certainly puts the difficult position," puts the difficult position. "The master deed specifically

states the owners are responsible for the window frame, so one could argue either way."

Then it goes on, April 3 he writes a letter and --

THE COURT: What year?

MR. BELLAMY, JR: Let me read you one here, September 26, '07, the Shipyard Village. Basically they have got a web site now where you can go on their line and get it up to that time. Leon Jennings told me they weren't sending out board minutes to the membership and they had a duty to do it but they weren't doing it. That is in his deposition, and they say in September 26, '07, water problems associated with recent rains. "The board has been made aware of acute water leaks into the interior of some of the A and B units during recent rains. The question has been raised as to who's responsible for the interior of the unit." And he is telling them, "Please refer to Article 2, Section 5(C) of the amended master deed, copy of which is attached. This document explains that only the sliding glass doors and the windows are the responsibility of the association." This is after he thought the amendment was in place. "The rest of the unit is the responsibility of the owner

and the maintenance company hired by the owner and not the management staff. The Board hopes this clarifies it."

Now, here is the Board telling the unit owners of A and B, telling the unit owners that they in fact are responsible. They know, they have got information that the windows are leaking. What Miss Boan would tell you is the fact is they got information the windows were leaking. Does that excuse you of your duty to go and investigate and make that determination? Because had they done so, then they would have merely assessed A and B, but they breached their duty, they never attempted to do that. They can't produce any evidence that they have attempted to do that. They just brushed it aside. Their argument is, and Sutton-Kennerly, they said Sutton-Kennerly is going to testify. He is not going to testify as to breakdown. They are just going to testify --

THE COURT: Let me stop you a minute.

Mr. Mills, tell me, tell me, Miss Boan has said they got conflicting reports as to the damage or the cause of the damage. Well, that does nothing more than tell me that they received some report. What is your position on the duty to

investigate to determine whether or not these damages are attributable to individual unit owners and what did they do, if anything.

MR. MILLS: Our position is, Your Honor, there is no such duty to make that inquiry.

THE COURT: Your position is there is no duty under the, there is no duty to make an investigation into a duty under the bylaws? You told me earlier you would agree that there is a duty to assess an individual unit owner if his unit damages the common areas, we settled that earlier, but are you telling me now that when given notice, albeit conflicting, albeit conflicting, some notice that that has occurred, there is no duty to the other homeowner association members to investigate or to look into the matter?

MR. MILLS: My answer is the Board did look into it, that you can --

THE COURT: That is what I want to know, that is a key here to me. I understand the business judgment rule.

MR. MILLS: Yes, sir.

THE COURT: I understand that is what they are working under and I can appreciate that, I can appreciate that.

MR. MILLS: Yes, sir.

THE COURT: Now, tell me what they did. I'm not concerned with going so far as to ask the contractor to do a special assessment, I know they didn't do that, but tell me what they did to satisfy themselves that they had done what they were supposed to do as far as an investigation of a possible claim against the individual unit owners. They have conflicting information, I know that, what did they do as a result of that?

MISS BOAN: The Board discussed what will we do with this assessment, how do we treat the A and B in light of the fact the assessment is invalid and the windows and doors are now the responsibility of A and B unit owners, how do we assess for that, knowing that, and the Board, knowing that and knowing what the other --

THE COURT: Wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.

MISS BOAN: The Board, in trying to decide how would we do the assessment, that the amendment is invalid --

THE COURT: All right.

MISS BOAN: The amendment is invalid.

THE COURT: Okay.

MISS BOAN: The people have spoke.

THE COURT: Okay.

MISS BOAN: The windows and doors need to be treated as if they are the A and B's responsibility.

THE COURT: Got you.

MISS BOAN: Okay. The Board, knowing that, discusses how are we going to apportion this, what are we going to do with this, and the Board made the decision that in light of the provision in the master deed about the general, the expenses incident to the general common elements and there was as likely an argument that the common elements caused the damage to the windows --

THE COURT: What do they base that on?

MISS BOAN: On all the information they were receiving.

THE COURT: Did they have a report that said that?

MISS BOAN: Yes, sir.

THE COURT: What report was that?

MISS BOAN: There is a documentation from SKA where they specifically asked SKA about the windows

and doors and what needed to be done with it and the response from SKA was, "You've got no choice but to remove those windows and doors because of the envelope system and what is going on with your building."

THE COURT: I understand that but did S & K ever tell them, "We have found evidence that leakage from the common elements has damaged the windows"?

MISS BOAN: That is what Larry Elkin will say to Your Honor.

THE COURT: I'm talking about not what Larry Elkin has said after the fact, I'm talking about when this is going on.

MISS BOAN: Sure, but this was after the fact. I'm not a construction expert, Your Honor, I can't interpret what they are telling the Board members but Larry Elkin has reviewed what the Board was presented with and the knowledge that they were given and he --

THE COURT: Can he be specific as to what they were presented with?

MISS BOAN: They were presented with there was water intrusion in this building, there was no way there was a source coming from windows and

doors, that the windows and doors were causing the collateral damage. They were presented specifically with information that --

THE COURT: You just lost me again. I thought a moment ago we had conflicting information coming in, some saying windows and doors and some saying others, I thought that is what we talked about earlier, that they had conflicting information.

MISS BOAN: They did, but in the final assessment, it's at the point the assessment comes down that they are making those decisions, the report coming down after the skin has been removed, this is a situation where there is water intrusion all over this building.

THE COURT: So you're telling me now that when they were having this construction ongoing they were getting reports back, and this was about assessment time, you're telling me they never had any information that would indicate that this was the result of failure to maintain windows and doors, they never heard that?

MISS BOAN: Correct.

THE COURT: Never heard it?

MISS BOAN: Yes. I mean, Your Honor, they

didn't hear that it is a result of the failure to maintain windows and doors.

MR. MILLS: What they heard was, "Your building is leaking everywhere."

THE COURT: You see, that casts things in an entirely different light. A moment ago I thought, I thought what I was hearing was all during the time someone was telling them they had, need to have this work done because of your water intrusion, that you were getting reports saying water intrusion is a result of failure to maintain windows, others saying no, your water intrusion is caused by common elements, leaking cracks, stucco and so forth and so on and they were, they didn't know which way to go because they had both things going on but now you're telling me, and the reason that gave me some concern was, well, if you had any information that it was somebody else's fault you should have explored it, that was how I was thinking, but now you're telling me there was no information until this lawsuit was filed that any of the damage was a result of failure to maintain windows?

MISS BOAN: The disconnect, Your Honor, is there was never any information related to the

Board that the leaking windows caused the collateral damage to the common element.

THE COURT: Okay, that's it. That's it right there. Because that affects how they would have reacted. Now, my thinking is that if they had any information that they should have investigated it, if they had any information they should have investigated. You're telling me they had no such information, didn't know about it?

MISS BOAN: We knew about the leaking windows, cannot deny that there were leaking windows. There was not evidence presented that leaking windows caused the collateral, caused any collateral damage.

THE COURT: Not a lick?

MISS BOAN: There is, Your Honor, I would have to go back to our expert's report, he addresses, if he is addressing it, I understand he comes in after the fact but he's addressing what is being presented to the Board and what the Board was faced with from a construction standpoint, he speaks to that.

THE COURT: Okay.

Mr. Bellamy? Mr. Bellamy, III.

MR. BELLAMY, III: Your Honor, in the meeting

the middle of 2002 George McGee & Associates who are the same forensic engineers that the association hired regarding buildings C and D, they prepared the reports Finkel & Altman, Finkel & Altman used in the litigation with respect to C and D. At the same time the Board asked McGee & Associates to look at buildings A and B, and I have talked to Mr. Henry who is one of the experts that came down here with McGee & Associates, he did water testing on A and B and it is in the minutes where he told the Board that water is coming in through the windows, and I can find the minutes, but it is in the minute, he says that.

Now, they hired Keystone Construction who is Kelly Dill's husband, she was, it was her management company, Kelly Dill, Kelly Dill was the senior management, K. A. Dill, she hires her husband David Dill with Keystone Construction to come in. He looks at the windows and he says, "You've got the wrong windows installed, they are residential, they are prefabricated, they are too small and if you don't fix it you're never going to resolve the water intrusion problem until you get them replaced." That was in 2003 and they don't know anything about it. While all this is going on

Leon Jennings is saying in letters to the Board members that the A and B windows are the unit owners' responsibility.

THE COURT: Okay.

MR. BELLAMY, III: Now, what happens is, you raised an excellent question, what precipitated this window issue. The Board hires ProTech to come in in early 2004, 2005. They come up and say this is going to cost 2.5 million to replace all the windows. At that point in time that is when the window amendment comes about because prior to that, just like in this particular, regarding this particular lawsuit, the Board has total autonomy, authority to approve whatever changes are made to the common element or individual unit.

5.6 of the master deed specifically provides if you are going to do any interior damage, you can't do anything to the common element but if you do any interior damage you have to submit it to the Board for approval and they respond in 90 days. They have always had that authority, always had oversight authority. The problem is they didn't want to deal with the headache dealing with 80 units so they kept putting it back on the individual units, so what happens is they passed

the window amendment. The first time the window amendment fails, the second time they send it out by proxy.

THE COURT: And it passed and then they do it again.

MR. BELLAMY, III: Right. What is interesting about it is, and I have to give total credit to them, I have to give dad credit, he read the window amendment, what is interesting, that they never indicated it is retroactive, it's proactive.

THE COURT: He says it's prospective.

MR. BELLAMY, III: Right. There was an assessment that came down in 2008, this is by M.C. Engineers, the total amount of the assessment was about 13.5 million. I think they were going to break it down to where our people would have to pay from 85 to 92 thousand dollars. I mean, let's kind of put it in perspective. When the C and D lawsuit, there was another financial assessment for $253,000, our people paid that. The A and B people, A and B units only paid $69,000 to finance the litigation in C and D. There was a settlement where what they got basically was 3.2 million, I think that was the total. They came in and what

they did is they only spent $780,000 on buildings C and D and interestingly, the expert report, Frank Henry says, "You need to replace all the windows in buildings C and D." They didn't replace a single window. He says, "You need to strip the EIFS for drainage on buildings C and D," they didn't do that either. They took 1.5 million from the C and D settlement and they put it in reserve and they have used that money to finance litigation for buildings A and B.

One of the issues in this lawsuit, let me tell you what is interesting, too. Kelly has recently gone back and investigated buildings C and D, and guess what, they have problems. I have talked to Frank Henry, an engineer who did the assessment back in early 2000, he has looked at Sutton-Kennerly's report, he says, "My God, the buildings are in worse shape." What has happened is, because of the Board's negligence it is going to probably cost $11,000,000 or more to fix buildings C and D now.

MR. MILLS: Are we trying that case now?

MR. BELLAMY, III: Well, the point is, Your Honor, the thing is, part of this lawsuit is that 1.5 million. The 1.5 million whould go back --

THE COURT: Let me ask Mr. Mills this. I was just wondering, I was wondering about that from the get go. Why didn't they make the repairs that were called for on C and D, why didn't they make the repairs? You said in the lawsuit there is $3,000,000 that needs to be done, you settle it, you get $3,000,000 and you don't fix it.

MR. MILLS: No, sir, they did fix it. They fixed it, they didn't have to do a total strip and reclad, they were able to do it without doing that and they had 1.5 million dollars left over and 600,000 of that went into a --

MISS BOAN: Your Honor, what I think is missing is, I have been involved in construction cases and part of the problem with them is you have experts who say to repair your building it is going to cost you your house, it is going to cost you $300,000. Well, if you settle the case you're not going to get $300,000. If you settle it you're going to be settling, you either have to try to get everything to fix it the way you want to or the way that is recommended or you come up with another solution with the money that has been reached in settlement, and in this situation that is what they did, they reached a repair --

THE COURT: Okay.

MR. BELLAMY, JR: My turn. Don Johnson, sitting in the courtroom, the president, I took his deposition on April 23, not long ago, less than a month ago. I asked him on page 49, "The Board went back and basically settled A and B for the actual hard cost of the windows, windows and doors, is that correct? Yes, sir. Now, at that point in time, and having Jeff King's letter, was this letter ever discussed at the board meeting? I don't recall that. Okay, that's fair. In any case, at the point Sutton-Kennerly, at that point Sutton-Kennerly was not asked or requested in the assessment of all the damages to break out what damages, if any, attributed to the leaks around the windows or doors that may have gotten into the common element, as to whether the unit owners in A and B should be responsible for that collateral damage? That's correct." And I said, "They were never asked to do that," and he said, "That's correct, Sutton-Kennerly."

Now, this is kind of like a moving target. They either had a duty under the master deed to enforce the master deed where they had evidence, they said conflicting, up until 1998 there is

basically not one scintilla of evidence that the windows and doors weren't leaking. They knew that. They didn't, they are writing A and B, as the record is fully repleat with that information, saying, "You're responsible for the windows and doors, you're responsible for the leaks," and they are hearing and they are writing letters to people that their windows are leaking but they don't do anything. They are writing letters and telling them, and what they are saying is, "We were faced with conflicting information about the situation." They never, when they hired Sutton-Kennerly, ever said to them, and you haven't gotten an answer from them, I think it is clear, but what you asked them was, was there ever any evidence that the Board said to Sutton-Kennerly, "To be fair to these people, they are looking at information in your documents where you are saying the windows and doors are leaking and there is evidence that that is occurring, because you're writing letters to the people and telling them it their responsibility and the windows and doors are leaking and what do they do?" When the opportunity comes forth and admittedly they, Schenider, they fire him, but when they finally got Sutton-Kennerly on board,

Sutton-Kennerly, according to Don Johnson, was never asked, "In fairness to C and D, because this assessment affects them and we have a duty, by the way, we have a duty where there is evidence that there are leaking windows, we have a duty to go to A and B and say you need to pay for some of this," and I submit to the Court that the president of the corporation told you just as clearly as I did when I read it they didn't do that. They treated it as one big problem, they didn't break it out, they just treated it as one problem and to this day that's the basis of the assessment, and by the way, our people have paid the assessment, 3.2 million dollars, they have paid that, but there has not been any evidence, if it wasn't a duty imposed under the master deed and if that duty wasn't breached by the Board when they by their own charge they go assess A and B for the damages, and obviously they don't want to talk about the soft costs, they make A and B pay for the windows but there is over half a million dollars worth of soft costs that are associated with that window problem, collateral damage, that they don't give that back. They assess us for $326,000 for interior repairs to A and B units which is their responsibility and

there is, until they finally get Larry Elkin on board who I submit to you doesn't talk to the Board, doesn't talk to Sutton-Kennerly, doesn't talk to any of the experts, doesn't talk to Bob Gallagher, doesn't talk, all he does is look at Steve Gallagher's report and say, I mean Steve Geiger's report and say, "I don't agree with it."

Well, that's wonderful but my people were forced to spend a substantial amount of money to get that but we don't have to get to what he found. The point is did they perform, did they breach their duty in not going and asking anybody to tell them, "Do we or should we assess because we have a duty, we're charged with a duty when we're put on notice the windows are leaking and the doors where leaking, we're put on notice to go assess A and B?" And, Your Honor, there is not one scintilla of evidence in this record that they ever looked any farther than passing the cost, the hard costs for the windows and doors. They never undertook to find out whether they should have assessed or not because the point is how do you prove it is coming from the windows?

You have asked a very valid question. Couldn't Sutton-Kennerly have been charged to go

over there when they took the windows out and look at it and say, "Is there rotting, is there water damage as a result of it," and if that is in fact the case then they should have assessed, but I say we're not asking you to award damages, all we're saying is they had a duty and it's clear they didn't exercise that duty. They can't, they have told me that the master deed and the bylaws control what goes on in this lawsuit and they basically say, they say, "When it suits us we'll follow the master deed and when it don't suit us we ain't going to follow it," and the point is where we are here is they had a duty and there is no evidence that they ever asked one soul to say is there any evidence of that, because when Larry Elkin came on board the buildings were sealed, were under repair, all the stuff was gone, there wasn't no way for him to look at it.

I just think, Your Honor, that this case from a trial standpoint should resolve around that there was a duty and they breached the duty and if the jury don't want to give us a dime based on that, then that's fine but I don't think that will be the case. I think it will resolve the issues and, you know, we have been through, well, we have been

through two mediations, we don't need to go into that, but I'm saying that what is on the table now and you can read the master deed, you have read it, I read it to you, they were charged with the responsibility, they were charged with the responsibility and they were required to enforce it when they were being told the windows are leaking like a sieve, and when they didn't do that it's the greater good, the greater good argument, but who is getting caught with the greater good? My people. And it would be a lot more peace in the family if they had tried to do that and they didn't do that and they don't intend to do it.

THE COURT: Thank you.

Mr. Mills, do you want to respond one last time?

MR. MILLS: I want to consult with Miss Boan if the Court will indulge me.

THE COURT: Certainly.

MR. MILLS: I appreciate your indulgence, Judge, I'm looking at one more thing.

THE COURT: That's certainly okay, go right ahead, Mr. Mills, we don't have a jury here.

MR. MILLS: Thank you.

THE COURT: Certainly.

MR. MILLS: Other than to add that there is testimony from the expert that some of the problems to the windows was attributable to original construction defects and not necessarily failure to maintain. The Court has our position.

THE COURT: Okay. Let me say this. A summary judgment is certainly an extraordinary remedy, one which should be used sparingly by the Court. A summary judgment is appropriate, however, when there is no material issue of fact. In determining whether or not there is material issue of fact the Court should look at the evidence and the inferences that can be drawn from the evidence in a light most favorable to the non moving party. In that regard I would consider the evidence and the inferences that may be drawn in a light most favorable to the defendant in this particular case.

As I look at the facts of this case I am convinced, though, that there are certain matters for which there is no material issue of fact. I find that summary judgment should be granted as to the issue of whether or not a duty exists under the Horizontal Regime Act and the bylaws of the horizontal regime, a duty to enforce the bylaws, and it would be the Court's duty to make a

determination of the existence of that duty in a negligence cause, whether I was asked to in summary judgment or otherwise.

That duty additionally, I believe, includes a duty, when presented with evidence which would show or reasonably show that an individual unit owner's neglect in maintaining his or her unit has resulted in damage to the common elements, that an investigation is required by the bylaws. That is, the homeowners association through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to pursue restitution from the offending property owner. In this case there is abundant evidence that at various times during the life of this project the Board, not only the present Board but the past Boards, became aware of the fact that there was water intrusion coming from the windows and doors of individual units in buildings A and B, or at least information that a reasonable person could have drawn that conclusion.

There is also no question, no material question of fact that at some time the Board became aware of the fact that there was substantial damage to these buildings, buildings A and B, damage that

amounted to an expenditure of almost $11,000,000 to make the repairs.

Now, upon receiving notice of this damage the Board, as I said earlier, had a duty under the bylaws to remedy the damage in some form or fashion, make a special assessment, do something to preserve the buildings. I don't think the Board had any choice in moving forward with that.

Now, there has been conflicting information provided to the Board, albeit maybe not information specifically stating that this, that this damage is caused by water intrusion from the windows, I don't know, but upon receiving that information I find that the Board had a duty to follow up to determine whether or not there should be some restitution made by people who had failed to maintain their unit if in fact, if in fact the failure to maintain the unit caused the damage. At this point that's a question of fact for the jury.

But what remains is this. The Board had a duty to move forward. Did they, did they breach that duty? Did they do what a reasonable person should have done? I understand the Board was bound by the business judgment rule and how they respond should be judged by the business judgment rule.

However, the uncontroverted evidence shows that the Board may have, or did take the route in which an assessment was made against all the units.

Now, that may at the time have seemed the fairest route, it may have seemed the most reasonable route, that is difficult to say. The point that stands out to me is this. In making that decision they did not investigate it to determine whether or not this damage was the fault of any particular unit owner or any particular group of unit owners. I find that in that regard there was an investigation done but it was after the lawsuit started, at the time they were having it declad and did not ask the construction company to look into it to tell them whether or not the intrusion from the windows and doors were the responsibility of the landowner or the unit owners and caused the problem. I find that they have breached the duty to investigate the allegations of water intrusion to determine whether or not the other members of the homeowners association were entitled to some sort of pitching in by the landowners or unit owners that had caused the problem. Now, whether or not there was any damage caused by leaking windows or doors is a matter for

the jury in this case but I do find that as a matter of law, taking the evidence in a light most favorable to the non moving party, that there was a duty, that that duty included a duty to investigate and that the defendant breached that duty.

All right. Okay, gentlemen, I will see you back at 9:30 in the morning and we'll begin this case.

MR. MILLS: If I may, Your Honor?

THE COURT: Yes.

MR. MILLS: Other motions that are pending by both sides, what is the Court's --

THE COURT: Oh, we have some others? Let's handle them.

MR. MILLS: All right, the Court has --

MR. BELLAMY, JR: Your Honor, could I ask one question now? Obviously this is an order of the Court and I do understand that the defendant intends to file a notice of intent to appeal from your order or your ruling, because that would stay the trial --

MR. MILLS: Your Honor, your ruling was just delivered about 30 seconds ago, I've got to think about my client's appellate right. I don't want to waste the Court's time or jury time, I will let you

know.

THE COURT: All right, good. Now, Mr. Mills, you have other motions?

MR. MILLS: I do, Your Honor. I had moved for partial summary judgment on the issue of plaintiff's claims for attorney fees.

THE COURT: And I was concerned about that. Mr. Bellamy, where is your authority for attorney fees? I did not see anything in the master deed that would entitle you to attorney fees.

MR. BELLAMY, JR: Your Honor, let me see if I can give you my theory.

THE COURT: All right.

MR. BELLAMY, JR: Section 16.2, compliance. It says each homeowner shall comply strictly with the bylaws and the administrative rules and regulations as adopted pursuant thereto, as either or the same may be amended from time to time, and with covenants and restrictions. Failure to comply with any of the same shall be grounds for an action to recover sums due or damages or injunctive relief. If you go back to page 24 of the master deed, on page, under sections 9.4, where there was a covenant to comply, each co-owner by accepting the deed ratifies the covenant on behalf of

himself. And it goes on down and talks about recovery of costs and condemnation, but at the bottom of the page it says any and all costs and expenses incurred by the Board in the exercise of its authority as granted in this article, including but not limited to court costs, reasonable attorney fees as determined by the court of competent jurisdiction and the cost of labor and attorneys shall be paid by the co-owner in violation until paid by such co-owner. This is talking about enforcement.

If you read those two sections together it says under Article 40, on page 40, or in a case of, a proper case by an aggrieved co-owner. Well, if we're there and we can recover the same thing they can recover, and I think that that makes a whole lot of sense because first of all we've got to show that we've been treated differently, we've been treated unfairly, and I think if you take that section and this section together they can recover it against us if we hadn't paid our assessment, you can bet on that, and in a like manner, when they don't collect or undertake to try to see if they should collect we should recover under that section cost and fees.

THE COURT: Will, let me hear from Mr. Mills.

MR. MILLS: That is the first time I have heard that, Judge.

THE COURT: Go ahead and take your time.

MR. MILLS: Section 16.2, Your Honor, deals with the right to seek damages or injunctive relief by the manager, the Board of Directors on behalf of the Council of Co-Owners, that means if my neighbor, my upstairs neighbor has water leaking down on me I can take action, I am in that proper case an aggrieved co-owner.

THE COURT: Doesn't it say for damages by aggrieved, does it limit the causes to anything, does it say, is there a preceding section or anything that would limit that language?

MR. MILLS: Let's start with 16.2, each co-owner shall comply strictly with the bylaws. It doesn't say the Board, it doesn't say the association, it says co-owners. Now, failure to comply shall be ground for an action to recover sums due. We're talking in the context of claims against a co-owner.

THE COURT: I got you.

MR. MILLS: If we flip over to the section cited by Mr. Bellamy, I'm seeing this now, section

9.4, any and all costs and expenses incurred by the Board in the exercise of its authority as granted in this article, including but not limited to court costs, reasonable attorney fees as determined by a court of competent jurisdiction shall be paid by the co-owner in violation until paid by such co-owner.

I lost this same argument, I was the plaintiff in front of Judge Culbertson who we tried to make the same thing, that it ought to apply to me as well but we just heard three hours of argument on strict construction of a master deed. If the master deed strictly construed is going to allow for a co-owner to recover attorney fees or a group of co-owners to recover attorney fees it would so provide. So, it can only be recovered by statute, contract. There is no applicable statute, this is the contract between the parties and it is not, it is not reciprocal.

THE COURT: Mr. Bellamy, I will hear you but I just don't think that the statute provides for attorney fees in this matter.

MR. BELLAMY, JR: Well, we're not saying the statute, we're not suggesting under the statute --

THE COURT: Or the bylaws.

MR. BELLAMY, JR: But the master deed, here is my analogy.

THE COURT: Okay.

MR. BELLAMY, JR: Under that section, compliance, what is it talking about? It is talking about that the co-owner shall comply with the master deed. One of the arguments in this case was they weren't looking after their windows and doors and the Board could have sued and says, and it says failure to comply with any of the same shall be ground for an action to recover sums or damages or injunctive relief or both maintainable by manager of the Board or in a proper case by an aggrieved co-owner.

THE COURT: How about that, Mr. Mills, how about that section?

MR. BELLAMY, JR: It says that.

MR. MILLS: Which one, sir?

THE COURT: Tell him what section that is, Mr. Bellamy.

MR. BELLAMY, JR: Section 16.2.

MR. MILLS: I'm looking at that.

MR. BELLAMY, JR: It says or in a proper case by an aggrieved co-owner, so what we were doing was we were enforcing a position that the Board should

have taken, the Board should have assessed the A and B unit owners about the windows, they didn't. A substantial part of this lawsuit is about the breach of that duty and it says under the enforcement that they can recover against the A and B unit owners for failing to maintain and keep their windows up and if a jury finds that the Board breached its duty, then all I'm saying is under the section what is good for the goose is good for the gander. I didn't put the language in there, I didn't draft it, I understand it was drafted by a lawyer --

THE COURT: You're saying it is sort of a derivative thing, that you are standing in the place of the Board, you're doing what the Board should have done?

MR. BELLAMY, JR: Right.

THE COURT: And that's the proper case that they talk about there.

MR. MILLS: And the problem with the derivative case analysis, Your Honor, it's not a derivative case. Derivative cases first of all are brought --

THE COURT: Against the other unit, the offending unit owner.

MR. MILLS: No, sir, against the organization, association.

THE COURT: This one is brought against the association.

MR. MILLS: It is indeed.

THE COURT: Yes, sir.

MR. BELLAMY: Is it not derivative because the nature of a derivative action is I'm asking you, I'm suing to have the Board do that which it should do and I want a recovery in favor of the association, if we win I have created a common fund for the association, not so with the plaintiffs, there are 50 individual named plaintiffs, is it not a derivative, it is not a class action, if they recover, the money goes to them, they haven't created anything for anyone else. It is a derivative action, we filed the lawsuit with respect to the 1.5 million, what we are saying is we take the position that money should have been used to fix buildings C and D which are experiencing problems right now. Sutton-Kennerly is investigating building C and D, what is happening is, because of the horizontal surfaces, it was not properly waterproofed, water has gotten down there and corroded the reenforced concrete.

The same thing is happening to buildings A and B, our people have paid 1.3 million to fix A and B, we brought a timely lawsuit back in 2000 and we got a recovery, about 3.2 million, that money should have been earmarked.

THE COURT: How about that, Mr. Mills, he is saying that the owners of C and D --

MR. MILLS: But the nature of a derivative action is for the benefit of everyone, number one.

Number two, it is not for the benefit of all the C and D owners, 50 out of 60 C and D owners, okay, so am I right, do I have my numbers right?

THE COURT: C and D has 60.

MR. MILLS: Ten people chose not to participate, some Board members, some other folks decided not to participate. The gravement of a derivative action, where does the money go, who suffered the alleged harm and who would receive the benefit of the recovery? The recovery they are seeking here is they are creating a common fund for themselves, they are the plaintiffs, if they win they get their money back, that does not give rise to a right to attorney fees.

MR. BELLAMY, III: Your Honor, we do not get the money back. All we're saying is for the Court

to direct the money, the 1.5 million should be spent on fixing buildings C and D, we do not get one cent of that.

THE COURT: My understanding of the relief that you are seeking, it goes to everybody in C and D.

MR. BELLAMY, III: That's right, it goes to buildings C and D but it benefits the other, A and B buildings. Buildings C and D are common element, by fixing the common element that benefits, that benefit is a mutual benefit and we brought the derivative action. What they did, they took 1.5 out and put it in the general reserve. I don't know, I guess when you put it in the general reserve you can spend it on whatever you want to spend it on. We're saying no, you need to fix buildings C and D, the common elements.

MR. BELLAMY, JR: Doris Bray said it was a part of the general reserve, it was not to fix C and D, the Board could do what they wanted to do with it.

MR. MILLS: I agree with half of that. It is in the general reserve, the Board cannot do whatever it wants to with it. It is not a derivative action, Judge, it has never been set up

that way.

THE COURT: I'm going to reserve ruling on the issue of attorney fees, I will wait and see how this case goes.

MR. MILLS: Okay.

THE COURT: See how much is developed. That goes to that --

MR. MILLS: Moving on, Judge, the defendants also have a motion for partial summary judgment on the claim of negligent misrepresentation.

THE COURT: All right.

MR. MILLS: That is very simple, it seems to be premised on the, the claim is premised on --

THE COURT: Not telling them that they had this intrusion back in '99, right?

MR. MILLS: Advertisements, product literature, and our position is we, we're an association, we don't, we didn't induce anyone, we don't do advertising and product literature.

MR. BELLAMY, III: Your Honor --

THE COURT: Are you going to make out that case?

MR. BELLAMY, III: This is our argument. If you go back and look -- let me back up a second. David has brought a motion for partial summary on

statute of limitations route and it deals with not all 50 of our clients, but the 18 specifically that bought their units prior to on or about 1998. Interestingly, when you went back and looked at all the deeds, the closing attorney on 34 of them was the McNair law firm, Jimmy Moore. Also at this point in time the association's attorney was Dan Stacy.

THE COURT: Who was preparing the assessment.

MR. BELLAMY, III: Yes. Our position is when our people were showing up at closings, you understand we're aware of the fact the McNair law firm was representing the developer but they still had a duty to disclose any assessments coming up because Dan Stacy was a member of their firm at that time, he was dealing with that $300,000 assessment which was kind of percolating up about 1998 and they didn't disclose that to our clients and we would ask if there was any disclosure on that we would appreciate it.

Based on that, we felt like when they purchased their units, and interestingly, the first thing in February of 1999 they were assessed for $300,000 and a lot of the, it was voted down but what I want to make a distinction is that same year

they did pass the assessment for 216,000, the original 300,000 assessment had been watered down. The Board took out about 59,000 and said, "No, we're not," basically what the 59,000 dealt with is the, it dealt with the waterproofing around the threshold of the sliding glass doors.

THE COURT: It wasn't $2,500 a unit, was it?

MR. BELLAMY, III: Yes, sir. I have to go back and look, our position would be they should have disclosed that at the closing.

THE COURT: Mr. Mills?

MR. MILLS: Your Honor, we have now moved into a legal malpractice action as well, the best I can tell.

THE COURT: What you're alleging is that the attorneys should have told them, their closing attorneys.

MR. BELLAMY, III: Well, Your Honor, our position would be that the McNair law firm was representing the association, we felt there was a duty that since the McNair law firm was closing on 14 of the units that information should have been conveyed, that is our position. Your Honor may respectfully disagree with us.

THE COURT: I do.

I'm going to grant your motion on that one, Mr. Mills.

MR. MILLS: Thank you, Your Honor. Moving on to our motions in limine. They are very quick.

THE COURT: Okay.

MR. BELLAMY, III: Your Honor, if we can approach, I think we can probably agree on two of them.

MR. MILLS: We can just argue them.

MR. BELLAMY, III: Sure.

MR. MILLS: The first one flows from the issue we just argued and you will see that their expert has taken some pot shots at our law firm, claiming there was a conflict of interest. Our position is he is simply unqualified to make those allegations, he is an HOA expert, he is not a lawyer, he is not legally trained and he doesn't --

THE COURT: Well, is he going to come up, depending on your motion for summary judgment as to that cause?

MR. MILLS: It is dead smack in the middle of his report, so --

MR. BELLAMY, III: We'll concede he said that, we don't need to go into that, we're not going to go into that.

THE COURT: There you go.

MR. MILLS: The second point, the same with Mr. Harris' report. I know reports don't come into evidence themselves but there is numerous references to directors and officers liability insurance.

MR. BELLAMY, III: We'll concede that, Your Honor.

THE COURT: All right.

MR. MILLS: Thank you.

The third issue goes to Director Don Johnson. Before he became a member of the Board he sent in a letter to Jeff King saying, "However, this payment of legal fees does not constitute an agreement to continued incurring of legal fees in the event the board does not accept the proposal."

Our position is very simply this. Whatever status Mr. Johnson held at that time --

THE COURT: Is that really relevant?

MR. BELLAMY, III: Your Honor, at least it is relevant, what is relevant not so much he paid $500, but that what he did was, understand, Your Honor, Jeff King did not know Mr. Johnson. Mr. Johnson made an unsolicited letter, Jeff King had no communication with our law firm, had no

communication with Mr. Johnson, didn't know him from Adam's apple. What happened is Dick Fisher and Bill Covington were trying to get a group of people together to bring a lawsuit, obviously to save money, and they took Jeff King's letter and showed it to him after he had sent it to the Board. This was before Mr. Johnson went on the Board. He went on the Board based on the fact one of the Board members resigned and he was appointed to fill the vacancy. What he did is, Mr. Johnson reviewed Jeff's letter. What is important about this is his letter is a template of our lawsuit and it deals with the following issues under heading number one, the 2006 amendment.

MR. MILLS: Are we talking about Mr. Johnson's letter?

MR. BELLAMY, III: We're talking about Mr. King's letter. Your Honor, under the third paragraph, it is improvement versus repair, under the fourth paragraph, repairs, responsibility of individual owners, and then you go on down.

THE COURT: We're talking about Mr. Johnson's letter, I thought.

MR. MILLS: I thought we were, too.

MR. BELLAMY, III: Your Honor, this is a

letter Jeff King had sent out to the Board of Directors telling them basically the very things that we filed the lawsuit about. One, that the 2006 window amendment is invalid.

THE COURT: Okay.

MR. BELLAMY, III: They should have individually assessed A and B units for the water intrusion damage, and let me explain what is going on right now. At this point in time, 2008, M.C. Engineers has met with the Board in April and they had a presentation and they met with the Board and all the unit owners. They came and said it is going to cost 13.5 million dollars to fix buildings A and B and everybody went, "Oh, my God." That's the first time our clients ever heard that that was the extent of the damage, the amount of damage and what it was going to cost to fix the buildings.

What happens is, there is a ground swale support after that to try to determine what their rights were. At the point in time that Jeff was communicating with Dick Fisher and Bill Covington Don Johnson was not a member of the plaintiffs' group at that point in time. A letter was sent out to the Board. This letter, Jeff King's letter, a copy of it was somehow relayed to Mr. Johnson, he

read it, he wrote a letter back to Mr. King, I have it right here. It says, "Dear Jeffrey: Thank you for your analysis and proposal to the Board of Directors of Shipyard Village representing the owners of buildings C and D. I believe the analysis is comprehensive with information, that your proposal is reasonable." Then he goes on to say, "We, Don and Linda, have submitted our portion of the legal fees, $500 for services rendered. However, this payment of legal fees does not constitute an agreement to continued incurring legal fees in the event the board does not accept the proposal."

Your Honor, the legal fees were sent to Bill Covington, they were not sent to the Bellamy law firm. There was no attorney-client relationship which I think is also, if you go back, and the way they describe it in their motion, they say either of the, either a former client or prospective client. Jeff King had no communication --

THE COURT: Are you trying to introduce the letter?

MR. BELLAMY, JR: No, we're not trying to introduce it but it goes to Mr. Johnson's credibility if he takes the witness stand because

he is writing a letter back and says Mr. King very comprehensively sets out the fair way to deal with the problem, he sent the letter probably to Bill Covington, or a mail out, I don't know how he got it but he send a check in saying that, "Your premise sounds reasonable." Well, all I'm saying is if he gets on the witness stand and says that's the most ridiculous thing in the world, what they are saying --

THE COURT: You want to do it for impeachment.

MR. BELLAMY, JR: Yes, sir.

MR. BELLAMY, III: Yes, sir, exactly.

MR. BELLAMY, JR: I intend to impeach him if he does that.

MR. MILLS: Are we talking about the issue of the letter, because the letter is attorney-client communication.

THE COURT: I don't think it is attorney-client. I think that went to the group that was trying to put together some attorney fees.

MR. BELLAMY, JR: It went to the Board.

MR. MILLS: No.

THE COURT: The rule on impeachment allows you very broad discretion to allow it, allow

documents of that sort you can use for impeachment purposes. That letter, it doesn't say a whole lot other than, "Here, I've pitched in the money for my part of the attorney fees and, you know, sounds reasonable to me," but that is about all it says.

MR. MILLS: Confusion, prejudice, undue prejudice.

THE COURT: 403.

MR. BELLAMY, III: Your Honor --

THE COURT: Well, let's see what he says and we'll deal with that as it comes up.

MR. MILLS: All right.

Your Honor, our motion to compel deals with association records prior to the C and D unit owners' purchases, whether it is negligence or breach of fiduciary duty. The claims are premised on a duty. Our position is the association owed no duty to purchasers of C and D units before the purchases in 1998.

THE COURT: How about that?

MR. BELLAMY, JR: Well, Your Honor, if he wants --

THE COURT: I think it might be admissible, Mr. Mills, on the issue of notice of there being construction problems.

MR. BELLAMY, III: Right, and also, Your Honor, the master deed, their own document, let me read the language. It says, "The purpose of this master deed is to establish pursuant to the Horizontal Act of the State of South Carolina a phased horizontal regime to be known as Shipyard Property Regime."

THE COURT: I know where you're going with this.

MR. MILLS: Yes, sir.

MR. BELLAMY, III: Your Honor, there is a case right on point, it the case of City of Charleston, a 1926 case. Here is what it says. Basically what the wording is, the remote guaranty of property is, however, entitled to bring a suit on a covenant runs with the land whether, here is the key language, whether the breach occurred before or after the remote guaranty took title. This is exactly what happened here. The master deed provides that they have an obligation to maintain and repair the phased development, it runs with the property, this obligation runs not only to the present owners but the future or subsequent guarantees. This case is right on point. And, Your Honor, I will hand up a copy.

THE COURT: Mr. Mills.

MR. MILLS: Your Honor, that is a breach of covenant case, this is a tort action, the issue is whether a duty arises. I find no South Carolina case directly on point but I do have a Florida case very closely on point, 1988, Mallard versus Dowling. It says there is no duty to advise construction purchasers, excuse me, there is no duty to advise prospective purchasers of a condominium unit of construction deficiencies prior to their purchase.

It is just not there. The duty, the duty arises the day they buy the unit, if at all, and that is our position, that you're reaching that back to 1982 or 1985 or 1993 or --

THE COURT: What about something like the issue of whether or not your client had no knowledge of defects such as water intrusion?

MISS BOAN: Your Honor --

THE COURT: It is kind of hard to say without knowing what the purpose --

MISS BOAN: Two things. One --

THE COURT: Specifically what item of evidence is sought to be introduced?

MR. BELLAMY, III: Your Honor, can I address

that?

THE COURT: Wait a minute.

MISS BOAN: Two things. One, anything that happens prior to their purchase, when they come up to purchase they are on equal footing as the association. They have the right to ask their seller to see and inspect everything in the association. The plaintiffs would put onto the Board constructive notice of all of its documents, that notice is also available and should be put on the plaintiff, so anything that we would have known they too should know by virtue of constructive knowledge on the date of purchase. So if that's the case we shouldn't be arguing about anything that is prepurchase.

THE COURT: Let me just ask you this. One of the issues here is whether or not the Board should have brought an action for construction defects on units A and --

MR. BELLAMY, III: That's correct.

THE COURT: That goes to a statute of limitation problem, okay? And doesn't that have to relate back to when they would have had notice of a defect? Wouldn't we have to talk about it in those terms, you know, you didn't bring this action

before the statute ran out? Wouldn't they be entitled to show when you knew or should have known or when the statute should have begun to have run? I mean, or are we talking about a situation there, again I don't know specifically what evidence they may try to put in but to say they could not use any of it for any purposes at this juncture, wouldn't that be a little difficult for me to say? You know, the example I just gave you, wouldn't that, if that is an issue in the trial, they may abandon it, I don't know, but if that was an issue wouldn't that be relevant?

MISS BOAN: Potentially the argument would be any notice that the Board had would have also been on that owner when they purchased, so the clock would have been ticking.

THE COURT: And it may have run out before the owner bought it, correct, so then you would still have to --

MR. BELLAMY, III: That is our argument, it ran out before they purchased it. Bob Gallagher contacted, Your Honor, I have his --

THE COURT: I'm going to reserve it, I'm not going to give you a blanket ruling right now but I do understand your argument as to when the duty

arose but I think there are exceptions to that.

MR. MILLS: All right, sir, we'll have to raise it at the appropriate time.

THE COURT: All right.

MR. BELLAMY, JR: Your Honor, the only thing I would say, the assessment is for $12,000,000 and it is to fix all the problems. Nobody has said otherwise, in fact all the experts have said it's been going on for a long time.

THE COURT: Since '82.

MR. BELLAMY, JR: They could have said everything prior to 1998 you pay for A and B and what goes forward from '89, but that assumes they fixed the buildings.

THE COURT: I'm going to reserve ruling on that. We'll just have to take it up when --

MR. BELLAMY, III: The only thing I want to point out, we did bring a contract action, obviously breach of restrictive covenant is a contract action. To the extent at some point in time we would have to elect which one we went with, if it goes to the jury we will have to decide which one we'll go forward on but it is relevant from that standpoint regarding a covenant runs with the property it is a contract breach.

THE COURT: All right.

MR. MILLS: Our last motion in limine, Your Honor, references the plaintiffs' purported testimony about settlement funds. You have heard considerable amount about that today, we have appended to our motion a copy of the April 15th, 2006, minutes of the Board of Directors where, minutes of the annual members' meeting wherein it is stated $600,000 out of any settlement of the funds received from the lawsuit has to be set aside for the recoating of C and D buildings for ten years and the remaining funds, approximately 900,000 to 1,000,000 were to be placed in the general reserve of the association. That was April 15th, 2006.

THE COURT: That was an agreement.

MR. MILLS: That was during the presidency of Brian Nisbet. So --

THE COURT: Was that part of the settlement agreement of the C and D suit?

MR. MILLS: No, sir. That was a decision of the Board announced in April, 2006, that said here is what we're going to do.

THE COURT: But wasn't there an agreement reached somewhere?

MR. BELLAMY, III: May I respond? It was not put to a vote. The Board unilaterally made the decision to only spend $780,000 in repairs to A and B even though the experts, and we have this McGee report back in 2006 that says you've got to remove all the windows, you've got to strip the EIFS and put up a cladding with drainage. That is the whole purpose behind it.

MR. BELLAMY, JR: The point is the McGee report was not given to the C and D unit owners for them to understand they were getting short changed.

MR. BELLAMY, III: Your Honor, Brian Nisbet in his deposition said he never got a copy of the report, if he had gotten a copy of the McGee report he would not have approved the $780,000 to fix buildings C and D. What is important is they never submitted it to the vote of the homeowners association.

MR. MILLS: The annual members meeting minutes from April 15th, 2006, Dr. Jennings reviews the repairs to the C and D buildings, possible solutions, ten year warranty, "Here is what we're going to do, we're going to spend $750,000, the Board is committed to putting aside $600,000 in the reserve account for maintenance of the C and D

buildings and recoating in ten years, the balance of the settlement funds, approximately $912,000, has been placed in general reserves." That is where you are telling them three and a half years before the lawsuit is brought this is what we're doing with the money and now you're suing us for doing that with the money.

THE COURT: Is this a summary judgment on a cause you're making? What are we doing?

MR. MILLS: Partial summary judgment.

THE COURT: Partial summary judgment, and the relief you're asking for is?

MR. MILLS: Don't go there, just don't let them.

THE COURT: Which cause are you addressing, or which defense are you addressing?

MR. MILLS: I'm addressing the plaintiffs' claim that a particular of negligence, it is scattered throughout the complaint, forgive me, I won't make you wait while I look but one of the particulars is, "This is another way we got the short end of the stick. You got 1.5 million dollars left over from that settlement, okay, great, you committed $600,000 to recoat the C and D buildings in ten years, I appreciate that, you're

on record as having said that but you didn't put the other $900,000 specifically committed to the C and D buildings."

That is exactly what he said we're going to do over three years before the suit and I point out to the Court 33-31-830 is the standard of directors, standard of conduct, general standard for directors, and it has a built in statute of limitations that says if you're going to sue a director alleging bad faith or lack of ordinary care it must be commenced before the sooner of three years after the failure complained of or two years after the harm complained of is or reasonably should have been discovered. There is no, there is no secrecy, it's in the annual members meeting, here is what we're doing.

THE COURT: How about that, Mr. Bellamy, where you have them saying this is what we're doing, you're on notice that is what they are going to do and that is how it is going to be handled.

MR. BELLAMY, III: Well, Your Honor, first let me add this. All motions in lemine were supposed to be filed on April 16th, 2012. This was not filed on April 16, 2012. We just got that maybe about a week ago, they didn't comply with the

scheduling order and timely file it, okay, that will be our first objection.

Our second objection would be that in our reply to their answer of our fourth amended complaint we raised the defense of estoppel to assert the statute of limitations based upon the fact they did not properly communicate with our client regarding what -- the McGee report was never provided to the association, they didn't mail it out to anybody. Brian Nisbet at his deposition said, "Look --"

THE COURT: We're dealing with something else here, we have heard about the McGee report.

MR. BELLAMY, III: The McGee report, it said, it said basically you needed to spend all the 2.3 million dollars to fix the buildings because you have got to remove all the windows, the windows are defective, you've got to strip the cladding, there probably wasn't going to be enough money even with the 2.3, they were probably going to have to assess for more.

What our position is, they did not disclose the McGee report. Let me make this clear, Your Honor. During the depositions, Don Johnson, Doris Bray, Marie Aker, Jim Poag never saw the McGee

report. The only person that saw the McGee report was Leon Jennings and for whatever reason he didn't disclose it to anybody and we're saying if he discloses it to the membership they would have known the 700,000 was a bandaid and not a fix because I'm telling you right now if they would have properly fixed the buildings back in 2005, 2006 it would have mitigated the damage of what it is going to cost to fix it now, and the point is, let me say this, Mr. Mills represented the developer in that lawsuit and he knows the insurance carrier would have never agreed to pay that kind of money if they knew they were going to take the money and spend it on something else. They would say, "Wait a minute. If you're only going to use $700,000, give us back the 1.5 you're not going to use. Clearly he knows that the money was earmarked, it was earmarked for the repair and reconstruction of buildings C and D. A and B were not a part of that lawsuit, I wish they were but they weren't and it is unfair they are taking that money now and using it for other purposes and the point is the McGee report is relevant because it was not disclosed to the members.

THE COURT: What would have prevented them,

when they found out what they were going to do with the money, they knew there was 2.3 million coming in and 700 was going to be used on the buildings and that was put in the record, did no one do any investigation of why that happened that way?

MR. BELLAMY, III: It was represented in the minutes that would have fixed the problem, okay, it was represented in the minutes that is all they needed to spend on the buildings. Like Miss Boan said, I'm not an engineer, a contractor, it was represented they had a right to rely upon it, okay, it is in the minutes this is what it is going to cost to fix it.

THE COURT: Why do you think they got all that extra money?

MR. BELLAMY, III: Your Honor --

THE COURT: Why do you think they got that extra million and a half dollars?

MR. BELLAMY, JR: Mr. Jennings said, "There was a lot of fluff, fluff in what we presented to the insurance carrier and we had some money left over." The point is we didn't know until we started taking depositions that the Board took the position that the $1,500,000 was going into the general reserve and they didn't have to spend it on

C and D. That is when we learned that and that is just within the last year.

MR. MILLS: I'm looking at it from 2006, "The balance of the settlement fund, approximately $912,000, has been placed in general reserves." You know, that is just not sneaking up on anybody, so I don't understand one word Mr. Bellamy said about an insurance company taking settlement money back, I don't follow any of that, I never had that experience, when it's settled it's settled, it's gone, it's gone. The problem, if there was one, was more then two or three years, depending on how you read the statute, prior to the lawsuit and again I'm gravely concerned this is morphousing into a suit concerning the C and D buildings as well when for two and a half years it has been about A and B. That is why I respectfully submit we should cut off this issue.

MR. BELLAMY, III: Your Honor, the statute of limitations that runs, we didn't sue the directors, we sued the defendant Shipyard Council of Co-Owners, we didn't sue the Directors. I was arguing --

THE COURT: How about that? Isn't the statute very clear as to suing directors?

MR. MILLS: Yes, sir. This is against directors. What they did, they sued the association and named all the things that the directors did wrong. It is a back door approach but it doesn't matter under this analysis because even under the longer general three year statute of limitations they are laying it out for the membership to see, "This is what we're doing with the money."

THE COURT: Mr. Bellamy, that gives me a problem when they say, "We're putting this in the general account," and you're saying that your client was satisfied with the response, "Well, it was enough and we sort of pulled the wool over the eyes of the insurance company and we got extra money."

MR. BELLAMY, III: Your Honor --

THE COURT: I mean, the minutes seem to be very clear, they apportion out $600,000 for resealing or whatever in ten years and then a million, excuse me, 900,000 going into just the general fund.

MR. BELLAMY, III: Your Honor --

MR. BELLAMY, JR: They did not designate that they were going to take it, and the general fund

doesn't put you on notice, it doesn't tell you that they had larceny in their heart. You have to learn out through discovery that when they said it's in a reserve account it is like putting it in a savings account, there is no telling the C and D people, "We're going to take your money and spend it somewhere else," all they did was said, "We're putting it in a reserve account." How does anybody know until it became an issue and we started deposing --

THE COURT: Has the money been spent as of this day?

MR. MILLS: No, Your Honor.

MR. BELLAMY, JR: No.

THE COURT: Well, until the money is misappropriated or is spent somewhere does the statute even begin to run?

MR. BELLAMY, JR: That's probably right.

THE COURT: I mean, it is not so much a suit against the Board of Directors, it is more or less a declaratory judgment matter to say, "What do we do with this money?" It is like against the money, not against the Board.

MR. BELLAMY, III: That's right.

THE COURT: Isn't it, Mr. Mills?

MR. MILLS: But it's a component of their allegation of negligence, they will use it, larceny in the heart, it is not just a good crisp, "Judge Hyman, just give us a directive, what do we do with that money?" No, no, it is part and parcel of the grand conspiracy theory of larceny in the heart, "Pull the wool over their eyes, didn't tell anybody anything and if you are going to do that you ought to be subject to the statute of limitations."

THE COURT: They don't have a conspiracy claim.

MR. MILLS: Not verbatim but I think you have heard, that is the way it will be presented, we're not seeking just a declaratory judgment, they are using that as a component of the Board's negligence, breach of fiduciary duty.

MR. BELLAMY, III: We're not, Your Honor, we saw it as a declaratory judgment, that isn't why we brought the derivative lawsuit, for the Court to rule where the money who should be spent on buildings C and D, that's all we have done. We're not --

THE COURT: I will leave it in but I have a real problem with you trying to bootstrap it in with your negligence.

MR. BELLAMY, III: We won't bootstrap it in with the negligence, Your Honor.

THE COURT: I mean --

MR. MILLS: Well, declaratory judgment is a matter for the Court.

THE COURT: I would rule on that.

MR. MILLS: Yes, if you rule, for example, if you're going to deal with the judicial dissolution issue, take that one and put in, too, it's got to be dealt with at some point.

MR. BELLAMY, III: That's fine.

THE COURT: That's how we'll do it, then.

MR. MILLS: Very good.

THE COURT: Fair enough.

MR. BELLAMY, III: We'll agree we will not bring that up as relates to --

THE COURT: Okay, that takes care of the problem.

MR. MILLS: Judge, if I can look at my stack.

THE COURT: Okay. Have you got anything else, Mr. Bellamy?

MR. BELLAMY, JR: No, sir.

MR. BELLAMY, III: Your Honor, one of the things we did, it is probably too late to do this, we were going to go over the exhibit list as far as

what would be kind of a checklist of what the parties can agree upon as far as what would be admitted in evidence, since all the documents came from the association, but we can wait.

THE COURT: While I drive home this evening you all can certainly be here and deal with that.

MR. MILLS: I missed the whole exchange.

THE COURT: He said you all were going to deal with the exhibits tonight, I said that is something tou can do without me.

MR. MILLS: You're welcome to join us, Your Honor.

THE COURT: I don't want to stay.

MR. MILLS: We're about to close out.

Nothing further from the defendant except may we approach when we conclude?

THE COURT: Yes. Okay, gentlemen, we're at ease and we will, you can come forward and mark the exhibits and we'll see you back at 9:30 in the morning.

MR. BELLAMY, JR: We want to make Shipyard Village meeting minutes from 1994 to 2005 Plaintiff's Exhibit Number 37 part of the record.

We want to make Shipyard Village meeting minutes from 1982 to 1993, identified as

Plaintiff's Exhibit Number 35, a part of the record.

We want to make Shipyard Village meeting minutes from 2006 to 2010 identified as Plaintiff's Exhibit Number 36 part of the record.

We want to make the master deed and bylaws of Shipyard Village Horizontal Property Regime recorded on July 9, 192, identified as Plaintiff's Exhibit Number 19, part of the record.

We're going to make plaintiff's affidavit of Steven J. Geiger, Professional Engineer, in opposition to the defendant Shipyard Village Council of Co-Owners motion for partial summary judgment against eighteen plaintiffs based on the Statute of Limitations defense, identified as Plaintiff's Exhibit Number 1 a part of the record.

We want to make the affidavit in opposition to defendant's motion for partial summary judgment based upon the statute of limitations identified as Plaintiff's Exhibit Number 2, which is the affidavit in opposition to defendant's motion for partial summary judgment based on statute of limitations defense identified as Plaintiff's Exhibit Number 2, make that part of the record.

We want to make the affidavit in opposition

to defendant's motion for partial summary judgment based upon the statute of limitations defense identified as Plaintiff's Exhibit Number 3 part of the record.

We want to make the affidavit in opposition to the defendant's motion for partial summary judgemnet based upon the statute of limitations defense identified as Plaintiff's Exhibit Number 4 part of the record.

We want to make affidavit in opposition to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 5 part of the record.

I want to make affidavit in opposition to defendant's motion for partial summary judgment based upon, based on statute of limitations defense identified as Plaintiff's Exhibit Number 6 part of the record.

We want to make the affidavit in opposition to the defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 7 part of the record.

We want to make the affidavit in opposition

to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 8 part of the record.

We want to make the affidavit in opposition to the defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 9 a part of the record.

We want to make the affidavit in opposition to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 10 part of the record.

We want to make the affidavit in opposition to the defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 11 a part of the record.

We want to make the affidavit in opposition to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 12 part of the record.

We want to make the affidavit in opposition

to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 13 part of the record.

We want to make the report of, identified as ABS, Applied Building Science, Inc., specifically Larry Elkins, identified as Plaintiff's Exhibit Number 14 a part of the record.

We want to make a Henderson Under Pressure quote, and it is job number 562 dated 10/28/98, identified as Plaintiff's Exhibit Number 15, we want to make that part of the record and the total amount quoted is 300,000.

We want to make plaintiff's reply to defendant's fourth amended answer and affirmative defense identified as Plaintiff's Exhibit Number 16 part of the record.

We want to make affidavit in opposition to defendant's motion for partial summary judgment based on statute of limitations identified as Plaintiff's Number, Plaintiff's Exhibit Number 17 a part of the record.

Okay. These are, I don't know where these go, these go with one of the, it goes with Mike Parades, here it is right here, it goes with this

one right here.

What I have got is I have Plaintiff's Exhibit Number 17 is the affidavit of Steve Geiger and you've got Exhibit Number 6, these go with Exhibit Number 8 and Exhibit Number 10, Exhibit Number 10, Exhibit Number 12, 13 -- I'm sorry, strike that last thing.

This is affidavit in opposition to defendant's motion for partial summary judgment based on the statute of limitations defense identified as Plaintiff's Exhibit Number 17 which we will make part of the record.

These other exhibits are the exhibits to the affidavit of Mike Parades.

All right. We want to make the deposition of Derek Hodgin, Professional Engineer, dated Monday, July 25th, 2011, identified as Plaintiff's Exhibit Number 22 part of the record.

We want to make the position of Steven J. Geiger, Professional Engineer, dated Wednesday, July 20, 2011, identified as Plaintiff's Exhibit Number 21, part of the record. And also plaintiff's exhibit 20 part of the report, they are both parts of the deposition for Steve Geiger.

Okay. We want to make the deposition of Jim

C. Poag dated, the deposition of Jim C. Poag dated Wednesday, April 18, 2012, identified as Plaintiff's Exhibit 29 a part of the record.

We want to make the deposition of Robert M. Postiglione dated Monday, April 23rd, 2012, identified as Plaintiff's Exhibit Number 30 part of the record.

We want to make the deposition of Jack Clark Eblin, Dr. Jack Clark Eblin, deposition of Dr. Clark -- strike that. The deposition of Jack Clark Eblin, Dentist, dated Wednesday, April 18, 2012, identified as Plaintiff's Exhibit Number 24 part of the record.

We want to make the deposition of Gary Curtis Bradham dated Wednesday, May 3rd, 2012, as Plaintiff's Exhibit Number 28 part of the record.

We have the, we've got, also I want to put in the deposition of Doris R. Bray, dated Monday, April 23rd, 2012, identified as Plaintiff's Exhibit Number 26, make that a part of the record.

MISS BOAN: Did you also identify Bradham was identified as Defendant's Exhibit 2 as well?

MR. BELLAMY, III: I didn't do that. As far as the deposition of Gary Curtis Bradham dated Wednesday, May 3rd, 2012, it also was identified as

Defendant's Exhibit Number 2.

MISS BOAN: I've got the deposition of Derrick A. Hodgin, July 25th, 2011, it is marked as Defendant's Exhibit 7, and then the exhibits to his deposition are marked as Defendant's Exhibit 5.

I've got the Schneider deposition, it is marked as Defendant's Exhibit 3.

I have got a deposition of Robert Gallagher and that is marked as Defendant's Exhibit 4.

I've got the deposition of Steven Geiger, volume one is marked as Defendant's 9.

The deposition of Steven Geiger, volume two, is marked as Defendant's 8.

The deposition of Michael Parades is marked as Defendant's Exhibit 6.

The plaintiff Markley's deposition is marked as Defendant's Exhibit 17.

Defendant's Exhibit 16 is the deposition of the plaintiff with the last name Kochanski.

Defendant's Exhibit 15 is the deposition of the plaintiff with the last name Moring.

Defendant's Exhibit 14 is the deposition of the plaintiff with the last name Fisher.

Defendant's Exhibit 13 is the deposition of the plaintiff with the last name Nisbet.

Defendant's Exhibit 12 is the deposition of the plaintiff with the last name Oates.

Defendant's Exhibit 11 is the deposition of the plaintiff with the last name Reynolds.

And Defendant's Exhibit Number 10 is the deposition of Rand Wilson, III.

MR. BELLAMY, III: All right. We've got the deposition of Leon Jennings, Dr. Jennings, dated Friday, April 20, 2012, identified as Plaintiff's Exhibit Number 33, we want to make part of the record.

And we've got the Shipyard Village Council of Co-Owners 17th annual members meeting dated April 10, 1999, identified as Plaintiff's Exhibit Number 18 that we want to make a part of the record.

We've got the photographs of unit A46 identified as Plaintiff's Exhibit Number 74 that we will make part of the record.

We've got photographs of A47 identified as Plaintiff's Exhibit Number 75 that we want to make a part of the record.

However you want to do these.

MISS BOAN: You can say photographs and do however many exhibit numbers there are.

MR. BELLAMY, III: Okay. Photographs 76, 77,

Plaintiff's Exhibit -- let me do this. Photographs identified as Plaintiff's Exhibit 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95. 96 is SKA, Consultant to Building Industry Since 1959, we'll just put as Plaintiff's Exhibit 96, we want to make it part of the record.

Okay. We've got, Plaintiff's Exhibit Number 97 we'll make part of the record, SKA, report of SKA.

We want to make Plaintiff's Exhibit Number 98, we want to put in Plaintiff's Exhibit 98, it is identified as exploratory field survey testing report by SKA, we want to make that part of the record.

Okay. Then photographs 73 -- hold on a second. Photographs 73, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72. Okay?

MR. MILLS: All right.

MR. BELLAMY,: Plaintiff's Exhibit Number 32, deposition of Marie Aker.

Plaintiff's Exhibit Number 23, deposition of Vickie Gallagher.

Plaintiff's and Defendant's, Plaintiff's

Exhibit 27, Defendant's Exhibit 1, the deposition of J. Lawrence Elkin, P.E.

MISS BOAN: Did you put the master deed in?

MR. BELLAMY, III: Yes, I put the master deed in. If it hadn't already been stated, Plaintiff's Exhibit 34, master deed, we put that in, make that part of the record.

Identified as Bates stamp, as Geiger, G-e-i-g-e-r, 005682 through 005708, identified as Plaintiff's Exhibit Number 99, I want to make part of the record.

MISS BOAN: Defendant's Number 18, it's a memo to the Board of Directors dated April 2nd, 1999.

Defendant's 19 is letters regarding the Moring unit B28.

Defendant's 20 is dated July 30, 2009, an SKA memo.

Defendant's 21 is a January 19th, 2008 M.E.C. Engineering Services letter to Mr. Eblin.

And Defendant's Exhibit 22 is a letter to the homeowners dated September 26, 2007.

(Recessed at 5:37 p.m., May 21, 2012).

(Reconvened at 10:24 a.m., May 22, 2012).

THE COURT: I understand for purposes of the

record we have identified all the exhibits that have been referenced throughout the presentation of both the plaintiffs and the defendants in this matter and that we're prepared to and agree to admit those as a group. Is that correct?

MR. BELLAMY, III: That's correct, Your Honor.

THE COURT: All right, I will hear from the plaintiffs.

MR. BELLAMY, III: We have previously identified Plaintiff's Exhbits starting from 1 through 99, that we're going to move to introduce and make part of the record, and we have done that through the consent of the defendants. They have also had defense exhibit, some of them have been marked both Plaintiff and Defense Exhibits, they have other exhibits they want to introduce as part of the record, we consent to that, too.

THE COURT: All right. I believe the defense has 23?

MR. MILLS: 22.

THE COURT: By agreement we're going to make it part of the record for appeal, is that correct?

MR. BELLAMY, III: That's correct.

THE COURT: Is that correct, Mr. Mills?

MISS BOAN: The other thing that is, Your Honor, not out here and not marked but are the prior submissions that are in the court's file that were referenced in the record yesterday.

THE COURT: That were attached.

MISS BOAN: Correct.

MR. MILLS: Your Honor, if they put in previous submissions it's in and we just ask that if we put it in it's in.

MISS BOAN: I didn't want the misunderstanding, it wasn't attached to our motion, it was previously submitted in opposition to their motions.

THE COURT: I understand.

MR. BELLAMY, III: We have no problem with that.

THE COURT: Okay, that's what we'll do. These matters are, exhibits are admitted into the record for purposes of appeal, okay?

Thank you very much.

MR. BELLAMY, JR: Thank you, Your Honor.

MR. MILLS: Thank you, Judge.

MR. BELLAMY, III: Thank you, Your Honor.

(Concluded at 10:30 a.m.).

I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Georgetown County, South Carolina, on the 21st and 22nd days of May, 2012.

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

August 17, 2012

Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

COURT OF COMMON PLEAS
2009-CP-22-01655

RICHARD A. FISHER, ET AL,

-vs-

SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.,

Defendant.

November 15, 2012

B E F O R E:

HONORABLE LARRY B. HYMAN, JR.

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

HOWELL V. BELLAMY, JR., Esquire
HOWELL V. BELLAMY, III., Esquire
Attorneys for the Plaintiffs

CARLYLE R. CROMER, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Fisher versus Shipyard. I think this is a motion to reconsider.

Mr. Bellamy, were you able to get that order I signed? It was rather lengthy but I was able to get to it yesterday and it has been signed.

All right, gentlemen, let me hear from you.

MR. CROMER: Your Honor, Carlyle Cromer for the defense Shipyard Village Council of Co-Owners. In May you granted plaintiffs summary judgment, we're asking you to reconsider that. I will try to be brief. I want to point out the areas in which I believe issues are raised by the issues presented back in May.

THE COURT: Okay.

MR. CROMER: First of all our expert Larry Elkins says clearly in his affidavit the cost of repairs attendant to replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation. Mr. Elkins did visit the site while the work was being done, visited the site November, 2010, the work was not complete, so he got to see the building in its original condition. A lot of work had been done but he saw a portion of the building where it had been declad

or he saw the original intrusion issues, he saw old windows that had been torn out and replaced, he saw the condition of the windows and after seeing that he himself and one of his associates who also visited the property on a separate occasion, he came to the conclusion that apportionment of the damages is not possible.

THE COURT: Well, that wasn't the information that I received when we heard this motion. The information given to me was that the homeowners association made a conscious decision that they just weren't going to investigate that, they weren't going to go there, although the bylaws and the statute all required them to, in my view, to make an inquiry as to whether or not the individual owners had failed to maintain their windows and doors in such a fashion that it had caused water intrusion into common elements and had damaged the buildings.

The information that was provided to me was simply that, "We decided just not to go there," and that was it, just not to go there, so my ruling was based upon the fact that you had a duty to make an inquiry and you made no inquiry. It is not a situation where you made an inquiry and then

determined that there was no intrusion or it wasn't attributable to defects in the manufacturing of the windows, it was just nothing done and that was the reason for my ruling that it was a situation where there was a duty and nothing was done to comply with it. That was why I ruled. What you're telling me is different.

MR. CROMER: Well, my firm was not involved at that stage but I do believe that Mr. Elkins' affidavit was stipulated to come in evidence at that time and what I can tell you, though, is that the reason the Board, the Board had conflicting information in years leading up to the time this work was done, they had engineers said this water is coming in through the stucco, through the roof, is not not coming in through the windows, and given that --

THE COURT: There is no question that they knew it because they tried to amend the bylaws --

MR. CROMER: Well, I believe --

THE COURT: -- to transfer the obligation to make repairs based on faulty windows or faulty maintenance of the windows to the homeowners association rather than making it the responsibility of the individual unit owners, and

it failed to pass. I think the parties all agree or stipulate that was not appropriate and then it did not pass, as I understand.

MR. CROMER: You're correct about that.

THE COURT: So, there is no question that they knew, and then they did a declad, at least a partial declad in which they had every opportunity in the world, if you're going to declad you take it off and you look, you look at it and you bring someone in and you say, "Okay, the damage we see right here is because these windows were leaking." That is what we've got here and you make an assessment. That wasn't done, that was my understanding.

MR. CROMER: Well, Your Honor, first of all if I could address that, we do agree that is behind us now but I think the reason they did that was to ensure uniformity of the windows and doors in the building. But moving beyond that, what the Board did is they received all this conflicting information about water intrusion, they knew repairs had to be done but they also knew to do a separate test to try to apportion --

THE COURT: But was there any conflicting information?

MR. CROMER: There was. In the order that opposing counsel has just written and filed they list evidence that supports their point of view. We also have evidence on our side. I will go through some of that with you. Back in 2004 Ben Morrow, who was a B building unit owner, his windows were like, he replaced them, they continued to leak so he hired an architect to look at this and in 2005 Joe Hiller, the architect, wrote a letter to Mr. Morrow saying, "It seems obvious to me that there was water migration through the exterior wall that is not related to the window sill, jamb or header."

In 2007 Snyder, a letter from Snyder Engineering Company to Shipyard Village said during destructive window testing on N-28 we understand the standard windows were leaking, top to jamb. Then it goes on to say the spandrel was not sufficient to turn the water away. That is not part of the window component that unit owners are responsible for. They are responsible for the, it is stated in the master deed, the doors, the screens, the frames, the casings. The spandrel, from my lay person understanding, is the distance from the bottom of a window, down to the top of a

window below it, that portion of the wall. He is saying that portion of the wall was insufficient to turn away that water. That was in 2007.

In 2008 there was a structural inspection by an inspector that said the present windows and doors have nonexistent flashing to prevent wind driven rain from getting into the windows. Again, the window flashing is not part of the owner's responsibility, it is not part of the glass, the frames and the casing or the screens. Flashing is a separate component and there was obviously defective flashing was causing some leakage.

THE COURT: But do you have any notes from any Board meetings or anything where they looked at it and said, "We're going to go with these reports, we're not going to go with the wealth of information that we have that would suggest that this is the result of leaking windows"? Do you have anything that would suggest to me that the Board actually came together and made a business judgment as to what to do? I mean, they did nothing, from what I can see.

MR. CROMER: Well, I think --

THE COURT: They just ignored the problem and just decided to pass it on.

MR. CROMER: -- the decision they made, I think they decided to take the route they did because they had so much conflicting information, they believe they made a reasonable business judgment decision that apportioning it to the jambs would be impossible, testing would have been extremely expensive and they had reason to believe it would not have been conclusive or told them anything they already didn't know, which was that these engineers say --

THE COURT: That is what I would like to see. Are there any minutes or anything like that?

MR. CROMER: I don't have minutes with me today but I do believe --

THE COURT: Where that is discussed or --

MR. CROMER: I believe so.

THE COURT: The information I got was that didn't take place.

MR. CROMER: Well, I think in their depositions what they said was that they had this conflicting information, they decided to do the assessment and assess all the owners, not equally, obviously they had A and B still paying for the windows and doors, that is why they carried the bulk of the assessment costs for these repairs, and

I would also point out that I think the business judgment rule here is clearly applicable and I point your attention to the case of Goddard versus Fairways Development General Partnership, and that is 310 SC 408 and it says in a dispute between the directors of the homeowners association and agrieved homeowners the conduct of the directors should be judged by the business judgment rule and absent a showing of bad faith, dishonesty or incompetence the judgment of the directors will not be set aside by judicial action.

MR. BELLAMY, III: I point out the business judgment rule does not apply because there are bylaws in place, the Horizontal Property Regime Act, that governs conduct.

MR. CROMER: That is illustrated by the case of Pelzer. It held the business judgment rule applies, the property regime had been in place many years at this point. The distinction is important to make, as Goddard said, which just cited the business judgment rule is going to apply in this situation.

Now, the bylaws and the master deed and the Horizontal Property Regime Act are applicable to determine whether the Board's action is ultra vires

or intro vires, that is where that comes into play. The fact there are bylaws here does not mean the business judgment rule does not apply. I mean, it clearly applies, so they have to show more than mere negligence to overcome this. We submit that they haven't and we also submit that the fact that, you know, they have a lot of information, a lot of evidence that water was coming in windows and doors but the bylaws say that that has to be due to negligence, it is not strict liability. The fact that water is coming in windows and doors does not mean that the unit owner was negligent.

THE COURT: Is there any, any doubt, is there any question that the water came in through the windows and doors?

MR. CROMER: We believe there is. I cited some evidence to you but I would say --

THE COURT: Are you being serious with me? As far as we are in this thing, are you being serious?

MR. CROMER: Judge, that is my point. Let's assume it was all coming in through the windows and doors, that is still not enough because they have to show that it was coming in due to window, due to unit owner negligence and --

THE COURT: That's it, nobody investigated it.

MR. CROMER: Ben Morrow replaced his unit, replaced the whole window unit and water was still coming in. I got that, a text letter, you know, so I think --

THE COURT: You've got one unit out of 40, excuse me, 80.

MR. CROMER: Right.

THE COURT: Two buildings, right?

MR. CROMER: I would point out that even in their expert's report --

THE COURT: And you don't know who replaced Mr. Morrow's windows.

MR. CROMER: Even their expert in his report, you know, never even said that apportionment could have been done during the declad and his conclusions, he never reached that conclusion it was even possible. Our expert says it's not possible, it could not have been done.

MR. BELLAMY, III: Your Honor, which expert is he talking about, Larry Elkins?

MR. CROMER: No, your expert, Geiger.

MR. BELLAMY, III: That's not correct.

MR. BELLAMY, JR.: I have read his report,

his conclusion, he says it's coming through the windows but he never says SKA could have come in here during the declad and apportioned water intrusion damage.

MR. BELLAMY, III: Mr. Geiger, one thing I asked, "What about the sliding glass doors, you're talking about the windows, what about the sliding glass doors, all the Board's consultants and experts clearly opined that water was going underneath the sliding glass door into the unit below and causing damage not only to the limited common element but to the unit below. Do you dispute that?"

MR. CROMER: Well, again this is my point, even if we assume all this water was coming in, they have to prove it was coming in due to unit owner negligence, it is not strict liability.

MR. BELLAMY, III: Your Honor --

MR. BELLAMY, JR.: It's not enough.

MR. BELLAMY, III: In the first part of the proposed order I made it very clear in the minutes back in 1990 at an organizational meeting, Dr. Jennings was president of the Board, they took the position that the unit owner was responsible for the sealing and waterproofing of the sliding glass

doors and the windows and clearly based upon their own expert's report, SKA, Sutton, Kennerly & Associates, they had about four or five engineers looked at it and I think all of them clearly opined the windows and sliding glass doors were leaking and in some cases they were very clear that the windows and sliding glass doors were leaking, were causing damage to the limited common elements. That is clear and all Your Honor asked is, they acknowledged at the hearing back on May 21st, 2012, when we sat down there, defense counsel acknowledged they had a duty to investigate and they had a duty to assess, assuming there was uncontroverted evidence that the unit owners failed to maintain the windows and sliding glass doors and that it was causing damages to limited common elements and they agreed on that. The duty is not the issue. The question is, based upon the substantial evidence that was in the record and from their documents they failed to investigate and do anything.

And let me, and this is, let me just, the further emphasis of this thing is the defendant's reply brief to our motion in opposition, our motion to reconsider in opposition to their, our Rule 59

motion and opposition to their motion, here is, in opposition to their motion, here is what it states. It is undisputed the defendant's Board did not ask any expert to break out the damages or attribute the alleged failure of the unit owners to maintain the windows and sliding glass doors. They didn't ask anybody.

What Your Honor ruled is you at least had a duty when presented with the evidence, you had a duty to at least investigate and they acknowledge if there was damage the unit owner, if the unit owners' sliding glass doors and windows were causing damage to common elements they acknowledged they, the association, had a responsibility to assess, individually assess that unit owner for the damage.

And, Your Honor, in your, it was a very narrow ruling saying they had a duty to investigate and they breached that duty because they failed to investigate. Based upon the evidence their experts were saying that existed out there, a reasonable person would have at least undertaken to investigate. And, Your Honor, the other thing, one last thing I want to point out is this kind of sums up, and I'm taking this from, this is the affidavit

of Doris Bray, and this is on page 5 of 7, it says right here, "As previously stated --" give me one second. This is on page 6 of 7, Your Honor, this is the affidavit of Doris Bray, she said, "By the vote the ownership made clear that the amendment did not enjoy a simple majority of support so we allocated the cost of the replacement windows and doors themselves to the A and B owners. We made our decision," here is the key, "We made our decision based upon business judgment, not what might or might not happen in court."

That is a false statement. Let me tell you why. Your Honor, I will pull it from right here. Your Honor, there was a letter sent out July 9th of 2009. This is after the third vote on the window amendment was voted down, and I will read it. This was a letter sent out by Kay Dill & Associates to all the individual unit owners within the Shipyard Village Horizontal Property Regime. The key language, let me read it, "The amount of the specail assessment will be dependent on the outcome of the lawsuit against the association with respect to the windows and sliding glass doors 2006 amendment. The calculations above assume the expense of the windows and sliding glass doors will

be borne by the homeowners in builings A and B." Here is the key language. "Currently the association has moved forward with summary judgment as a means of resolving the civil action filed by the C and D owners, consequently the result of the judgment may have an impact on the windows and doors cost allocation to A, B, C and D. If the ruling comes back that all the unit owners are responsible for the expense for the windows and doors the assessment will be adjusted accordingly."

They never made the business decision, they never sat down and said, "We're going to be fair, we're going to hold the A and B responsible for the hard costs." What they did was it was conditioned upon if the Court came back and said, "I think the amendment is valid, granted the defendant's motion for partial summary judgment, based upon that language they would have gone back and individually assessed the C and D owners for their proratta share regarding the repairs being made to buildings A and B.

And when Miss Bray would get up, and knowing this affidavit was going to be submitted to the Court, and said they made a business decision, a business judgment decision regarding what was fair

regarding the repairs to buildings A and B and said it was not based on any legal outcome, I can't believe they submitted that for the Court's consideration, and that goes to the lack of good faith on the part of the Board in general in treating our clients with equity and fairness.

Your Honor, if you read minutes, if you read reports it is clear, it is uncontroverted that the windows and sliding glass doors were leaking, they just didn't want to deal with it and essentially they were hoping that our people would tire of having to pay attorneys and expert fees and just give up the battle and when they couldn't out spend us then they had to think about how they were going to legally confront this. Miss Boan said at the hearing, she acknowledged that the amending was invalid, she acknowledged the budgetary objects were not presented.

Hold on one second, the Court's indulgence.

At the motions hearing on May 21st, after we got the transcript, Your Honor, and went back and read it I was shocked. The first time I have ever heard defense counsel acknowledge on the record that the window amendment was invalid and they acknowledged it was invalid based upon receipt of

Jeff King's letter, so they knew back in 2008 the window amendment was invalid. They continued to enforce it knowing of its invalidity, which is a clear sign of lack of good faith on the part of the Board because it was an ultra vires act.

But then what happens is after they tried to pass a special assessment and they have to fix the buildings and the special assessment didn't pass, then they were supposed to present the budget to the unit owners at the annual meeting, which would have been April 4th, 2009. Well, they didn't present the budget. And the reason why they didn't present the budget, as they said at the hearing, they didn't want any discussion on it, they didn't want to give them an opportunity to amend it.

And David Mills said, "Well, clearly we did that, clearly we presented the budget at the April 9th, April 4th, 2009 meeting," and they didn't. We've got deposition testimony from Doris Bray, we also have deposition testimony from Mickey Gallagher saying, "We didn't present the budget," and it is supposed to be, pursuant to the bylaws they are supposed to make a budgetary item and supposed to give the association a right to vote on it. We're talking budget information the next

fiscal year which would have been 2010. Correspondingly it did give them an opportunity after we filed this lawsuit to consider the budget for 2011.

Clearly that is bad faith and the thing is, Your Honor, when you made the ruling and they acknowledged they had duties, they had a duty to maintain and repair the common elements, they had a duty also to ensure that if the individual unit owner was not complying with its duty to maintain the unit they had a duty to go back in and directly assess them or bring some type of legal or injunctive action, which they didn't do.

There is no question, based on the transcript, they acknowledge they had duties and they breached the duty by their failure to investigate. Clearly, Your Honor, there is so much evidence in the record, I can't understand why they just didn't ask somebody to go out and look at it and say, "Tell me what you think, can you parcel it out, can you break it out?" Our expert can do that, no question about that. And they didn't ask Larry Elkins who is an architect, they didn't ask, excuse me, they didn't ask -- back up a second, Your Honor.

The first person they asked to come out there was McGee & Associates. They looked at the buildings and they opined the windows were leaking. More importantly, Ralph McCullough who was representing the association said the windows were a safety issue. And pursuant to my proposed order, and it's in the minutes, and he instructed the Board to send out a letter notifying all the A and B units owners that the windows were a safety issue and they didn't do anything about it. That is back in 2002.

And all the minutes clearly show water was coming underneath the thresholds of the sliding glass doors and it was causing damage to the unit below, the actual unit and to the common elements, and that is clear and undisputed. Their experts say, I have to go read through the reports of Ken Snyder, he is an architect, he said the windows were leaking, the sliding glass doors were leaking. Even Larry Elkins acknowledges, and I will go back, this is the last thing, I will tie it up, but even in his deposition right here, one point I want, Your Honor, in his affidavit he admits the windows were leaking, he doesn't say all the windows but he admits the windows were leaking. He didn't say

that in his deposition, let me read the relevant part of it. I said, "So, you're not going to offer an opinion whether --" Let me back up a second. "So, you're not going to offer an opinion the water basically migrated through as far as through the cracks and stucco and damaged the window?" His response is, "That's possible." Then he goes on to say, "But I didn't test for it."

And then here is the question, the relevant part is, this is on page 44 of Larry Elkins' deposition, lines two through six, the question is, "Is it possible that water could have entered the building through, under the sliding glass door, as far as where I think, on top of the horizontal slab, is that right, is that on top of that, it's right on top of that?" His response is, "It's possible. I think it was actually Ken," he is talking about Ken Snyder's deposition, "where I read there being an open joint, where the two slabs above, there was an open joint, that is where it was going in." I said, "Engineered joint?" He said, "Yes, that is where the water was going in, it would blow up against the wall and would go into the joint."

That is an admission right there from their

own expert water was going into that joint under the sliding glass door. Then he goes on to say, my next question is, "Let's take a break." His response was, "Before we go off the record I want to tell you, I would like to tell you that once we got," let me get my glasses, his answer is, "Before we go off the record, what I would like to tell you is once we got Ken Snyder being at the building, that is when we got into lots of professionals being at the buildings and working on the buildings, that is really when the solution that we have now goes into place, so once Ken got, once we get to Ken Snyder, you know, I know that he has, he wanted to put in this fiberglass cement to go under the door to catch this water, he did a mock-up there two different locations so he could test the thing."

Elkins is acknowledging in his deposition that Ken Snyder came up or at least found the problem where there was an engineered joint and the slider was placed on top of it and water was going underneath that into the units below and also damaging the concrete blocks underneath that and he came up with a solution of putting this fiberglass surface to block the water when it was wind driven

rain going into that joint, which is an acknowledgement by Elkins which is inconsistent with what defense counsel is saying, is that he never opined that water was going into the building.

MR. CROMER: Your Honor, can I just add two things? I'm sure you have had an opportunity to read the transcript, page 131 through 134 is where you gave your ruling from the bench in which you said, two things we say the transcript indicated about Mr. Elkins from his deposition. One, he never talked to SFK, the contractor. He never talked to the Board members. His testimony was that he told them they needed an accountant, not an engineer. He came on after the fact and said, "Why are you hiring me, Mr. Mills," and he says, "Well, they've got an expert, we need to get an expert." He said, "Well, you need to have an accountant, not an engineer." He is a mechanical engineer, Mr. Elkins.

What you were thinking about, what you were driving at and what you pursued very vigorously in the hearing was obviously, as you have indicated from the bench a minute ago, the Board kept pursuing the amendment trying to pass the

responsibility for the windows and doors on to the association as a whole rather than the individual units in A, B, C and D and the reason they wanted to do that was they wanted to have that cost apportioned to everybody in a general fund.

MR. BELLAMY, JR: Well, and then they also proceed with the notion that they continue in bad faith, which eliminates the business judgment rule, they continue in bad faith to continue to argue that the assessment is valid even though they knew it was voted down, they knew it was voted wrong. The assesment finally voted on, voted down, and what did they do to create further bad faith? They then say, "We're going to make it a part of the budget."

Well, the law requires that the budget be presented at the annual meeting of the association, which it was not, it was not. But more importantly, what you were concerned about is what, if anything, did the Board attempt to do, attempt to do to discharge their duties because their actions certainly were not in good faith, and as part of the order and on page 34 of the proposed order I had asked if the president of the association who is supposed to be the most

knowledgeable guy there, named Don Johnson, and I asked him, "Okay, that's fair. In any case, at that point Sutton-Kennerly was not asked or requested in their assessment of damages to break out what damages if any were attributed to the leaks around the windows and doors that may have gotten into the common elements, as to whether or not the unit owners in A and B should be responsible for that collateral damage?" "That's correct." "Okay. They were never asked to do that?" "That's correct." And I said, "Did the Board --" let me back up on the same line for a second. "When the Board got Sutton, Kennerly's cost of repairs for buildings A and B in the amount of eleven million dollars did the Board undertake to do any investigation to find out what the extent unit owners of A and B units had been negligent regarding the maintenance and repair of the units?"

What they did, they decided to cram it down with the assessment which failed and they continued to go forward and assess on an assessment they knew was invalid, bad faith, and then they continued to get the assessment, when it didn't get voted, to deal with it based on a budget and all those were ultra vires acts and I think Howell has pointed out

to you were not there. The record before you is, as you said this morning, does not raise the issues they attempt to argue today.

THE COURT: Counsel.

MR. CROMER: Your Honor, all of this evidence that I brought up is in the record, it was agreed to by stipulation back in May, I don't think that is an issue here today. I do think what is important, there were several experts, Steven Robinson said there was bad flashing on the windows, Spectrum said the same thing, non-existent or obsolete flashing. We had Snyder who talked about the spandrel formed by the slab edge. We're not saying there was no way it came in through the windows and doors, we're not saying that. What we're saying is flashing and these other components are not part of the unit owner's responsibility, so any water that was coming in those areas, there is no evidence it was due to their negligence and we think that given the evidence in this case, the information, the Board made a reasonable business decision.

THE COURT: Where did the, what evidence do you have that the Board even considered it? All I heard here and all I see here is the Board upon

receiving information there is a problem with the windows and doors and there is no question the bylaws make that, or any resulting damage, collateral, collateral damage the responsibility of the individual homeowner or condo owner if the damage is to the common units or common elements. Instead of addressing it pursuant to the bylaws and making some determination of whether or not it is actually the fault of the unit owner or the fault of the engineer or designer of the windows, they go and try to adopt an amendment which will fix it and just make it everybody's problem rather than the problem of the individual homeowner or unit owner, and that is what really concerns me about this, they knew it, there is only one reason for that amendment, they wanted that amendment because they knew that there was an obligation on the part of these unit owners and they wanted to make sure that these units owners didn't bear that responsibility, that it got spread out and was paid by all the other unit owners, including the unit owners in C and D. That is what I see here, repeated attempts to change the bylaws, change that part of the bylaws that would clearly make this a problem of the individual unit owner, and I think it is

significant, something you said a moment ago, every unit wasn't leaking, every unit wasn't leaking. If it was a design problem, if it was a problem resulting from the flashing or whatever I would think that every unit would have a problem but there were just some units that were and those units, in my mind, obviously are the units that were not maintained, that is what would seem to me but I will hear you, go ahead.

MR. CROMER: I was just going to say that, I know I have spoken on this earlier about we had B-28 replace the windows, the same problem, you know, the evidence the Court had was it is not anything, this wouldn't have been the responsibility of the units owners, if they replaced the windows and there was still a water intrusion problem, what else can the owner do? He has done what he is required to do under the bylaws and there is still a water problem.

MR. BELLAMY, III: Your Honor, one quick response with B-28. I read the report of Mr. Morrow who is an engineer, he also said the problem with window leakage regarding those windows was also a caulking, sealing problem which would be a unit owner responsibility.

THE COURT: A maintenace issue. All right. Okay, I'm going to deny respectfully your motion for reconsideration of the order. I think my order was correctly issued. Thank you very much.

MR. CROMER: Thank you.

THE COURT: Prepare the order denying the motion.

MR. BELLAMY, III: Yes, sir.

THE COURT: Thanks.

(Hearing Concluded).

I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Georgetown County, South Carolina, on the 15th day of November, 2012.

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

January 24, 2013

Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA) **)** **COUNTY OF GEORGETOWN)**	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **CIVIL ACTION NO. 2009-CP-22-00152**
Richard Fisher, Platt B. Moring, Marianne G. Kochanski, and Jim H. Markley, on Behalf of All Persons Situated Who Owned Units in Building A & B of the Shipyard Village Property Regime Plaintiffs, Vs. Shipyard Village Council of Co-Owners, Inc. Defendant.	**DEFENDANT'S ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSIONS**

TO: HOWELL V. BELLAMY, III, ESQ. AND HOWELL V. BELLAMY, JR., ESQ., attorneys for the Plaintiffs.

The Defendant responds to the Requests for Admissions propounded by the Plaintiffs as follows:

1. Admit that the Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, did not hold a meeting after April 15, 2006, to vote on the proposed 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to make "window glasses, screens, frames, and casings" of each unit the responsibility of the association (as Limited Common Elements) instead of the unit co-owner.

ANSWER: Admitted.

2. Admit that votes (of unit co-owners) can only be cast at meetings of the Shipyard Village Council of Co-Owners convened in accordance with the Bylaws, Article I, Section 1.3, and the Shipyard Village Master Deed.

ANSWER: The Defendant admits that Article I, Section 1.3 of the Defendant's Bylaws states "Votes can only be cast at meetings of the Council convened in accordance with the Bylaws . . ." and admits that the Master Deed incorporates the Bylaws by reference. However, the Defendant craves reference to S.C. Code Ann. §33-31-708 (2006).

3. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* altered the dimensions of the units or the percentage interest in the common elements appurtenant thereto.

ANSWER: Denied.

4. Admit that the Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to obtain the consent of each unit Co-owner prior to altering the dimensions of their units or the percentage interest in the common elements appurtenant thereto, and, thereby violated Article XIV, Section14.1, Amendments of Co-owners of the Shipyard Village Master Deed.

ANSWER: The Defendant objects to this Request on the grounds that it is vague, confusing, and assumes as fact legal conclusions with which the Defendant in good faith disagrees. Without waiving its objection this Request, this Defendant denies that the dimensions of the units were altered or that percentage interest in the common elements appurtenant to any units was altered, and denies that Article XIV, Section 14.1 of the Master Deed was violated.

5. Admit that the procedure used to adopt the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* whereby votes were counted as cast without holding a meeting, violated Article I, Section 1.3 of the Bylaws of the Shipyard Village Master Deed.

ANSWER: It is admitted that the 2006 amendment was adopted by votes not cast at a meeeting and that Article I, Section 1.3 of the Bylaws states that "Votes can only be cast at meetings of the Council."

6. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* violates Article XIV, Section 14.1, AMENDMENTS, of the Shipyard Village Master Deed.

ANSWER: Denied.

7. Admit that the Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to require a special meeting at a certain time, place, and date for the purpose of voting on the proposed amendment to modify the Master Deed, *(2006 amendment recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5).*

ANSWER: Admitted, with the explanation that the proposed amendment was considered and voted on at a Members' meeting in April, 2006. The amendment did not pass at that meeting and was revoted on, but a meeting was not called for the second vote.

8. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the provisions of Article III, Section 3.6 (c) and 3.7(b) are invalid, and violates the Shipyard Village Master Deed.

ANSWER: The Defendant objects to this Request on the grounds that it is vague and confusing. Without waiving its objection, this Defendant denies that the amendment is invalid or violates the Master Deed.

9. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* was not adopted at a special meeting on April 15, 2006, by the affirmative vote of Co-owners of two-thirds of the total interest in the common elements as required by Article XIV, Section 14.1 of the Master Deed.

ANSWER: The Defendant objects to this Request on the grounds that it is vague and confusing. Without waiving its objection, the Defendant admits that the 2006 amendment was not adopted at a special meeting on April 15, 2006. The Defendant denies that Article XIV, Section 14.1 of the Master Deed requires that amendments to the Master Deed may be adopted only at a special meeting.

10. Admit that the Defendant Shipyard Village Council of Co-owners, its agents, employees, and representatives, solicited proxy votes from all unit Co-owners or members after April 15, 2006, instead of holding a meeting of the Council to adopt the proposed 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the Master Deed.

ANSWER: The Defendant admits that the 2006 amendment referred to was adopted by a vote that was not taken at a meeting.

11. Admit that the Defendant Shipyard Village Council of Co-owners, by and through its agents, employees, and representatives, failed to comply with Section 14.1, Article XIV of the Master Deed, and Sections 1.3, 1.4, 1.7, 1.8, and 1.10 of the By-Laws by improperly adopting the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the Master Deed.

ANSWER: Denied.

12. Admit that the Defendant Shipyard Village Council of Co-owners, by and through its agents, employees, and representatives, did not obtain the written consent and signatures of all Co-owners prior to adopting the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the Master Deed.

ANSWER: Admitted.

13. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the Shipyard Village Master Deed provides as follows:

> NOW, THEREFORE, KNOW ALL MEN BY **THESE PRESENTS** that the Master Deed for Shipyard Village Horizontal Property Regime is amended as follows:
>
> The following language is hereby deleted from Article III, Section 3.6(c):
>
> **(ii) the window glasses, screens, frames and casings which are part of the window openings of the Unit;**
>
> The following language is hereby deleted from Article II, Section 5(o) of the First and Second Amendments to the Master Deed:
>
> **(iv) the window glasses, screens, frames, and casings which are part of the window openings of the Unit;**
>
> The following sentence is hereby added to the end of Article III, Section 3.7(b) of the Master Deed:
>
> **The Limited Common Elements shall also include the window glasses, screens, frames, and casings which are part of the window openings.**
>
> The First and Second Amendments to the Master Deed are hereby amended so that the final two sentences of Article III, Section 2 of those amendments read as follows:
>
> **The Limited Common Elements shall also include the window glasses, screens, frames, and casings which are part of the window openings. Except as otherwise set forth herein, the use of the Limited Common Elements are restricted exclusively to the respective Unit Owner, members of his immediate family, guests and tenants.**

ANSWER: It is admitted that the language quoted in Request Number 13 is an excerpt of the language in the Amendment recorded in Deed Book 235 at page 5 in the Georgetown County Register of Deeds; however, the text above contains bold font that is not in the recorded Amendment. The Defendant craves reference to the actual document recorded in Deed Book 235 at page 5 in the Georgetown County Register of Deeds.

The Defendant further craves reference to that Correction and Clarification of Amendment to the Master Deed of Shipyard Village Horizontal Property Regime, recorded on November 14, 2007 in the Georgetown County Register of Deeds in Deed Book 754 at page 173.

14. Admit that Article XIV, Section 14.1, AMENDMENTS, of the Shipyard Village Master Deed provides as follows:

> This Master Deed and all Exhibits incorporated by reference herein, including the By-Laws, may be amended from time to time by resolution adopted by the affirmative vote of the Co-owners of two-Thirds (2/3) of the total interest in the Common Elements subject to the following conditions: **No amendment by the Co-owners shall be in violation of the Act and no amendment shall alter the dimensions of a Unit or the Percentage Interest in the Common Elements appurtenant thereto without the consent of the Co-owners of such Unit.**

ANSWER: It is admitted that the language above appears in Section 14.1 of the Master Deed for Shipyard Village Horizontal Property Regime; however, the text above contains bold font that does not appear in Section 14.1 of the Master Deed. The Defendant craves reference to the Master Deed as recorded in the Georgetown County Register of Deeds.

15. Admit that Article I, Section 1.3. VOTING, of the Shipyard Village Bylaws provides in pertinent part as follows:

> A Co-owner's voting rights and the vote required to adopt decisions shall be as set out in Article VII and ***Exhibit C and D*** of the Master Deed. Holders of fifty-one (51%) percent or more of the value of the Regime Property as a whole must vote affirmatively to adopt any matter before the council. **Votes can be cast only at meetings of the Council convened in accordance with the Bylaws, and in the absence of a valid proxy, an individual shall act in his own behalf, a corporation shall act by any officer thereof, a partnership shall act by any general partner thereof, an association shall act by any associate thereof, a trust shall act by any trustee thereof.**

ANSWER: It is admitted that the language above appears in Section 1.3 of the Bylaws of Shipyard Village Horizontal Property Regime; however, the text above contains bold font hat

does not appear in Section 1.3 of the Bylaws. The Defendant craves reference to the Bylaws that are recorded in the Georgetown County Register of Deeds.

16. Admit that Shipyard Village Co-Owners received notice on or about July 6, 2006, by Letter titled Shipyard Village Council of Co-owners, Inc., from Kellie A. Diehl, PCAM, managing agent, that the proposed 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* to the Master Deed had been adopted.

ANSWER: It is admitted that on July 6, 2006, the managing agent for Shipyard Village Council of Co-Owners mailed a letter to the co-owners notifying them, among other things, that the proposed amendment making windows the responsibility of the association passed. The Defendant craves reference to the document itself.

17. Admit that on March 21, 2009, a re-vote was taken on the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)*, and it did not pass.

ANSWER: Admitted.

18. Admit that the scope and/or language of the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* does not address or include sliding glass doors.

ANSWER: Admitted; however, the 2006 amendment was corrected by that that Correction and Clarification of Amendment to the master Deed of Shipyard Village Horizontal Property Regime recorded in the Georgetown County Register of Deeds in Deed Book 754 at page 173, which addresses sliding glass doors.

19. Admit that the 2006 amendment *(recorded in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5)* does not make the sliding glass doors of each unit the responsibility of the Shipyard Village Association instead of the unit Co-owner.

ANSWER: Admitted that the amendment recorded in the Georgetown County Register of Deeds in Deed Book 235 at page 5 does not address the sliding glass doors; however, the 2006 amendment was corrected by that that Correction and Clarification of Amendment to the master Deed of Shipyard Village Horizontal Property Regime recorded in the Georgetown

County Register of Deeds in Deed Book 754 at page 173, which addresses sliding glass doors.

20. Admit that Article VI of Shipyard Village Master Deed does not allow cost related to the operation of Regime Property to be declared common expenses by amendment.

ANSWER: Denied.

II. REQUEST TO ADMIT GENUINENESS OF DOCUMENTS

1. **Exhibit No. 1:** attached hereto is a genuine and true copy of a document identified as the Master Deed of Shipyard Village Horizontal Property Regime filed with the Register of Deeds for Georgetown County, South Carolina on July 9, 1982, in Deed Book 201 at Page 880.

ANSWER: Admitted that the attached Exhibit 1 is a true and correct copy of the Master Deed of Shipyard Village Horizontal Property Regime, with the following exceptions:

a. The pages recorded in the Georgetown County Register of Deeds in Deed Book 201 from page 929 through page 948 are missing from the attached Exhibit 1, and therefore Exhibit 1 is not a complete copy of the Master Deed.

b. The attached Exhibit contains handwritten markings, such as circlings and underlinings, that do not appear on the Master Deed recorded in Deed Book 201 at page 880.

2. **Exhibit No. 2:** attached hereto is a genuine and true copy of a document identified as the Minutes of Shipyard Village Council of Co-owners, Inc.'s Twenty Fourth Annual Members' Meeting dated April 15, 2006;

ANSWER: Denied that Exhibit 2 is a complete copy of the Minutes, in that page six of the Minutes is missing from Exhibit 2. Otherwise, it is admitted that Exhibit 2 is a true copy of pages one through five of the Minutes of the Twenty-Fourth Annual Members' Meeting of Shipyard

3. **Exhibit No. 3:** attached hereto is a genuine and true copy of a document identified as a Letter titled Shipyard Village Council of Co-owners, Inc. from Kellie A. Diehl, PCAM, managing agent, to shipyard Village Owners dated July 6, 2006;

ANSWER: Admitted.

4. **Exhibit No. 4:** attached hereto is a genuine and true copy of a document identified as a Letter titled Shipyard Village Council of Co-owners, Inc. from Kellie A. Diehl, PCAM, managing agent, to shipyard Village Owners dated April 24, 2008;

ANSWER: Admitted, except that the attachments to the letter are omitted from Exhibit 4. Although Exhibit 4 is dated 2008, the Defendant believes that this was a typographical error in the original, and that the letter was actually mailed on April 24, 2006.

5. **Exhibit No. 5:** attached hereto is a genuine and true copy of a document identified as the Amendment To The Master Deed of Shipyard Village Horizontal Property Regime recorded on September 26, 2006, in the Office of the Clerk of Court for Georgetown County in Deed Book 235 at Page 5; and

ANSWER: Admitted. The Defendant would also crave reference to that Correction and Clarification of Amendment to the Master Deed of Shipyard Village Horizontal Property Regime, which was recorded on November 14, 2007 in the Georgetown County Register of Deeds in Deed Book 754 at page 173 and which corrects and clarifies the Amendment attached as Exhibit 5.

6. **Exhibit No. 6:** attached hereto is a genuine and true copy of a document identified as Letter dated June 9, 2008, to the Board of Directors of Shipyard Village Council of Co-owners, Inc., from Attorney Jeffrey W. King of the Bellamy Law firm.

ANSWER: Admitted.

7. **Exhibit No. 7:** attached hereto is a genuine and true copy of a document identified as Shipyard Village Council of Co-Owners, Inc., Special Members Meeting, March 21, 2009, Minutes;

ANSWER: Admitted.

8. **Exhibit No. 8:** attached hereto is a genuine and true copy of a document identified as the Bylaws of Shipyard Village Horizontal Property Regime attached to the Master Deed dated July 7, 1982.

ANSWER: Denied that Exhibit 8 is a complete copy of the Bylaws because Exhibit 8 as received by the undersigned contained only even-numbered pages and is a partial copy. However, it is admitted that the pages received are pages from the Bylaws of Shipyard Village Horizontal Property Regime.

PATRICK AND STATHOS, LLC

Kimberley Campbell
Attorney for the Defendant
P.O. Drawer 15669
Surfside Beach, SC 29587
(843) 238-5618

September 24, 2009

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2009-CP-22-00152
Richard Fisher, Platte B. Moring, Jr., Marianne G. Kochinski, and Jim H. Markley, on behalf of all persons situated who own units in Buildings C and D of the Shipyard Village Property Regime, Plaintiff, -vs- Shipyard Village Council of Co-Owners, Inc., Defendant.	AFFIDAVIT OF MAILING

Personally appeared before me, Cynthia H. Bedenbaugh, an employee of Patrick & Stathos, L.L.C., who being duly sworn, states that on this 24th day of September, 2009, she deposited a copy of the Defendant's Answers to Plaintiff's Request For Admission and Affidavit of Mailing in the United States Mail, with sufficient first class postage attached thereto, addressed as follows:

Howell V. Bellamy, III, Esq.
P. O. Box 357
Myrtle Beach, SC 29578

Cynthia H. Bedenbaugh

SWORN to before me this 24th
day of September, 2009.

Notary Public of South Carolina
My Commission Expires: February 21, 2017

STATE OF SOUTH CAROLINA)		IN THE COURT OF COMMON PLEAS
)		FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)		CIVIL ACTION NO.: 2009-CP-22-01655
Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC;	)	**DEFENDANT SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.'S ANSWERS TO PLAINTIFFS' REQUEST TO ADMIT AND REQUEST FOR GENUINENESS OF DOCUMENTS HAND-DELIVERED ON MARCH 24, 2010 ("FIRST RTA") AND REQUEST TO ADMIT AND REQUEST FOR GENUINENESS OF DOCUMENTS RECEIVED VIA MAIL MARCH 31, 2010 ("SECOND RTA")**

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Linda A. Mendicino; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A.

Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

TO: HOWELL V. BELLAMY, III, ESQUIRE, JEFFREY W. KING, ESQUIRE AND HOWELL V. BELLAMY, JR., ESQUIRE, ATTORNEYS FOR PLAINTIFFS ABOVE NAMED:

The Defendant Shipyard Village Council of Co-Owners, Inc. (hereinafter "Defendant"), responding to the Plaintiffs' **Request to Admit and Request for Genuineness of Documents hand delivered on March 24, 2010 ("First RTA") and Request to Admit and Request for Genuineness of Documents received via mail on March 31, 2010 ("Second RTA")**, hereby responds to each of the First and Second RTA's and states that each Request to Admit not specifically admitted, qualified or explained in the answer thereto is denied.

Subject to the foregoing, Defendant hereby responds to Plaintiffs' **First RTA and Second RTA** as follows:

RESPONSES TO REQUEST FOR ADMISSION OF FACT

1. Admit that the Defendant Shipyard Village Council of Co-Owners, Inc. ("Shipyard Village Council of Co-Owners") has an affirmative duty to maintain, replace, and repair the common elements of Buildings A and B as required by the Master Deed and By-Laws of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: The first sentence of Request to Admit No. 1 is admitted. The second sentence of Request to Admit No. 1 is denied.

2. Admit that the Defendant Shipyard Village Council of Co-Owners has a duty of care to adequately fund the reserves for the maintenance, replacement, and repair of the common elements of Buildings A and B as required by the Master Deed and By-Laws of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: Denied.

3. Admit that the Defendant Shipyard Village Council of Co-Owners owes a continuing fiduciary duty to all Unit Co-Owners to adequately maintain, replace and repair the common elements of Buildings A and B as required by the Master Deed and By-Laws of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: Denied.

4. Admit that Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to adequately maintain, replace, and repair the common elements of Buildings A and B of the Shipyard Village HPR as evidenced by *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009.* A copy of *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009* is attached hereto, and marked as **Exhibit No. 6.**

ANSWER: Denied.

5. Admit that Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to adequately fund the reserves for the maintenance, replacement and repair of the common elements of Buildings A and B of the Shipyard Village HPR as evidenced by *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009.* A copy of *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009* is attached hereto, and marked as **Exhibit No. 6.**

ANSWER: Denied.

6. Admit that Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to individually assess any and/or all A and B Unit Co-Owners for their direct negligence in failing to maintain, repair and/or replace their leaking windows and sliding glass doors of their units which caused substantial water intrusion damage to the common elements of Buildings A and B of the Shipyard Village HPR as evidenced by *Sutton Kennerly & Associates, Inc.*

("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009. A copy of *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009* is attached hereto, and marked as **Exhibit No. 6**.

ANSWER: Denied.

7. Admit that Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees and representatives, failed to properly adopt and present the 2010 budget to the Unit Co-Owners at their annual meeting as required by the Master Deed and By-Laws of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: Denied.

8. Admit that Defendant Shipyard Village Council of Co-Owners, by and through its agents, employees, and representatives, failed to uphold its common law duty to pursue a recovery and institute litigation against the Developer, its agents, employees and representatives, for the construction defects, deficiencies, and damages associated with common elements of Buildings A and B of the Shipyard Village HPR as evidenced by *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009.* A copy of *Sutton Kennerly & Associates, Inc. ("SKA")'s Exploratory Field Survey and Testing Report dated February 13, 2009* is attached hereto, and marked as **Exhibit No. 6**.

ANSWER: Denied.

9. Admit that Defendant Shipyard Village Council of Co-Owners has a duty of care to maintain, replace, and repair the component parts of the common elements of Buildings A and B as required by the Master Deed and By-Laws of the Shipyard HPR. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: Denied.

10. Admit that Defendant Council of Co-owners, by and through its agents, employees, and representatives, breached and violated Sections 2.2, 2.2, 5.2, 5.6, 6.1, 6.4 and 7.3 of the Master Deed and By-Laws of the Shipyard Village HPR by improperly incorporating a part of the alleged common expense repair assessment in the amount of Ten Million Nine Hundred Forty-Four Thousand Four Hundred Sixty-Eight and No/100 ($10,944,468.00) Dollars as an operating expense into the 2010 annual budget for repair and reconstruction of Buildings A and B. A copy of the Master Deed and By-Laws of Shipyard Village HPR are attached hereto, and marked as **Exhibit Nos. 1** and **2**.

ANSWER: Denied.

RESPONSES TO GENUINENESS OF DOCUMENTS

1. **Exhibit 1**: Denied.
2. **Exhibit 2**: Denied.
3. **Exhibit 3**: Denied.
4. **Exhibit 4**: Denied.
5. **Exhibit 5**: Denied.

6. **Exhibit 6**: Denied.

7. **Exhibit 7**: Denied.

8. **Exhibit 8**: Denied.

9. **Second Exhibit 8**: Denied.

10. **Exhibit 9**: Denied.

11. **Exhibit 10**: Denied.

12. **Exhibit 11**: Denied.

13. **Exhibit 12**: Denied.

14. **Exhibit 13**: Denied.

15. **Exhibit 14**: Denied.

16. **Exhibit 15**: Denied.

17. **Exhibit 17**: Denied.

18. **Exhibit 18**: Denied.

19. **Exhibit 19**: Denied.

20. **Exhibit 20**: Denied.

21. **Exhibit 21**: Denied.

22. **Exhibit 22**: Denied.

23. **Exhibit 23**: Denied.

24. **Exhibit 24**: Denied.

25. **Exhibit 25**: Denied.

26. **Exhibit 26**: Denied.

27. **Exhibit 27**: Denied.

28. **Exhibit 28**: Denied.

29. **Exhibit 29**: Denied.

30. **Exhibit 30**: Denied.

31. **Exhibit 31**: Denied.

32. **Exhibit 32**: Denied.

33. **Exhibit 34**: Denied.

34. **Exhibit 35**: Denied.

35. **Exhibit 36**: Denied.

36. **Exhibit 37**: Denied.

37. **Exhibit 38**: Denied.

38. **Exhibit 39**: Denied.

39. **Exhibit 40**: Denied.

40. **Exhibit 41**: Denied.

41. **Exhibit 42**: Denied.

42. **Exhibit 43**: Denied.

43. **Exhibit 44**: Denied.

44. **Exhibit 45**: Denied.

45. **Exhibit 46**: Denied.

MCNAIR LAW FIRM, P.A.

David J. Mills, SC Bar #10194
Leigh P. Boan, SC Bar #68300
14361 Ocean Highway, Third Floor
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 546-6102 – Telephone
(843) 546-0096 – Facsimile
dmills@mcnair.net
lboan@mcnair.net

Attorneys for Defendant

Pawleys Island, South Carolina
April ___, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO.: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008 and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC;

DEFENDANT SHIPYARD VILLAGE COUNCIL OF CO-OWNERS, INC.'S ANSWERS TO PLAINTIFFS' 2ND SET OF REQUEST TO ADMIT

JUN 29 2011

Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H.S. Keeter and Sandra C. Keeter; Linda A. Mendicino; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A.

Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miller and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame,

Plaintiffs,

vs.

Shipyard Village Council of Co-Owners, Inc.,

Defendant.

TO: HOWELL V. BELLAMY, III, ESQUIRE, JEFFREY W. KING, ESQUIRE AND HOWELL V. BELLAMY, JR., ESQUIRE, ATTORNEYS FOR PLAINTIFFS ABOVE NAMED:

The Defendant Shipyard Village Council of Co-Owners, Inc. (hereinafter "Defendant"), responding to the Plaintiffs' 2nd Set of Request to Admit hand delivered on May 31, 2011 and mailed May 27, 2011(received June 1, 2011), hereby states that each Request to Admit not specifically admitted, qualified or explained in the answer thereto is denied. Additionally, Defendant objects to Plaintiffs' Request to Admit, including Plaintiffs' Second Request to Admit, as they exceed the twenty (20) Request

to Admit authorized by Rule 36, SCRCP, and Defendant's responses herein do not constitute, and should not be deemed to effect, any waiver of such objection.

Subject to the foregoing, Defendant hereby responds to Plaintiffs' 2nd Set of Request to Admit as follows:

RESPONSES TO REQUEST FOR ADMISSION OF FACT

1. Admit that Shipyard Village Condominium Development is a Horizontal Property Regime under South Carolina Law and is subject to the South Carolina Horizontal Property Act ("Act") under S.C. Code Ann. §27-31-10 *et seq.*, 1976, as amended. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Defendant admits only so much of the first sentence of Request to Admit No. 1 as alleges that the Shipyard Village Horizontal Property Regime as defined in the Master Deed, including the amendments thereto, is a horizontal property regime formed pursuant to South Carolina law and is subject to South Carolina law, including but not limited to the South Carolina Horizontal Property Act ("Act"). Defendant denies all remaining allegations of the first sentence of Request to Admit No. 1 inconsistent with such admission. The second sentence of Request to Admit No. 1 is denied.

2. Admit that other Horizontal Property Regimes (in the State of South Carolina), like Shipyard Village, are administered by its By-Laws inserted in or appended to its Master Deed (*See* S.C. Code §27-31-150 (1991); Ortega v. Kingfisher Homeowners Association, Inc., 314 S.C. 180, 442 S.E.2d 202 (Ct. App. 1994)). A copy

of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Denied.

3. Admit that Master Deed, as amended, and By-Laws, as amended, of the Shipyard Village Horizontal Property Regime ("HPR"), are required to be strictly enforced by the Defendant pursuant to the South Carolina Horizontal Property Act ("Act") under S.C. Code Ann. §27-31-10 *et seq.*, 1976, as amended, and the case law of the State of South Carolina interpreting the Act. (*See* Kneale v. Bonds, 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994)). A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Defendant admits only so much of the first sentence of Request to Admit No. 3 as alleges that Kneale v. Bonds, 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994) includes language that the Master Deed at issue in that particular case "should be strictly enforced." Defendant denies all remaining allegations of the first sentence of Request to Admit No. 3. The second sentence of Request to Admit No. 3 is denied.

4. Admit that the Defendant is subject to the jurisdiction of the South Carolina Horizontal Property Act ("Act"), §§27-31-10 et seq., 1976, as amended, and is legally bound by the act and required to strictly comply with and enforce its provisions. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Defendant admits only so much of the first sentence of Request to Admit No. 4 as alleges that it is subject to the Act, as amended, and is bound by the Act. All remaining allegations of the first sentence of Request to Admit No. 4 are denied. The second sentence of Request to Admit No. 4 is denied.**

5. Admit that Defendant is required to strictly enforce the provisions of the Master Deed, as amended, and By-Laws, as amended, of the Shipyard Village Horizontal Property Regime ("HPR"), based on the language of South Carolina Horizontal Property Act ("Act") under S.C. Code Ann. §27-31-10 *et seq.*, 1976, as amended, and the appellate opinions and/or case law interpreting the Act. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Denied.**

6. Admit that Sections 3.6, 4.3, 5.5, 5.6, 7.1, 7.4, 9.4, 9.6, 9.9, 12.1, 16.1, 16.2, and 16.4 of the Master Deed, as amended, are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Responding to the first sentence of Request to Admit No. 6, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 6 inconsistent with such admission are denied. The second sentence of Request to Admit No. 6 is denied.**

7. Admit that Sections 3.6, 4.3, 5.5, 5.6, 7.1, 7.4, 9.4, 9.6, 9.9,12.1, 16.1, 16.2, and 16.4 of the Master Deed, as amended, impose affirmative duties on the Defendant and the individual A, B, C and D Unit Co-Owners regarding the maintenance, replacement, and repair of their individual units and the regime's common elements. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: **Responding to the first sentence of Request to Admit No. 7, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 7 inconsistent with such admission are denied. The second sentence of Request to Admit No. 7 is denied.**

8. Admit that Sections 2.2, 5.2, 5.3, 6.1, 6.2, 6.3, 6.4, 6.5, 7.1, 7.3 and 11.5 of the By-Laws, as amended, are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners of the Shipyard Village HPR. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: **Responding to the first sentence of Request to Admit No. 8, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 8 inconsistent with such admission are denied. The second sentence of Request to Admit No. 8 is denied.**

9. Admit that Sections 2.2, 5.2, 5.3, 6.1, 6.2, 6.3, 6.4, 6.5, 7.1, 7.3 and 11.5 of the By-Laws, as amended, impose affirmative duties on the Defendant and the

individual A, B, C and D Unit Co-Owners regarding the maintenance, replacement and repair of their individual units and the regime's common elements. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 9, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 9 inconsistent with such admission are denied. The second sentence of Request to Admit No. 9 is denied.

10. Admit that the provisions of **Section 3.6(c) of Article III (Boundaries of Units in Phase I)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 10, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 10 inconsistent with such admission are denied. The second sentence of Request to Admit No. 10 is denied.

11. Admit that the provisions of **Section 4.3(c) of Article IV (Maintenance and Repair)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners. A copy of

the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 11, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 11 inconsistent with such admission are denied. The second sentence of Request to Admit No. 11 is denied.

12. Admit the provisions of **Section 4.3 of Article IV (Maintenance and Repair)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 12, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 12 inconsistent with such admission are denied. The second sentence of Request to Admit No. 12 is denied.

13. Admit that the provisions of **Section 5.6 of Article V (Operation and Maintenance)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: **Responding to the first sentence of Request to Admit No. 13, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 13 inconsistent with such admission are denied. The second sentence of Request to Admit No. 13 is denied.**

14. Admit that the provisions of Section 7.4 of Article VII (Bylaws and Regulations) of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C and D Unit Co-Owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Responding to the first sentence of Request to Admit No. 14, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 14 inconsistent with such admission are denied. The second sentence of Request to Admit No. 14 is denied.**

15. Admit that the provisions of **Section 9.4 of Article IX (Covenant to Comply with Restrictions and Obligations)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Responding to the first sentence of Request to Admit No. 15, Defendant admits that it and all Co-Owners are bound by the Master Deed, as**

amended. All remaining allegations of the first sentence of Request to Admit No. 15 inconsistent with such admission are denied. The second sentence of Request to Admit No. 15 is denied.

16. Admit that the provisions of **Section 9.6 of Article IX (Right of Access)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 16, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 16 inconsistent with such admission are denied. The second sentence of Request to Admit No. 16 is denied.

17. Admit that the provisions of **Section 9.9 of Article IX (Covenant to Comply with Restrictions and Obligations Expenses)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 17, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No.

17 inconsistent with such admission are denied. The second sentence of Request to Admit No. 17 is denied.

18. Admit that the language of **Paragraph three (3) of Section 12.1 (Reconstruction and Repair)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 18, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 18 inconsistent with such admission are denied. The second sentence of Request to Admit No. 18 is denied.

19. Admit that **Section 16.1 of Article XVI (Application)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 19, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 19 inconsistent with such admission are denied. The second sentence of Request to Admit No. 19 is denied.

20. Admit that **Section 16.2 of Article XVI (Compliance)** of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 20, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 20 inconsistent with such admission are denied. The second sentence of Request to Admit No. 20 is denied.

21. Admit that Section 16.4 of Article XVI (Conflicts) of the Master Deed, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 21, Defendant admits that it and all Co-Owners are bound by the Master Deed, as amended. All remaining allegations of the first sentence of Request to Admit No. 21 inconsistent with such admission are denied. The second sentence of Request to Admit No. 21 is denied.

22. Admit that **Section 2.2 of Article II (Authorities and Duties)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-

Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 22, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 22 inconsistent with such admission are denied. The second sentence of Request to Admit No. 22 is denied.

23. Admit that **Section 5.2 of Article V (Budget)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 23, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 23 inconsistent with such admission are denied. The second sentence of Request to Admit No. 23 is denied.

24. Admit that **Section 5.3 of Article V (Approval of Budget)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: **Responding to the first sentence of Request to Admit No. 24, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 24 inconsistent with such admission are denied. The second sentence of Request to Admit No. 24 is denied.**

25. Admit that **Section 6.1 of Article VI (Maintenance by Manager)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Responding to the first sentence of Request to Admit No. 25, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 25 inconsistent with such admission are denied. The second sentence of Request to Admit No. 25 is denied.**

26. Admit that **Section 6.2 of Article VI (Maintenance by Co-Owners)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: **Responding to the first sentence of Request to Admit No. 26, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No.**

26 inconsistent with such admission are denied. The second sentence of Request to Admit No. 26 is denied.

27. Admit that **Section 6.3 of Article VI (Default by Co-Owner)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 27, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 27 inconsistent with such admission are denied. The second sentence of Request to Admit No. 27 is denied.

28. Admit that **Section 6.4 of Article VI (Expenses)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 28, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 28 inconsistent with such admission are denied. The second sentence of Request to Admit No. 28 is denied.

29. Admit that **Section 6.5 of Article VI (Improvements)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 29, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 29 inconsistent with such admission are denied. The second sentence of Request to Admit No. 29 is denied.

30. Admit that **Section 7.1 of Article VII (Restrictions)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4.**

ANSWER: Responding to the first sentence of Request to Admit No. 30, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 30 inconsistent with such admission are denied. The second sentence of Request to Admit No. 30 is denied.

31. Admit that **Section 7.3 of Article VII (Enforcement)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of

the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 31, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 31 inconsistent with such admission are denied. The second sentence of Request to Admit No. 31 is denied.

32. Admit that **Section 11.5 of Article XI (Conflicts)** of the By-Laws, as amended, of the Shipyard Village HPR are legally binding on the Defendant and the individual A, B, C, and D Unit Co-owners. A copy of the Master Deed and By-Laws of the Shipyard Village HPR, including their amendments, are attached hereto, and marked as **Exhibit Nos. 1-4**.

ANSWER: Responding to the first sentence of Request to Admit No. 32, Defendant admits that it and all Co-Owners are bound by the By-Laws, as amended. All remaining allegations of the first sentence of Request to Admit No. 32 inconsistent with such admission are denied. The second sentence of Request to Admit No. 32 is denied.

RESPONSES TO GENUINENESS OF DOCUMENTS

1. **Exhibit 1**: Denied.
2. **Exhibit 2**: Denied.
3. **Exhibit 3**: Admitted.
4. **Exhibit 4**: Admitted.

MCNAIR LAW FIRM, P.A.



David J. Mills, SC Bar #10194
Leigh P. Boan, SC Bar #68300
14361 Ocean Highway, Third Floor
Post Office Box 1469
Pawleys Island, South Carolina 29585
(843) 546-6102 – Telephone
(843) 546-0096 – Facsimile
dmills@mcnair.net
lboan@mcnair.net

Attorneys for Defendant

Pawleys Island, South Carolina
June 27, 2010

BOOK 201 PAGE 880

TABLE OF CONTENTS

OF

MASTER DEED OF SHIPYARD VILLAGE
HORIZONTAL PROPERTY REGIME

ARTICLE I	ESTABLISHMENT OF HORIZONTAL PROPERTY REGIME	Begins Page 1
	Sec. 1. General	
	Sec. 2. General Description of Plan of Development	
	Sec. 3. Rights and Obligations	
	Sec. 4. Reservation to Grantor	
	Sec. 5. Phase 1 Construction	
ARTICLE II	DEFINITIONS	Begins Page 5
ARTICLE III	THE PROPERTY	Begins Page 7
	Sec. 1. Property	
	Sec. 2. Regime Property	
	Sec. 3. Land	
	Sec. 4. Building Locations for Phase 1	
	Sec. 5. Description of Units in Phase 1	
	Sec. 6. Boundaries of Units in Phase 1	
	Sec. 7. Common Elements	
	Sec. 8. Future Phases	
	Sec. 9. Values	
ARTICLE IV	UNITS: OWNERSHIP AND USE	Begins Page 11
	Sec. 1. Ownership of Units	
	Sec. 2. Occupancy of Units	
	Sec. 3. Legal Description	
	Sec. 4. Maintenance and Repair	
ARTICLE V	COMMON ELEMENTS: OWNERSHIP AND USE	Begins Page 13
	Sec. 1. Ownership of Common Elements	
	Sec. 2. Appurtenancy of Percentage Interest	
	Sec. 3. No Partition	
	Sec. 4. Use of Common Elements	
	Sec. 5. Limited Common Elements	
	Sec. 6. Operation and Maintenance	
ARTICLE VI	COMMON EXPENSES	Begins Page 16
	Sec. 1. Enumeration of Expenses	
	Sec. 2. Assessments	
	Sec. 3. Liability of Unit Owner	
	Sec. 4. Lien Upon Unit	
	Sec. 5. Sales of Unit	
	Sec. 6. Foreclosure Purchaser	
	Sec. 7. Records	
ARTICLE VII	SYSTEM OF ADMINISTRATION OF THE REGIME	Begins Page 18
	Sec. 1. Council of Co-owners, Board of Directors and Manager	
	Sec. 2. Voting	
	Sec. 3. Incorporation	
	Sec. 4. Bylaws and Regulations	

FILED
JUL 9 2 41 PM '82
REGISTER OF DEEDS
GEORGETOWN COUNTY, S.C.
BOOK _____ PAGE _____

CERTIFIED A TRUE
AND CORRECT COPY
Wanda G. Cressatte
REGISTER OF DEEDS
GEORGETOWN COUNTY, S.C.

0957

ARTICLE VIII CONDEMNATION — Begins Page 19

Sec. 1. Rights of Co-owners
Sec. 2. Duties of Council

ARTICLE IX EASEMENTS, COVENANTS AND RESTRICTIONS — Begins Page 20

Sec. 1. Use of Property
Sec. 2. Future Easements
Sec. 3. Utility Easements
Sec. 4. Covenant to Comply with Restrictions and Obligations
Sec. 5. Encroachments
Sec. 6. Right of Access
Sec. 7. Construction and Sales Easement
Sec. 8. Reservation of Rights and Easements to Swimming Pools
Sec. 9. Covenant to Comply with Restrictions and Obligations

ARTICLE X LIENS — Begins Page 29

Sec. 1. Attachment
Sec. 2. Discharge
Sec. 3. Taxes

ARTICLE XI INSURANCE — Begins Page 30

Sec. 1. Hazard Insurance
Sec. 2. Public Liability Insurance
Sec. 3. Workmen's Compensation Insurance
Sec. 4. Premiums
Sec. 5. Insurance by Co-owner
Sec. 6. Substitute of Insurance Trustee

ARTICLE XII RECONSTRUCTION AND REPAIR — Begins Page 33

Sec. 1. Reconstruction
Sec. 2. Insurance Trust
Sec. 3. Adjustment

ARTICLE XIII TERMINATION — Begins Page 36

Sec. 1. Casualty or Condemnation
Sec. 2. Voluntary Termination
Sec. 3. Ownership and Termination
Sec. 4. Partition

ARTICLE XIV AMENDMENTS — Begins Page 37

Sec. 1. Co-owners
Sec. 2. By Grantor-General
Sec. 3. By Grantor-Future Phases
Sec. 4. Power of Attorney
Sec. 5. Recording

ARTICLE XV GRANTOR — Begins Page 39

ARTICLE XVI MISCELLANEOUS — Begins Page 40

Sec. 1. Application
Sec. 2. Compliance
Sec. 3. Waiver
Sec. 4. Conflicts
Sec. 5. Severability
Sec. 6. Captions
Sec. 7. Gender and Number
Sec. 8. Acceptance of Deed to a Unit
Sec. 9. Assignment of Warranties
Sec. 10. Failure to Enforce
Sec. 11. Rule Against Perpetuities

EXHIBITS

TO

MASTER DEED

EXHIBIT A	Survey Plat of Phase 1, Pool Easement Area and Survey Plat of Land from Which Future Phases Will be Derived [1].
EXHIBIT B	Architectural Plans of Buildings and Units of Phase 1[2].
EXHIBIT C	Determination of Percentage Interest in Common Elements upon Submission of all Phases to Condominium Ownership
EXHIBIT D	Percentage Interest in Common Elements of Phase 1 Units
EXHIBIT E	Bylaws of Shipyard Village Council of Co-owners
EXHIBIT F	Legal Description of Phase 1 Regime Property
EXHIBIT G	Legal Description of Land for Future Phases
EXHIBIT H	Legal Description of Pool Easement Area

1. Recorded in the office of the Clerk of Court of Georgetown County in Plat Book 2, at page 25.

2. Recorded in the office of the Clerk of Court of Georgetown County in Miscellaneous Plat Book ____, at page 31.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

BOOK 201 PAGE 883

MASTER DEED

OF

SHIPYARD VILLAGE

HORIZONTAL PROPERTY REGIME

THIS MASTER DEED is made, published and declared by LITCHFIELD-BY-THE-SEA, a joint venture organized under the Uniform Partnership Act of South Carolina (hereinafter referred to as the "Grantor"), pursuant to the Horizontal Property Act of South Carolina for the purpose of creating a horizontal property regime and establishing certain easements, covenants and restrictions to run with the land, this 7th day of July, 1982.

ARTICLE I

ESTABLISHMENT OF HORIZONTAL PROPERTY REGIME

Section 1.1. General. The purpose of this Master Deed is to establish, pursuant to the Horizontal Property Act of the State of South Carolina, a phased horizontal property regime to be known as SHIPYARD VILLAGE HORIZONTAL PROPERTY REGIME. The land and improvements to be submitted in phases to the provisions of the Act and to the terms of this Master Deed are defined in Article III as the "Property". The Grantor, by filing of record this Master Deed, publishes and declares that upon the express submission of each Phase to condominium ownership, that portion of the Property so submitted shall be owned, occupied, used, conveyed, encumbered, leased, and improved in accordance with the provisions of the Act, and in accordance with the easements, covenants, restrictions, encumbrances, obligations, reservations, liens and charges set forth or incorporated by reference in this Master Deed, all of which shall be deemed to be covenants and obligations running with the Property and shall bind and inure to the benefit of the Grantor, its successors and assigns, and all subsequent owners of any interest in the Property, their grantees, successors, heirs, executors, administrators, devisees or assigns.

The Grantor hereby submits to condominium ownership the Regime Property constituting Phase I which is defined in Article III hereof. Upon no event shall Grantor be deemed obligated hereby to submit any additional portion of the Property or any additional Phase to condominium ownership, and this Master Deed shall not be deemed to create any restriction upon the use of any portion of the Property or future Phase if the same is not submitted by Grantor to condominium ownership.

Section 1.2. General Description of Plan of Development. Grantor intends to develop the Property as a four (4) phase condominium regime. Phase I will consist of two (2) five (5) story Buildings each containing forty (40) Units. Accordingly, the maximum number of Units in Phase 1 shall be eighty (80) Units. Each subsequent Phase shall consist of one or more buildings containing such number of Units as Grantor may determine, provided, however, the number of Units in each subsequent Phase shall not exceed forty (40) Units per Phase for an aggregate in Phases II, III and IV of one hundred twenty (120) Units. The maximum number of Units for the entire horizontal property regime may be two hundred (200) Units. Grantor shall elect whether or not to submit additional Phases to condominium ownership by December 31, 2001. Grantor hereby reserves the right in its sole discretion to elect to develop and to submit to condominium ownership or ownership under any type of Vacation Time Sharing Plan any Phase or group of Phases without regard to the location, order or sequence in which Phases are developed. The Regime Property submitted herewith to condominium ownership in Phase I is defined and described in Section 3.2 of Article III. That portion of the Property (the "Land") which will be submitted in subsequent Phases, if all Phases are developed, is defined and described in Section 3.3 of Article III. Grantor hereby reserves the right in its sole discretion to select and determine the exact portion of the Land which will be

submitted to condominium ownership or ownership under any type of vacation time sharing plan in any subsequent Phase or group of Phases. Grantor further reserves the right in its sole discretion to elect to increase the amount of Land submitted to condominium ownership or ownership under any type of vacation time sharing plan in any future Phase or group of Phases provided that no such expansion shall substantially increase the proportionate amount of the Common Expenses payable by the then existing Co-owners. Grantor further reserves the right in its sole discretion to revise, modify or change in whole or in part the Buildings or Units to be developed in any subsequent Phase or group of Phases or to alter the mix and type of Units to be built in any subsequent Phase or group of Phases, including the right to build one bedroom through four bedroom Units. Grantor further reserves the right in its sole discretion to construct Buildings and Units in any subsequent Phase or group of Phases which are different in exterior design or interior plan from Phase I Buildings and Units, and such Buildings may consist of any number or mixture of Unit types within a single Building as elected by Grantor. Grantor has built a pool on property designated "Pool Easement Area" as described on Exhibit H attached hereto. Grantor has leased the Pool Easement Area to the Shipyard Village Council of Co-owners, Inc. for a term of five years. The rights of Grantor, Co-owners and others to the swimming pool are more particularly described in Article IX, Subsection 9.8, hereof. A chart showing the maximum reduction in Percentage Interest in the Common Elements of each Co-owner in Phase I at each stage of development, if the Grantor herein submitting the Land to condominium ownership elects to proceed with all Phases of development, is attached hereto as Exhibit C.

Section 1.3. Rights and Obligations. As stated above, Grantor has reserved its right to elect to proceed with any subsequent Phase or group of Phases. Each election to proceed shall

be evidenced by the recording of an amendment to this Master Deed submitting such Phase or group of Phases to condominium ownership. The Co-owners of Phase I and any additional Phases dedicated to the Regime by Grantor as provided herein shall have the full legal rights and be obligated as required by South Carolina law. The Co-owners by purchasing and accepting a Unit in any Phase acknowledge that further Phase construction and dedication by Grantor shall diminish the percentage of ownership in the Common Elements as described and provided in Exhibit C and in other applicable portions of this Master Deed.

Section 1.4. Reservation to Grantor. Grantor hereby reserves unto itself, its successors and assigns, the following options to be exercised in its sole discretion:

(a) To develop or not to develop and to submit or not to submit to condominium ownership any or all future phases.

(b) The rights, easements and reservations to the Pool Easement Area are set forth in Article IX, Section 9.8 hereof.

(c) To mortgage the Land prior to the submission to condominium ownership of any subsequent Phase or group of Phases; provided, however, that each Unit conveyed in any subsequent Phases shall be conveyed free and clear of such mortgage.

(d) To submit or not to submit any or all of the condominiums or Units in any Phase to any type of Vacation Time Sharing Plan.

The Grantor does not grant easements to the property for view of the dunes, ocean, lakes and marshes, except such view of the dunes and ocean located directly along the ocean front of the Property. Each Co-owner acknowledges that Grantor shall construct additional Buildings which may limit the views from Buildings of Shipyard Village Horizontal Property Regime.

Section 1.5. Phase I Construction. Each of the Buildings and Units submitted herewith to condominium ownership in Phase I shall be constructed substantially in accordance with the survey plat and architectural plans set forth in Exhibits A and B, attached hereto and by reference specifically incorporated herein, which show the Buildings and the number and identity of the Units. The Grantor expressly reserves the right, during the course of construction, to revise, modify or change in whole or in part any of such Units or Buildings, provided, however, (i) Grantor shall adhere to the general plan of development described in Section 1.2 of this Article and (ii) Grantor shall not make any substantial alterations to any Unit sold or under a valid sales contract without having first obtained the express written consent of the Co-owner or prospective Co-owner.

ARTICLE II

DEFINITIONS

Section 2.1. Unless defined herein or unless the context requires otherwise, the words defined in Section 27-31-20 of the Code of Laws of South Carolina, 1976, when used in this Master Deed or any amendment hereto shall have the meaning therein provided. The following words when used in this Master Deed or any amendment hereto, unless the context requires otherwise shall have the following meaning:

(a) "Act" shall mean and refer to the Horizontal Property Act of South Carclina, Chapter 31, Title 27, Code of Laws of South Carolina, 1976.

(b) "Assessment" shall mean and refer to a Co-owner's share of the Common Expenses assessed against such Co-owner and his Unit from time to time by the Council in the manner hereinafter provided.

(c) "Board of Directors" or "Board" shall mean and refer to the Board of Directors of the Shipyard Village Council of Co-owners, Inc., and "director" or "directors" shall mean a member or members of the Board.

(d) "Building(s)" shall mean and refer to one or more of the buildings constructed on and being a part of the Property and containing the condominium Units described in this Master

Deed. The Phase I Buildings are shown in Exhibit A and Exhibit B to this Master Deed.

(e) "Bylaws" shall mean and refer to the Bylaws established by Exhibit E attached hereto and specifically incorporated by reference herein for the administration of Shipyard Village Council of Co-owners, Inc. and the Regime Property.

(f) "Common Elements" shall mean and refer to both the General Common Elements and Limited Common Elements and include all portions of the Regime Property not included within the Units.

(g) "Common Expenses" shall mean and refer to (a) all expenses incident to the administration, maintenance, repair and replacement of the General Common Elements and the Limited Common Elements, after excluding therefrom such expenses which are the responsibility of a Co-owner as set forth herein, (b) expenses determined by the Council to be Common Expenses and which are lawfully assessed against Co-owners, and (c) expenses incident to the General Common Elements and Limited Common Elements as defined in the Act or declared to be Common Expenses by this Master Deed.

(h) "Co-owner" shall mean and refer to persons, firms, corporations, partnerships, associations, trusts or other legal entities or any combination thereof, who own of record a Unit within a Building; furthermore, and except as otherwise provided in this Master Deed, "Co-owner" shall mean and refer to persons, firms, corporations, partnerships, associations, trusts or other legal entities or any combination thereof, who have an ownership or leasehold interest in a Time Sharing Unit.

(i) "General Common Elements" shall mean and refer to all Regime Property exclusive of Units and Limited Common Elements.

(j) "Grantor" shall mean and refer to Litchfield-by-the-Sea, a joint venture organized under the Uniform Partnership Act of South Carolina, its successors and assigns.

(k) "Limited Common Elements" shall mean and refer to those special Common Elements designated as appurtenant to and reserved for the exclusive use of a specific Unit.

(l) "Master Deed" shall mean and refer to this Master Deed dated July 7, 1982, with all Exhibits hereto specifically incorporated by reference thereto and to all amendments to this Master Deed.

(m) "Of Record" shall mean recorded in the Office of the Clerk of Court for Georgetown County, South Carolina.

(n) "Percentage Interest" shall mean and refer to the percentage of undivided interest each Co-owner owns as a tenant in common in the Common Elements.

(o) "Phase" or "Phases" shall mean and refer to each stage or group of stages of development of the Property as set forth in Section 1.2 of Article I.

(p) "Property" shall mean and refer to Regime Property and Land as set forth in Section 3.1 of Article III.

(q) "Regime Property" shall mean and refer to that portion of the Property submitted in each Phase to condominium ownership as set forth in Section 3.2 of Article III.

(r) "Time Sharing Unit(s)" shall mean and refer to a Unit which the Grantor, in its sole discretion, has declared to be subject to a Vacation Time Sharing Plan.

(s) "Unit(s)" shall mean and refer to the apartment (as defined by the Act) and described herein. For purposes other than describing the physical boundaries of a Unit and unless the context clearly indicates otherwise, the term "Unit" shall also mean and refer to a Time Sharing Unit.

(t) "Vacation Time Sharing Plan(s)" shall mean and refer to either a vacation time sharing ownership plan or a vacation time sharing lease plan as defined in Chapter 32, Title 27, Code of Laws of South Carolina, 1976.

ARTICLE III

THE PROPERTY

Section 3.1. Property. The term "Property" means and includes the Regime Property and the Land hereinafter described and all improvements and structures now existing or hereafter placed thereon and all easements, rights and appurtenances belonging thereto.

Section 3.2. Regime Property. The "Regime Property" shall mean and refer to that portion of the Property owned in fee simple absolute by Grantor and submitted to condominium ownership in each Phase. The Regime Property being submitted to condominium ownership in Phase I is shown by the Plat set forth in Exhibit A attached hereto and specifically incorporated by reference herein

and is more particularly described in Exhibit F attached hereto and specifically incorporated by reference herein. The Regime Property which will be submitted to condominium ownership in subsequent Phases shall be described in each amendment to this Master Deed.

Section 3.3. Land. The term "Land" shall mean and refer to that portion of the Property owned in fee simple absolute by Grantor and expressly reserved for the possible future submission to condominium ownership in subsequent Phases or groups of Phases. The Land is shown by the Plat set forth in Exhibit A hereto and is more particularly described in Exhibit G attached hereto and specifically incorporated by reference herein.

Section 3.4. Building Locations for Phase I. The site locations of the Buildings are shown on the Plat of Phase I Regime Property set forth in Exhibit A, attached hereto and specifically incorporated by reference herein. The Buildings are of the general design as graphically depicted in the certified architect's plans which are compiled and set forth in Exhibit B, attached hereto and specifically incorporated by reference herein. Each Building has five (5) floors and contains eight (8) Units on each floor.

(a) Building A of Phase I contains forty (40) Units designated as Units A11 through A18, A21 through A28, A31 through A38, A41 through A48, A51 through A58, inclusive.

(b) Building B of Phase I contains forty (40) Units designated as Units B11 through B18, B21 through B28, B31 through B38, B41 through B48, B51 through B58, inclusive.

Section 3.5. Description of Units in Phase I. The individual Units in Phase I are depicted by the architectural plans set forth as Exhibit B, and are described as follows:

All units in Phase I are three bedroom Units having an interior heated area of 1,387 square feet. The interior of the Units includes rooms as follows: three bedrooms, 12 x 14, 12 x 12 and 19 x 11; two baths, 8 x 10 and 5 x 8; living room, 19 x 15; dining room, 14 x 9; kitchen, 8 x 15; together with halls and closets. The kitchen is equipped with sink, garbage disposal, dishwasher, range and oven combination, refrigerator and range hood. The Units have hot water units, heating and air conditioning units.

All floors are carpeted except kitchen, foyer and baths. The closet in hallway is equipped with a washer and dryer. The two smaller bedrooms include lavatories. The bath off the master bedroom includes a tub and shower. The dining area includes a bar equipped with sink and ice maker. The master bedroom has a walk-in closet.

Section 3.6. Boundaries of Units in Phase I. Each Unit is composed of the interior cubic space, fixtures, appliances, furnishings, walls, floors, ceilings, and building material enclosed within the following boundaries:

(a) The upper boundary of the Unit shall extend to the unfinished interior surfaces of the unfinished sheetrock ceiling. The lower boundary of the Unit shall extend to the unfinished surface of the structural slab constituting the floor.

(b) The perimetrical boundaries of the Unit shall extend to the unfinished interior surfaces of the perimeter walls of the Unit, excluding load-bearing structural interior walls or components.

(c) Each Unit shall also encompass and include the following: (i) the doors (including screen doors) opening into the Unit and onto any balcony reserved to the use of a Unit, including the frames, casings, hinges, handles, and other fixtures which are part of the doors; (ii) the window glasses, screens, frames, and casings which are part of the window openings of the Unit; (iii) the plumbing, wiring and mechanical vents which exclusively serve the Unit; (iv) the appliances, air conditioning and heating units (including the condenser and all piping, wiring and attachments), hot water heaters, lavatories, bath tubs, toilets, carpeting, floor covering, trim finished surface of ceilings and walls, insulation and other fixtures and furnishings which are within or serve the Unit when delivered to the initial Co-owner; (v) all appurtenances which are integral and exclusive to the Unit, including but not limited to lamps attached to the exterior of the Unit, and water and sewer pipes within the Unit exclusively serving the Unit.

Section 3.7. Common Elements. The Common Elements include all of the Property submitted to condominium ownership which is not included within the Units. Exhibits A and B of this Master Deed graphically depict the areas encompassing the

Common Elements in Phase I.

(a) General Common Elements. The General Common Elements shall include, without limitation, the following:

(i) Except for such portion reserved as Limited Common Elements, all land within the boundaries of the Regime Property, together with all easements, rights and hereditaments appurtenant thereto.

(ii) All improvements, exclusive of the Units and Limited Common Elements, erected upon the Property, including without limitation: (a) the roof covering the Buildings including built-up asphalt roof of roofing felt and tar and gravel; (b) the exterior of stucco over reinforced concrete masonry, including those limited exterior areas having plywood over masonry; (c) the pipes, wires, conduits, pumps, motors, and other equipment installed to provide utility service to the Units or to portions of the Common Elements; (d) certain parking areas, street signs, storm draining, guttering, retaining walls, walkways, paths, trees, gardens, irrigation systems, outside electric lighting systems and landscaping and (e) the foundations, pilings and structural members, subflooring, girders, beams, supports, load bearing interior walls and interior walls enclosing pipe chases and utility installations serving more than one Unit; (f) pool easement area subject to all rights and reservations set forth in this Master Deed; and (g) all other elements rationally of common use.

(b) Limited Common Elements. The Limited Common Elements shall include those special elements designated in each Phase as for the exclusive use of a specific Unit. The Limited Common Elements are more specifically designated in Exhibits A and B and include ground floor storage rooms, covered parking and decks.

Section 3.8. Future Phases. The Common Elements of future Phases shall be similar to and compatible with the Common Elements designated in Phase I and no amendment of this Master Deed by the Grantor alone shall alter the designation of Common Elements in Phase I.

Section 3.9. Values. Values are fixed for the sole purpose of complying with the Horizontal Property Act and shall not prevent each Co-owner from fixing a different circumstantial value to his Unit in all types of acts or contracts. The assigned value of that portion of the Property submitted to condominium ownership in Phase I is $6,400,000. The value of each Unit is set forth in Exhibit D attached to this Master Deed and specifically incorporated by reference herein. The value of that portion of the Property submitted at the sole election of the Grantor to condominium ownership in future Phases shall be established by the Grantor in each amendment to this Master Deed; provided that the assigned values for each Unit which shall be a part of future Phases must be one of the the following:

Type	Value
A	$50,000
B	$55,000
C	$60,000
D	$65,000
E	$70,000
F	$75,000
G	$80,000
H	$85,000
I	$90,000
J	$95,000
K	$100,000
L	$105,000

The Grantor may construct in any future Phase or group of Phases any combination or mixture of the above Units using the values assigned above, but in no event shall the Percentage Interest for any Unit in Phase I be reduced more than is set forth in Exhibit C.

ARTICLE IV

UNITS: OWNERSHIP AND USE

Section 4.1. Ownership of Units. Each Unit, together with its undivided interest in Common Elements, shall constitute a separate parcel of real property; and each Co-owner shall be entitled to exclusive ownership and possession of his Unit, subject to: (i) the provisions of this Master Deed and the easements, restrictions, covenants, and encumbrances set forth herein and (ii) the Bylaws of the Council, as they may be amended from time to time, together with the regulations and resolutions

that may be adopted by the Council or its Board pursuant to the Bylaws. In addition to the provisions of the Master Deed and Bylaws of the Council, the ownership and possession rights of each Co-owner of a Time Sharing Unit shall be subject to any supplemental declarations or plans filed of record together with such easements, restrictions, covenants, and encumbrances set forth therein and in any bylaws of any associations or management entities established by Grantor in connection with Vacation Time Sharing Plans.

Section 4.2. Legal Description. Each Unit may be sufficiently described for purposes of deeds, mortgages, leases, and other conveyances by referring to its designated unit number and by reciting that it is part of Shipyard Village Horizontal Property Regime as established by this Master Deed. The conveyance of an individual Unit shall be deemed to convey the undivided interest in Common Elements appurtenant to that Unit. The ownership of an undivided interest in Common Elements appurtenant to a Unit shall be inseparable from the Unit, and no such undivided interest may be conveyed or encumbered except as an appurtenance to the Unit.

Section 4.3. Maintenance and Repair. Every Co-owner (except Co-owners of Time Sharing Units), shall be responsible at his own expense for maintaining, repairing, and decorating all walls, ceilings and floors of his Unit. However, no Co-owner shall do any work nor make any addition, improvement, structural modification or alteration of his Unit, nor shall any Co-owner alter the appearance of any external door, window, vent, flue, or other external element of his Unit without obtaining prior written approval of the Board. Written notice of any intended modification, addition, improvement, painting or alteration shall be given to the Board, setting forth details and requesting approval. The Board shall consider the request and decide whether approval shall be granted. The Board may require the deposit of funds sufficient in the sole discretion of the Board to

defray all costs, including attorney's fees, of modifying this Master Deed and recording such modification. The Board shall advise the Co-owner of its decision in writing within ninety (90) days from the receipt of the request. Nothing in this Section shall relieve any Co-owner from obtaining approval for alterations required by other applicable covenants, restrictions or governmental authority. No Co-owner shall undertake to modify, alter, improve, paint or repair any portion of the Common Elements.

The maintenance and repair of all Time Sharing Units shall be the responsibility of the associations or management entities created pursuant to the establishment of Vacation Time Sharing Plans.

ARTICLE V

COMMON ELEMENTS: OWNERSHIP AND USE

Section 5.1. Ownership of Common Elements. The Co-owners shall own the General Common Elements and Limited Common Elements as tenants in common with each Unit in Phase I having appurtenant thereto the Percentage Interest in said General Common Elements and Limited Common Elements as set forth in Exhibit D, attached hereto and incorporated herein by reference. The Percentage Interest appurtenant to each Unit in Phase I has been determined by finding the percentage equivalent to the value of the individual Unit in relation to the value of all Units in Phase I as a whole. In the event the Grantor elects to construct an additional Phase or Phases, the Percentage Interest appurtenant to each Unit will automatically change to the Percentage Interest in the General Common Elements and Limited Common Elements to be set forth in the amendment to be recorded at the time the Grantor elects to submit additional Phases to condominium ownership. This Percentage Interest shall express the value of each Unit in relation to the cumulative value of the Units in all Phases. In the event the Grantor does not elect to proceed with the development of any additional Phases in accordance with the provisions of Section 1.2, Article I, the Percentage Interest appurtenant to

each Unit in Phase I will remain as set forth in Exhibit D, or if Grantor elects to proceed with some but not all Phases, the Percentage Interest will be determined as provided in this Article and Exhibit C. The stated Percentage Interest is permanent in character and cannot be altered except as provided in this Article and by the formula expressed in Exhibit C without the consent of all (100%) of the Co-owners expressed in an amendment to the Master Deed duly recorded.

Section 5.2. Appurtenancy of Percentage Interest. The Percentage Interest in the General Common Elements and the Limited Common Elements cannot be separated from the Unit to which it appertains and shall be automatically conveyed or encumbered with the Unit even though such interest is not expressly mentioned or described in the deed or other instrument of conveyance.

Section 5.3. No Partition. The General Common Elements and Limited Common Elements shall remain undivided and no right to partition the same or any part thereof shall exist except as provided in the Horizontal Property Act of South Carolina and this Master Deed.

Section 5.4. Use of Common Elements. A Co-owner shall use the General Common Elements and Limited Common Elements in accordance with the purpose for which they are intended so long as such Co-owner does not hinder the exercise of or encroach upon the rights of other Co-owners. The Board of Directors shall, if any question arises, determine the purpose for which a part of the General Common Elements is intended to be used. The Board shall have the right to promulgate rules and regulations limiting and regulating the use of the Limited and General Common Elements by Co-owners, their guests and tenants; restricting the number of guests or tenants who may use the Limited and General Common Elements; and providing for the exclusive use of a part of the General Common Elements by a Co-owner and his guests for special occasions which exclusive use may be conditioned, among

other things, upon the payment of a fee. Each Co-owner and his agents, tenants and guests shall have a non-exclusive easement appurtenant to his Unit for ingress and egress over the Common Elements for access to and from his Unit.

Section 5.5. Limited Common Elements. Ownership of each Unit shall entitle the Co-owner thereof to the exclusive use of the Limited Common Elements reserved for such Unit and so designated in Exhibits A and B as Limited Common Elements. This exclusive use may be delegated by a Co-owner to his guests or to the tenants of his Unit. With the permission of the Board of Directors, Co-owners may place plants, furniture, grills and other similar items within the balconies to their Units, but such use shall be subject to the right of the Board of Directors of the Council (i) to adopt rules and regulations limiting the use of the Limited Common Elements and (ii) to require, by resolution, any Co-owner to remove any item placed on the Limited Common Elements.

Section 5.6. Operation and Maintenance. Each Co-owner (except Co-owners of Time Sharing Units) shall, at his own expense, keep the Limited Common Elements to which his Unit has exclusive use clean and neat. The Limited Common Elements to which any Time Sharing Unit has the exclusive use shall be kept clean and neat by the association or management entity created pursuant to the establishment of a Vacation Time Sharing Plan. Except as specifically provided herein, the maintenance, repair, replacement, management, operation and use of the Common Elements and Limited Common Elements shall be the responsibility of the Board. The expenses incurred for such purpose shall be assessed as Common Expenses except in the case of the negligence of a Co-owner or his

tenants or guests, and in the event of such negligence, such expenses or a portion thereof may be assessed as an individual assessment pursuant to the terms of Article XII hereof.

ARTICLE VI

COMMON EXPENSES

Section 6.1. Enumeration of Expenses. Except as otherwise provided herein, each Co-owner shall bear in proportion to his respective interest in the Common Elements the following expenses:

(a) Expenses incurred in operating, maintaining, improving, repairing and replacing the Common Elements.

(b) Expenses incurred in administering the affairs of the Council including salaries, wages, and any compensation paid to a managing agent for such purpose.

(c) Expenses incurred in providing public liability insurance, hazard insurance or other insurance adequate to cover the Regime Property, exclusive of Unit contents and furnishings, as provided in Article XI of this Master Deed.

(d) Contributions to provide sufficient reserves to create a general reserve to operate and maintain the Regime Property and to administer the affairs of the Council.

(e) Contributions to provide sufficient reserves to make such major repairs or replacements to the Common Elements as may be required from time to time.

(f) Any other costs related to the operation of the Regime Property or administration of the affairs of Council which are declared by this Master Deed, the Bylaws or any amendment thereto to be Common Expenses, and any valid charge against the Regime Property as a whole.

Section 6.2. Assessments. All assessments of Common Expenses shall be determined as provided in the Bylaws.

Section 6.3. Liability of Unit Owners. No Co-owner may exempt himself from liability for Common Expenses by waiving the use or enjoyment of the Common Elements or by abandoning his Unit.

Section 6.4. Lien Upon Unit. All assessments of the Council for the share of Common Expenses chargeable to any Unit which are unpaid after becoming due shall, upon the filing of a Notice of Lien in the R.M.C. Office for Georgetown County, South Carolina, and mailing of same by certified mail to the Co-owner, constitute a lien against such Unit prior and superior to all other liens except: (i) liens for property taxes upon the Unit in favor of any taxing authority; and (ii) mortgage liens duly recorded prior to such delinquency. The lien for such assessments may be foreclosed by the Board acting in behalf of the Council in the same manner as a mortgage upon real property. In the event of foreclosure, the Co-owner shall be required to pay a reasonable rental for the Unit during pendency of the foreclosure action, and a receiver may be appointed to collect the rentals during such period. The Board, on behalf of the Council, may bring suit for judgment against the Co-owner in the amount of delinquent assessments. In the event of foreclosure or suit for money judgment, a reasonable amount may be added to the sum due for attorney's fees and other costs of collection. The lien created by this section shall cover rentals accruing during the pendency of the foreclosure action and any reasonable amount of attorney's fees and other costs of collecting.

Section 6.5. Sales of Unit. Except as set forth in Section 6.6 below, upon the sale or conveyance of a Unit, all unpaid assessments against a Co-owner for his pro rata share of Common Expenses shall first be paid out of the sale price or by the purchaser or grantee who shall be jointly and severally liable with the grantor for unpaid assessments in preference over any other assessments, charges, or liens, except the following:

(a) Lien for taxes and special assessments upon the Unit which are unpaid.

(b) Payment due under mortgages upon the Unit which are duly recorded prior to such sale or conveyance.

Section 6.6. Foreclosure Purchaser. If the mortgagee holding a first mortgage on a Unit acquires title by foreclosure

of its first mortgage, or by deed in lieu of foreclosure, or if a purchaser acquires title at a sale foreclosing such first mortgage, such mortgagee or purchaser shall not be liable for the share of Common Expenses assessed by the Council upon the Unit so acquired accruing after the date of recording of such mortgage but prior to the acquisition of title. The unpaid assessments occurring during such period shall be deemed Common Expenses collectible from all Co-owners, including such mortgagee or purchaser or grantee, his successors, heirs and assigns. The provisions of this Section, however, shall not release any Co-owner from personal liability for unpaid assessments.

Section 6.7. Records. The Board of Directors of the Council, or any managing agent which it employs, shall keep accurate and detailed records, in chronological order, of receipts and disbursements connected with the operation, administration, maintenance, repair and replacement of the Regime Property. Such records, together with the vouchers authorizing payment, shall be available for examination by the Co-owners at convenient hours on working days, with the appropriate hours being set and announced for general knowledge.

ARTICLE VII

SYSTEM OF ADMINISTRATION OF THE REGIME

Section 7.1. Council of Co-owners, Board of Directors and Manager. The Regime shall be administered by a Council of Co-owners, an incorporated association which shall act by and through a Board of Directors elected as herein provided. The Council may employ a managing agent ("Manager") for the Regime.

Section 7.2. Voting. On all matters relating to the Regime upon which a vote of the Co-owners is required, each Co-owner shall be entitled to cast the number of votes equal to his Percentage Interest in the Common Elements, provided, however, the election of the Board of Directors is subject to the provisions contained in Article XV, Section 15.2. When any Unit is owned of record in the name of two or more persons or entities, whether fiduciaries, joint tenants, tenants in common, tenants in partnership or in any other manner of joint or common ownership, one person or entity shall be designated the voting Co-owner to bind all the others. Written notice of such designation shall be delivered to the Secretary of the Council prior to the exercise

of a vote by joint owners. The Percentage Interest of Co-owners for each Unit in Phase I is set out in Exhibit D, and the Percentage Interest of Co-owners for Units subsequent to the addition of any Phase shall be determined as set forth in Exhibit C. The affirmative vote of the Co-owners of fifty-one percent or more of the value of the Regime Property shall be required to adopt decisions submitted to the Co-owners for a vote pursuant to this Master Deed or the Bylaws; unless, however, the Master Deed or Bylaws require a greater percentage for a particular act or decision and except as otherwise provided in Article XIV hereof.

Section 7.3. Incorporation. The Grantor (prior to the election of the first Board of Directors) shall incorporate the Council, and in such event:

(a) each Co-owner shall be a member of the Corporation.

(b) the Bylaws referred to in Section 7.4 shall be adopted as the Bylaws of the Corporation.

(c) the Articles of Incorporation shall not contain provisions inconsistent with this Master Deed.

(d) the name of the Corporation shall be "Shipyard Village Council of Co-owners, Inc." (the "Council"); and

(e) the Council and its Board of Directors shall have all of the powers, rights and obligations of corporations organized under the laws of the state of its incorporation, including but not limited to the power to borrow money and mortgage its property.

Section 7.4. Bylaws and Regulations. The Council and the administration of the Regime shall be governed by (1) the Bylaws attached to this Master Deed as Exhibit E and hereby incorporated by reference herein, and (2) any regulations ("Regulations") adopted pursuant to the Bylaws. The Bylaws may be modified or amended only in the manner set forth in the Bylaws.

ARTICLE VIII

CONDEMNATION

Section 8.1. Rights of Co-owners. If any portion of the Regime Property is condemned by any authority having the power of eminent domain, each Co-Owner shall be entitled to receive notice of such condemnation and to participate in the proceedings incident thereto unless otherwise prohibited by law. Each Co-owner shall be entitled to an individual award to be determined by the value of his

interest in the portion or portions of the Regime Property condemned.

Section 8.2. Duties of Council. In the event that any award is received by the Council on account of condemnation of any portion or portions of the Common Elements, the Board of Directors shall promptly call a special meeting of the Council to determine whether any condemned portion of the Common Elements shall be replaced. If the Council determines to replace any condemned portion of the Common Elements, the Board of Directors shall provide for the replacement of such portions in the same manner as if such portions had been destroyed by casualty.

ARTICLE IX

EASEMENTS, COVENANTS AND RESTRICTIONS

Section 9.1. Use of Property. Each Co-owner shall be entitled to the exclusive ownership and possession of the interest conveyed by his deed to a Unit or interest therein and may use his Unit and the Common Elements to the extent permitted by his deed in accordance with this Master Deed. In order to protect the Common Elements, preserve the property values of the community created by this Master Deed, retain the benefits and protection to Co-owners provided by the rules and regulations adopted from time to time by the Board of Directors of the Council of Co-owners and to provide for the orderly administration of the Regime, each Unit of Shipyard Village Horizontal Property Regime shall be subject to the following restrictions and covenants, which shall be covenants running with the land. Each Co-owner, his successors and assigns, shall comply with these covenants and restrictions, and with the rules and regulations adopted by the Board of Directors to carry out the purpose of these restrictions and covenants. The Board shall adopt reasonable penalties for the violation of its rules and regulations. Each Co-owner shall be responsible for the conduct of his tenants, guest, agents and members of his household.

(a) No "For Sale" or "For Rent" signs, advertising or other displays shall be maintained or permitted on any part of the Property except at such location and in such form as shall be determined by the Board. The right is reserved by the Grantor or his agent or agents, to place "For Sale" or "For Rent" signs on any unsold or unoccupied Units, and on any

part of the Common Elements, and the right is hereby given to any mortgagee, who may become the owner of any Unit, to place such signs on any Unit owned by such mortgagee.

(b) There shall be no obstruction of the Common Elements nor shall anything be stored in the Common Elements without the prior consent of the Board except as herein expressly provided. The use and the covering of the interior surfaces of windows, whether by draperies, shades or other items visible on the exterior of the Building, shall be subject to the rules and regulations of the Board.

(c) Nothing shall be done or kept in any Unit or in the Common Elements which will increase the rate of insurance on the Building, or contents thereof, without the prior written consent of the Board. No Co-owner shall permit anything to be done or kept in his Unit or in the Common Elements which will result in the cancellation of any insurance maintained by the Regime, or which would be in violation of any law.

(d) Co-owners shall not cause or permit anything to be hung or displayed on the outside of windows or placed on the outside walls of the Building and no sign, awning, canopy, shutter, radio or television antenna (except as installed as of the date of this Master Deed is recorded or except as thereafter installed by Grantor) shall be affixed to or placed upon the exterior walls or roof or any part thereof, without the prior written consent of the Board.

(e) Upon the express written consent of the Board, certain household pets may be kept in Units, subject to rules and regulations adopted by the Board, which rules or regulations may exclude any kind of pet by type or category, provided that permitted household pets are not kept, bred, or maintained for any commercial purpose; and provided further that any authorized pet causing or creating a nuisance or unreasonable disturbance shall be permanently removed from the Property upon three (3) days written notice from the Board.

(f) No noxious or offensive activity shall be carried on in any Unit or in the Common Elements, nor shall anything be done therein, either wilfully or negligently, which may be or become an annoyance or nuisance to the other Co-owners or Occupants.

(g) Nothing shall be done in any Unit or in, on or to the Common Elements which would impair the structural integrity of the Building or which would structurally change the Building except as constructed or altered by or with the permission of the Grantor or the Board.

(h) Each Co-owner and the Council hereby waives and releases any or all claims which he or it may have against any other Co-owner, the Council, members of the Board, the Grantor, and their respective employees and agents, for damage to the Common Elements, the Unit, or to any personal property located in the Units or Common Elements caused by fire or other casualty or any act or omission referred to in sub-paragraph (i) below, to the extent that such damage is covered by fire or other form of hazard insurance.

(i) If the act or omission of a Co-owner, or of a member of his family, a household pet, guest, tenant, occupant or visitor of such Co-owner, shall cause damage to the Common Elements or to a Unit or Units owned by others, or maintenance, repairs or replacements shall be required which would otherwise be at the Common Expense, then such Unit Owner shall pay for such damage and such maintenance, repairs and replacements, as may be determined by the Board, to the extent such payment is not waived or released under the provisions of subparagraph (h) above.

(j) Any release or waiver referred to in subparagraph (h) and (i) hereof shall be valid only if such release or waiver does not affect the right of the insured under the applicable insurance policy to recover thereunder.

(k) No Co-owner shall overload the electric wiring in the Building, or operate any machines, appliances, accessories or equipment in such manner as to cause, in the judgment of the Board, an unreasonable disturbance to others. Nor shall any Co-owner connect any machine, appliance, accessory or equipment to the heating, cooling or plumbing system, without the prior written consent of the Board.

(l) This Article shall not be construed to prevent or prohibit a Co-owner from maintaining his personal professional library, keeping his personal business or professional records or accounts, handling his personal business or professional telephone calls, or conferring from time to time with business or professional associates, clients or customers, in his Unit.

Section 9.2. Future Easements. Provided that the Board of Directors determines it to be in the best interest of all of the Co-owners, the Board of Directors may hereafter grant easements for the benefit of the Regime Property and the Co-owners. Each Co-owner, by the acceptance of the deed or lease to his Unit does hereby grant to the Board of Directors an irrevocable power of attorney to execute, deliver and record for and in the name of each Co-owner, such instruments as may be necessary and proper to the granting of such easements.

Section 9.3. Utility Easements. Each Co-owner shall have a non-exclusive easement appurtenant to his Unit for the use in common with other Co-owners of all pipes, wires, ducts, flues, cables, conduits, public utility lines, and other Common Elements, if any, located in any other Unit or within the Common Elements and serving his Unit. Each Unit shall be subject to an easement in favor of the owners of all other Units to use the pipes, wires, ducts, flues, cables, conduits, public utility lines, and other Common Elements located in such Unit which serve other Units. The Regime Property is subject to utility easements for installation, operation, and maintenance of electric and telephone and television distribution lines, water and sewer lines, and the Board of Directors may grant additional easements and relocate existing easements for installation of any type of utilities.

Section 9.4. Covenant to Comply with Restrictions and Obligations. Each Co-owner by acceptance of a deed or lease to a Unit ratifies and covenants to observe on behalf of himself, his heirs, successors, and assigns this Master Deed, the Regime Bylaws and the decisions, resolutions and regulations of the Council, Board of Directors or their representatives, as lawfully amended from time to time.

The violation of any rule or regulation adopted by the Board or the breach of any covenant or provision herein contained, shall, in addition to any other rights provided for in the Act, this Master Deed and the Bylaws, give the Board the right: (a) to enter upon the Unit, or any portion of the Property upon which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Co-owner, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions hereof, and neither the Board nor the officers, employees or agents thereof shall thereby be deemed guilty in any manner of trespass; or (b) to enjoin, abate or remedy by appropriate legal proceedings, either by law or in equity, the continuance of any breach; or (c) to take possession of such Co-owner's interest in the Property and to maintain an action for possession of such Unit in the manner provided by law.

Provided, however, that, except in cases of emergency where damage to persons or property is threatened, the Board shall not take any such action unless (a) it has first given the Co-owner alleged to have violated any restriction, condition or regulation adopted by the Board or to be in breach of any covenant or provision herein contained, a hearing on such allegations pursuant to rules and regulations adopted by the Board; and (b) the Board shall have determined such allegations to be true and (c) the Co-owner shall not have desisted from such violation or breach or shall not have taken steps as shall be necessary to correct such violation or breach within such reasonable period of time as determined by the Board and communicated to the Co-owner. Any and all costs and expenses incurred by the Board in the exercise of its authority as granted in this Article, including but not limited to court costs, reasonable attorney fees as determined by a court of competent jurisdiction, and cost of labor and materials shall be paid by the Co-owner in violation, and, until paid by such Co-owner shall constitute a lien on the interest of such Co-owner in the Property, which lien may be perfected and

foreclosed in the manner provided herein or by the Act with respect to liens for failure to pay a share of the Common Elements.

Furthermore, if the Co-owner refuses to come to the hearing or if after hearing and finding as aforesaid and failure of the Co-owner to desist from such violation or to take such corrective action as may be required, the Board shall have the power to issue to the defaulting Co-owner a ten (10) day notice in writing to terminate the rights of the said defaulting Co-owner to continue as a Co-owner and to continue to occupy, use or control his Unit and thereupon an action in equity may be filed by the Board against the defaulting Co-owner for a decree declaring the termination of the defaulting Co-owner's right to occupy, use or control the Unit owned by him on account of the violation of a rule or breach of covenant or provision as aforesaid and ordering that all right, title and interest of the Co-owner in the Property shall be sold at a judicial sale upon such notice and terms as the court shall establish, except that the court shall enjoin and restrain the defaulting Co-owner from re-acquiring his interest at such judicial sale or by virtue of the exercise of any right of redemption which may be established, and except that the court shall direct that any existing first mortgage be retired out of the proceeds of such judicial sale.

The proceeds of any such judicial sale shall first be paid to discharge court costs, reasonable attorneys fees and all other expenses of the proceeding and sale, and all such items shall be taxed against the defaulting Co-owners in said decree. Any balance of proceeds after satisfaction of such charges and any unpaid assessments hereunder or any liens shall be paid to the Co-owner. Upon the confirmation of such sale, the purchaser thereat shall thereupon be entitled to a deed or lease to the Unit and to immediate possession of the Unit sold and may apply to the court for a writ of assistance for the purpose of acquiring such possession and it shall be a condition of any such sale, and the decree shall so provide, that the purchaser shall take the interest in the Property sold subject to this Master Deed.

Section 9.5. Encroachments. If any portion of the Common Elements now encroaches upon any Unit or if any Unit now encroaches upon any other Unit or upon any portion of the Common Elements, or if any such encroachment shall occur hereafter as a result of (1) the settling of the building, (2) the repair, alteration or reconstruction of the Common Elements made by or with the consent of the Council, (3) the repair or reconstruction of a Unit following damage by fire or other casualty, or (4) condemnation or eminent domain proceedings, a valid easement shall exist for such encroachment and for the maintenance of the same so long as the Property remains subject to the Act and this Master Deed.

Section 9.6. Right of Access. The Council shall have the right of access to each Unit during reasonable hours and with reasonable notice for maintaining, repairing, or replacing any Common Elements located within or accessible through the Unit, and the right of immediate access for making emergency repairs within the Unit necessary to prevent damage to the Common Elements or to another Unit. This easement and right of access may be exercised by the Board, by its agents and employees, or by a managing agent to whom the responsibility of maintaining has been delegated. Damages resulting to any Unit because of such maintenance and repairs shall be corrected promptly at the expense of the Council.

Section 9.7. Construction and Sales Easement. The Regime Property shall be subject to a non-exclusive easement in favor of Grantor and its employees, agents, independent contractors and invitees for entry upon and passage over the Regime Property for purposes of constructing the Units and of exhibiting and selling the Units.

Section 9.8. Lease, Grant, and Reservation of Rights to Swimming Pool. Grantor has entered into a Lease Agreement ("Lease") leasing to the Shipyard Village Council of Co-owners, Inc. a certain parcel of land contiguous to the boundary of Phase I, together with the pool and all other improvements constructed thereon, as more particularly described on Exhibits A and H incorporated herein by reference and made a part hereof, and

referred to as "Pool Easement Area". The Lease provides for a term of five years commencing on the date of the recording of this Master Deed. At any time during the term of the Lease, the Grantor may convey the Pool Easement Area to Shipyard Village Council of Co-owners, Inc. At the expiration of the Lease, Grantor may either convey the Pool Easement Area to the Shipyard Village Council of Co-owners, Inc. or to the Litchfield-by-the-Sea Community Association, Inc. free and clear of the interest of Shipyard Village Council of Co-owners, Inc. Grantor hereby reserves unto itself, its successors and assigns, certain rights, easements of enjoyment, use and ingress and egress (as herein described) in and to the Pool Easement Area. Such reservation of rights and easements shall continue beyond the date of recording of this Master Deed and the date of recording of any amendment electing a subsequent phase of Shipyard Village Horizontal Property Regime. The Lease and any conveyance of the Pool Easement Area to the Shipyard Village Council of Co-owners, Inc. is expressly subject to the following reservations, restrictions and limitations:

(a) Grantor, its successors and assigns reserve easements for ingress and egress over the property of Phase I, Phase II, Phase III and Phase IV to the Pool Easement Area subject to the restrictions and limitations herein and specifically excluding all buildings, covered parking and Units existing at any time in any phase outside of the boundary of designated Pool Easement Areas. The Shipyard Village Council of Co-owners, Inc. may limit access within the regime property by persons not owners, guests or lessees of Units at Shipyard Village (i) to regulate and prohibit access by private vehicles if access by shuttle or similar transportation on a reasonable schedule is provided by the Litchfield-by-the-Sea Community Association, Inc.; (ii) to limit access for parking of any type of vehicle to designated parking areas, and (iii) to limit access for ingress and egress to designated paved walkways within elected phases of the Shipyard Village Horizontal Property Regime.

(b) Any rules established by the Shipyard Village Council of Co-owners, Inc. governing use of the facility must be applicable to all persons entitled to use the facility from time

to time, including Co-owners or their assigns and guests of Units in Shipyard Village Horizontal Property Regime and members or their assigns and guests of Litchfield-by-the-Sea Community Association, Inc.

(c) No user fee may be charged by the Shipyard Village Council of Co-owners, Inc. to users not owners of Shipyard Village except with the express permission of the Board of Directors of Litchfield-by-the-Sea Community Association, Inc.

(d) During the term of the Lease and until or unless the Pool Easement Area is conveyed to the Litchfield-by-the-Sea Community Association, Inc., the Shipyard Village Council of Co-owners, Inc. shall be responsible for all insurance, maintenance, taxes and expenses of the Pool Easement Area and the cost of all said insurance, maintenance, taxes and expenses shall be Common Expenses.

Section 9.9. Covenant to Comply with Restrictions and Obligations. Each Co-owner by acceptance of a deed or lease to a Unit ratifies and covenants to observe on behalf of himself, his tenants, guests, household members, heirs, successors and assigns, the following:

(a) The Declaration of Covenants, Restrictions and Affirmative Obligations Applicable to All Property at Litchfield-by-the-Sea dated June 15, 1978, and recorded in the Office of the Clerk of Court for Georgetown County in Book 159, Page 306, and all applicable recorded additions and amendments thereto (hereinafter called "General Covenants").

(b) The Declaration of Covenants and Restrictions of Litchfield-by-the-Sea Community Association, Inc., dated June 15, 1978, and recorded in the Office of the Clerk of Court for Georgetown County in Book 159, Page 264, and all applicable recorded additions and amendments thereto.

(c) This Master Deed, the Bylaws of Shipyard Village Council of Co-Owners, decisions, resolutions and Regulations of the Council, Board of Directors or their representatives, as lawfully amended from time to time.

In addition to the observation of the covenants, restrictions and obligations contained in subsections 9.9(a), (b) and (c) above, each Co-owner of a Time Sharing Unit, by acceptance of

a deed or lease to a Time Sharing Unit, also ratifies and covenants to observe on behalf of himself, his tenants, guests, household members, heirs, successors and assigns, any supplemental declarations or plans filed of record together with such easements, restrictions, covenants and encumbrances set forth therein and in any bylaws of any association or management entity established by Grantor in connection with any Vacation Time Sharing Plan.

ARTICLE X

LIENS

Section 10.1. Attachment. No lien arising subsequent to the recording of this Master Deed and any amendment hereto, or while any portion of Regime Property remains subject to the Act, shall be effective against the Regime Property. During such period liens or encumbrances shall arise or be created in the Units and Common Elements appurtenant thereto in the same manner and under the same conditions and in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership; provided, that no labor performed or materials furnished with the consent or at the request of a Co-owner, his agent, contractor, or subcontractor shall be the basis for the filing of a mechanic's or materialman's lien against any property (including the Unit) of any other Co-owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by each and every Co-owner should the need for emergency repairs arise. Labor performed or materials furnished for the Common Elements, if duly authorized by the Council, the Manager, or the Board of Directors in accordance with the Act, this Master Deed, or the Bylaws, shall be deemed to be performed or furnished with the express consent of each Co-owner, and shall be the basis for the filing of a mechanic's or materialman's lien against each of the Units and may be discharged as provided in Section 10.2 of this Article.

Section 10.2. Discharge. In the event a lien against two or more Units becomes effective, the respective Co-owners may remove their Unit from the lien by payment of the

fractional or proportional amounts attributable to each of the Units affected. Such individual payment shall be computed by reference to the Percentage Interest appearing in this Master Deed or, as to Time Sharing Units, such Percentage Interest appearing in the applicable Vacation Time Sharing Plan. Subsequent to any such payment, discharge, or other satisfaction, the Unit and the percentage of undivided interest in the Common Elements appurtenant thereto shall thereafter be free and clear of the lien so paid, satisfied, or discharged. Such partial payment, satisfaction, or discharge shall not prevent the lienor from proceeding to enforce his rights against any Unit (and the percentage of undivided interest in the Common Elements appurtenant thereto) with respect to which such lien is not paid, satisfied, or discharged.

Section 10.3. Taxes. Taxes, assessments, and other charges of this State, of any political subdivision, of any special improvement district, or of any other taxing or assessing authority may be assessed against and collected on each Unit, which shall be carried on the tax books as separate and distinct entities for that purpose, and not on the Buildings or the Regime Property as a whole. No forfeiture or sale of the Buildings or any portion of the Regime Property for delinquent taxes, assessments, or charges shall ever divest or in anywise affect the title to an individual Unit so long as taxes, assessments, and charges on the individual Unit are currently paid.

ARTICLE XI

INSURANCE

Section 11.1. Hazard Insurance. The Board of Directors shall insure the Regime Property against loss or damage due to fire and lightning, with extended all-risk hazard coverage, including flood, windstorm, earthquake and wind-driven water in an amount equal to the full replacement cost of the Regime Property. The Board of Directors shall obtain hazard coverage without any co-insurance requirements or, if co-insurance requirements cannot be waived, an agreed value endorsement must be obtained each year and coverage must be at least in the amount of the agreed value. All hazard insurance

shall cover the entire insurable real estate of the Regime Property, including each Unit as delivered to a Co-owner by the Grantor, regardless of whether or not such portion of the Regime Property is a General Common Element, a Limited Common Element or a Unit, exclusive only of the contents, decoration and furnishings of an individual Unit supplied by a Co-owner and any additions or improvements made by the Co-owner of a Unit. The Board may establish reasonable deductibles for each category of insurance and shall establish reasonable reserves for such deductibles; provided, however, deductibles shall not exceed $1,000,000 except for deductibles for damages due to earthquake or flood, which deductibles shall not exceed $25,000.

All hazard insurance policies obtained by the Board of Directors shall designate the Board of Directors as the named insured as Insurance Trustee for the benefit of all the Co-owners and their mortgagees collectively, as their respective interests may appear. In the event of loss or damage, all insurance proceeds shall be paid to the Board of Directors as Insurance Trustee under the provisions of this Master Deed.

All hazard insurance policies obtained by the Board of Directors shall provide for the issuance of Certificates of Insurance to each Co-owner. Each Certificate shall evidence the issuance of the Master Policy and shall indicate the amount of insurance covering the Building within which the respective Unit is located. If a Unit is mortgaged, a Certificate of Insurance shall be issued to the mortgagee bearing a standard mortgagee endorsement, if requested.

If obtainable, all hazard insurance policies upon the Regime Property shall include provisions waiving: (i) any rights of the insurer to subrogation against the Council, its agents and employees, and against the individual Co-owners and their servants, agents and guests; and (ii) any rights of the insurer to contribution from hazard insurance purchased by the Co-owners upon the contents and furnishings of their Units.

Section 11.2. Public Liability Insurance. The Board of Directors may obtain comprehensive public liability insurance with limits and provisions as it deems desirable and as may be obtainable. All such policies shall contain severability of interest clauses or endorsements extending coverage to liabilities of the Council, to an individual Co-owner and to liabilities of one Co-owner to another Co-owner.

Section 11.3. Workmen's Compensation Insurance. The Board of Directors, as necessary, shall obtain Workmen's Compensation Insurance to meet the requirements of law.

Section 11.4. Premiums. All premiums upon insurance policies purchased by the Board of Directors shall be assessed as Common Expenses and paid as a Common Expense.

Section 11.5. Insurance by Co-owner. Each Co-owner (except Co-owners of Time Sharing Units) shall be responsible for obtaining, at his sole expense, insurance covering the personal property, decorations, and furnishings within his own Unit, and the additions and improvements made by him to the Unit. Each Co-owner (except Co-owners of Time Sharing Units) shall be responsible for obtaining, at his own expense, insurance covering his liability for the safety of the premises within his Unit. The personal property and liability insurance for the safety of the premises within Time Sharing Units will be obtained and maintained by the association or management entity created in connection with the establishment of any Vacation Time Sharing Plans. If obtainable, all such insurance policies shall include, however, provisions waiving: (i) any right of the insurer to subrogation to claims against the Council and against individual Co-owners, as well as their agents, servants, employees, and guests; and (ii) any right of the insurer to contribution or proration because of the master hazard policy.

Section 11.6. Substitution of Insurance Trustee. The Board of Directors in its discretion, may decline to serve as Insurance Trustee and may appoint in its place any financial institution which is qualified and willing to act as Trustee and which also has offices in Georgetown or Horry County, South Carolina. Any substitute Insurance Trustee appointed by the

Board of Directors shall succeed to all of the powers and responsibilities vested in the Board of Directors as Insurance Trustee under the terms of this Master Deed.

ARTICLE XII

RECONSTRUCTION AND REPAIR

Section 12.1. Reconstruction. In the event of casualty loss, condemnation or damage to the Regime Property, the Board of Directors shall be responsible for applying the proceeds of all casualty insurance or condemnation to the repair or reconstruction of the Regime Property in accordance with the provisions of this Article. Reconstruction or repair shall be mandatory for any casualty, loss or damage to the Regime Property occurring before December 31, 2001 or ten years after the sale by Grantor of eighty percent (80%) of the Units authorized by this Master Deed, whichever last occurs ("Mandatory Reconstruction Period") and, thereafter, reconstruction or repair shall be mandatory unless two-thirds (2/3) or more of the Regime Property is destroyed, condemned or substantially damaged. After the Mandatory Reconstruction Period, if two-thirds (2/3) or more of the Regime Property is destroyed, condemned or substantially damaged, the condemnation proceeds or insurance indemnity received by the Board of Directors, unless otherwise unanimously agreed upon by the Co-owners, shall be distributed jointly in proportion to their respective interests in Common Elements. The remaining portion of the Regime Property shall be subject to any action for partition at the suit of any Co-owner or lienor as if owned in common. In the event of suit for partition, the net proceeds of sale, together with the net proceeds of condemnation or insurance policies, shall be considered one fund and distributed prorata among all Co-owners and their mortgagees jointly in proportion to their respective interest in Common Elements. If any casualty, loss or damage occurs to the Regime Property prior to the expiration of the Mandatory Reconstruction Period, and thereafter, if less than two-thirds (2/3) of the Regime Property is destroyed, condemned or substantially damaged, the Regime Property shall be reconstructed or repaired in the following manner:

Any reconstruction or repair must follow substantially the original plans and specifications of the Regime Property unless the Co-owners holding seventy-five (75%) percent or more of the total interest in Common Elements and their mortgagees, if any, vote to adopt different plans and specifications and all Co-owners whose Units are affected by the alterations unanimously consent.

The Board of Directors shall promptly obtain estimates of the cost required to restore the damaged property to its condition before the casualty occurred. Such costs may include professional fees and premiums for bonds as the Board of Directors deems necessary.

If the damage to the Regime Property is not insured or if the amount of the loss is within the deductible provisions of the insurance policy or if the proceeds of insurance or condemnation are insufficient to cover the cost of reconstruction or repair, the deficiency shall be paid as a Common Expense of all Co-owners; provided, however, any such deficiency resulting from damage to the Regime Property as a result of the neglect, willful act or abuse of the Regime Property by any Co-owner or his guests shall be charged to such Co-owner as an individual assessment.

The insurance or condemnation proceeds received by the Board of Directors and any special assessment collected to cover a deficiency in such proceeds shall constitute a construction fund from which the Board of Directors shall disburse payment of the costs of reconstruction and repair. It shall be presumed that the first disbursements from the construction fund are insurance or condemnation proceeds; and if there remains a balance in the fund after payment of all costs or reconstruction and repair, it shall be distributed to any Co-owners who paid special assessments in proportion to their payments. Any balance remaining after such distribution shall be that of the Council and shall be distributed as directed by the Board of Directors.

Section 12.2. Insurance Trust. In the event of casualty loss to the Regime Property, all insurance proceeds indemnifying the loss or damage shall be paid to the Board of Directors as Insurance Trustee. The Board of Directors, acting as Insurance Trustee, shall receive and hold all insurance proceeds in trust for the purpose stated in this Article, and for the benefit of the Council, the Co-owners, and their respective mortgagees in the following shares:

Insurance proceeds paid on account of loss or damage to the Common Elements only shall be held in the same proportion as the undivided interest in the Common Elements which are appurtenant to each of the Units.

Insurance proceeds paid on account of loss or damage to less than all of the Units, when the damage is to be restored, shall be held for the Co-owners of the damaged Units in proportion to the costs of repairing each damaged Unit.

Insurance proceeds paid when the Regime Property is not to be restored shall be held for the benefit of all Co-owners, the share of each being equal to the undivided share in Common Elements appurtenant to his Unit.

In the event a Certificate of Insurance has been issued to a Co-owner bearing a mortgagee endorsement, the share of the Co-owner shall be held in trust for the mortgagee and the Co-owner as their interests may appear; provided, however, that no mortgagee shall have any right to determine or participate in the determination as to whether any damaged property shall be reconstructed or repaired, and no mortgagee shall have any right to apply or have applied to the reduction of a mortgage debt any insurance proceeds except for insurance proceeds paid jointly to the Co-owners and their respective mortgagees pursuant to the provisions of this Master Deed.

Section 12.3. Adjustment. Each Co-owner shall be deemed to have delegated to the Board of Directors his right to adjust with insurance companies all losses under policies purchased by the Council, subject to the rights of mortgages of such Co-owners.

ARTICLE XIII

TERMINATION

Section 13.1. Casualty or Condemnation. If after the expiration of the Mandatory Reconstruction Period, two-thirds (2/3) or more of the Regime Property is substantially destroyed or taken by condemnation, the Regime Property may be removed from the provisions of this Master Deed and the Horizontal Property Act in accordance with Article XII.

Section 13.2. Voluntary Termination. This horizontal property regime may also be terminated, removing the Regime Property from the provisions of this Master Deed and the Act, if the record Co-owners of title to the Units and the record owners of mortgages upon each Unit agree in a written instrument to termination unanimously or in such percentage as may be required for termination by the Act. Termination shall become effective upon recordation of such written instrument, duly executed by the requisite number of Co-owners and mortgagees.

Section 13.3. Ownership After Termination. After termination of this horizontal property regime, the Co-owners shall own the Regime Property as tenants in common in undivided shares and the holders of mortgages and liens upon the Units shall have mortgages and liens upon the respective undivided common interests of the Co-owners. The undivided share of each tenant in common shall be the same as his undivided interests in Common Elements prior to termination. Any asset of the Council, any funds held by the Board of Directors, and any insurance proceeds shall also be the property of the former Co-owners and tenants in common in the same undivided shares as their interest in Common Elements prior to termination. The costs incurred by the Board of Directors in connection with the termination shall be considered a Common Expense.

Section 13.4. Partition. After termination, the Regime Property shall be subject to an action for partition by any Co-owner or any lienor in which event the net proceeds from the judicial sale shall be divided among all Co-owners

in proportion to their respective interests in Common Elements and paid to each Co-owner and mortgagee.

ARTICLE XIV

AMENDMENTS

Section 14.1. Co-owners. This Master Deed and all Exhibits incorporated by reference herein, including the By-Laws, may be amended from time to time by resolution adopted by the affirmative vote of the Co-owners of two-thirds (2/3) of the total interest in the Common Elements subject to the following conditions: No amendment by the Co-owners shall be in violation of the Act and no amendment shall alter the dimensions of a Unit or the Percentage Interest in the Common Elements appurtenant thereto without the consent of the Co-owners of such Unit.

Section 14.2. By Grantor-General. Grantor reserves the right to amend this Master Deed and the By-Laws without the consent of the Co-owners at any time prior to the sale by Grantor of eighty percent (80%) of the Units authorized by this Master Deed to be constructed in all Phases of the Regime Property or December 31, 1987, whichever first occurs, and provided that no amendment by Grantor shall divest a Co-owner of any portion of his Unit or the percentage interest in the Common Elements appurtenant thereto without the consent of such Co-owner (but reapportionment of the ownership of the Common Elements upon the incorporation of additional Phases as provided herein or amendments affecting Common Elements shall not be deemed to divest any Co-owner of a portion of his Unit or to require his consent).

Section 14.3. By Grantor-Future Phases. Subject to the expiration dates and general conditions set forth in Section 1.2 of Article I for the election by Grantor to proceed with any future Phase, Grantor further reserves the right to amend this Master Deed without the consent of the Co-owners to take such action set forth in Article I, including but not limited to:

(a) Elect to select and incorporate any portion of the Land to be submitted to condominium ownership for any future Phase or group of Phases whether or not such portions are contiguous.

(b) Elect to construct on the portion of Land incorporated in any future Phase a maximum of Forty (40) Units.

(c) Elect to revise, modify or change in whole or in part the Buildings and Units to be incorporated in any future Phase or to alter the mix and type of Units to be built subject to the limitations set forth in Section 3.9 of Article III with respect to the valuation of the Units.

(d) Elect to increase or decrease the amount of land which may be submitted to condominium ownership.

(e) Elect to record all additional documents required by this Master Deed or the Act to effect the submission of the Land and improvements of any future Phase to condominium ownership.

(f) Elect to submit or not to submit any or all of the condominiums or Units in any Phase to any type of Vacation Time Sharing Plan.

Section 14.4. Power of Attorney. Each Co-owner shall be deemed by his acceptance of a deed or lease to a Unit to have consented to the powers of amendment herein reserved by Grantor and to any amendments previously or thereafter executed by Grantor pursuant thereto. Each Co-owner shall further be deemed by his acceptance of a deed to a Unit to have appointed Grantor his attorney-in-fact to give, execute and record the consent of said Co-owner to any and all amendments to this Master Deed which Grantor may wish to execute pursuant to the powers herein reserved.

Section 14.5. Recording. No amendments to this Master Deed shall be effective unless and until recorded in accordance with the Act.

ARTICLE XV

GRANTOR

Section 15.1. Rights as Owner. Grantor is the initial owner of each Unit and shall be entitled to exercise all rights appurtenant thereto until such time as Grantor has conveyed title to the Unit to another person. For purposes of the exercise of the rights appurtenant thereto by Grantor, all Units shall be deemed in existence at such time as they are incorporated into the Regime Property, regardless in each case of whether construction has been commenced or completed; however the Grantor shall not be required to pay assessments to the Council of Co-owners with respect to any Unit owned by it until (i) such Unit has been completed suitable for occupancy and (ii) the Grantor has owned such completed Unit for two (2) months.

Section 15.2. Rights and Powers. Until the sale by Grantor of eighty percent (80%) of the Units authorized by this Master Deed to be constructed in all Phases of the Regime Property or December 31, 1987, whichever shall first occur, Grantor shall be entitled to exercise, without the consent of the Co-owners, all rights granted to the Co-owners to elect the members of the Board of Directors by the Act, this Master Deed, or the Bylaws.

Section 15.3. Successors. The term "Grantor" as used in this Master Deed and in the Bylaws shall be deemed to include any person who succeeds to the title of Grantor to the Property by sale or assignment of the interest of Grantor in the Property, or by exercise of a right of foreclosure or power of sale granted in or conveyed by any mortgage, deed of trust or deed to secure debt given by Grantor and duly recorded prior to the recording of this Master Deed. Any such person shall be entitled to exercise all rights and powers conferred upon Grantor by the Act, this Master Deed, or the By-Laws.

ARTICLE XVI

MISCELLANEOUS

Section 16.1. Application. All Co-owners, guests, family members, tenants, or any other person who may in any manner use the Regime Property or any part thereof shall be subject to the Act and to this Master Deed, the By-laws and the Regulations.

Section 16.2. Compliance. Each Co-owner shall comply strictly with the By-laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to the Unit of such Co-owner. Failure to comply with any of the same shall be grounds for an action to recover sums due, or damages or injunctive relief, or both, maintainable by the Manager or the Board of Directors on behalf of the Council, or in a proper case, by an aggrieved Co-owner.

Section 16.3. Waiver. No provisions hereof shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, regardless of the number of violations or breaches which may have occurred.

Section 16.4. Conflicts. This Master Deed is intended to comply with the requirements of the Act, and in the event that any of the provisions hereof conflict with the provisions of the Act, the Act shall control.

Section 16.5. Severability. The provisions of this Master Deed are severable, and the invalidity of one or more provisions hereof shall not be deemed to impair or affect in any manner the validity, enforceability, or effect of the remainder hereof.

Section 16.6. Captions. The captions herein are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope of this Master Deed or the intent of any provision hereof.

Section 16.7. Gender and Number. All pronouns used herein shall be deemed to include the masculine, the feminine and the neuter and the singular and the plural whenever the context requires or permits.

Section 16.8. Acceptance of Deed to a Unit. The acceptance of a deed of conveyance, the entering into a lease, or any other occupancy or use of a Unit shall constitute (i) an acceptance and ratification of the provisions of the Master Deed by such Co-owner, tenant or occupant, and (ii) the acknowledgment by the Co-owner, tenant, or occupant that the Grantor makes no implied or express warranties relating to the Unit or to the Common Elements except for such warranties as are contained in the special warranty deed conveying the same or in the contract of sale between Grantor and the Co-owner.

Section 16.9. Assignment of Warranties. All contractual warranties running in favor of the Grantor in connection with the construction of Buildings and Units and installation of material, equipment, and appliances therein, shall accrue to the benefit of and are hereby assigned to the respective Co-owners or the Council as appropriate.

Section 16.10. Failure to Enforce. No terms, obligations, covenants, conditions, restrictions, rules, regulations or provisions imposed hereby or contained herein shall be abrogated or waived by any failure to enforce the same, no matter how many violations or breaches may occur.

Section 16.11. Rule Against Perpetuities. If any of the terms, covenants or rights created by this Master Deed shall be void or unlawful for violation of the rule against perpetuities or any analogous statutory or common law provision, then such provision shall continue only until twenty-one (21) years after the death of the survivor of now living descendants of the now incumbent President and Vice-President of the United States of America.