STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2009-CP-15-469

The Retreat at Edisto Co-owners Association, Inc. Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, Barry Smith, Joseph Zuyus, and Emily Zuyus,

Plaintiffs,

vs.

The Retreat at Edisto, LLC; W. Mark, Steedley, individually ; Terry Hoff d/b/a Terry Hoff Construction; Handcrafted Homes, LLC; G&S Supply Co., Georgia-Pacific Building Products, LLC, Georgia-Pacific Wood Products, LLC, General PreCast Manufacturing Co., Inc.; Banks Construction Company; Stroble Site Services, LLC, Eugene H. Brislin, P.E.; James J. Barlow, P.E.; Barlow Engineering, P.C., PFS Corporation; James Glenn; Wayne Reeves; and Mike Miller

Defendants.

G & S Supply Co., Inc.

Third-Party Plaintiff,

vs.

James Pritchard d/b/a Low Country Exteriors and Edson A. Barros d/b/a Sunshine Vinyl Siding,

Third-Party Defendants,

ORDER

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PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2013 JUN -6 PM 4:43

This matter comes before the Court on the Plaintiff Retreat at Edisto Co-Owners' Association, Inc.'s (hereinafter "HOA") cause of action for declaratory judgment pursuant to

S.C. Code Ann. 15-53-10 et seq., as amended. The HOA seeks the following declarations from this Court:

(A) That Defendant W. Mark Steedley and Defendant Retreat at Edisto, LLC, their successors and/or assigns, have no legal property interest in the common elements of the Regime, specifically including, but not limited to, that 3.724 acre parcel of property described as Exhibit A to the Master Deed of the Retreat at Edisto Horizontal Property Regime, recorded at the Colleton County Register of Deeds at Book 924, Page 138.

(B) That Defendant W. Mark Steedley, Defendant Retreat at Edisto, LLC, their successors and/or assigns, do not have any legal right to develop any portion of the 3.724 acre parcel of property described as Exhibit A to the Master Deed of the Retreat at Edisto Horizontal Property Regime, recorded at the Colleton County Register of Deeds at Book 924, Page 138, or to expand the Retreat at Edisto Horizontal Property Regime, or to control or cause to be commenced any construction of structures on the Property.

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The relevant pleading is HOA's Fifth Amended Complaint. Defendant W. Mark Steedley[1] and Defendant Retreat at Edisto, LLC (hereinafter "Defendants") served an Answer to the Fifth Amended Complaint and asserted a counterclaim asking this Court to declare that Defendants maintain "rights to develop Phase II of the Retreat at Edisto as set forth in the Master Deed and Amendment thereto." *See* Amended Answer and Counter Claims of The Retreat at Edisto, LLC and W. Mark Steedley to the Plaintiffs' Fifth Amended Complaint, ¶ 74. HOA replied to the counter claim and asserted various affirmative defenses, including the statute of frauds.

This matter was originally before the Honorable Carmen T. Mullen on cross motions for summary judgment. Judge Mullen found for the HOA. Defendants appealed the order and the Court of Appeals reversed the order finding summary judgment to be inappropriate because

[1] Defendant W. Mark Steedley only asserts an interest in this matter by virtue of his membership in The Retreat at Edisto, LLC.

Defendants presented the "requisite scintilla of evidence on the question of its intent." *See* Unpublished Opinion No 2012-UP-558. The Court held that the interpretation and construction of the master deed and amendment was a question for the finder of fact. A non-jury hearing was therefore held on April 29, 2013 before the Honorable Perry M. Buckner. Appearing for HOA were W. H. Bundy, Jr., Esquire and M. Brent McDonald, Esquire and appearing for Defendants was David Haller, Esquire.

The Court has carefully considered the evidence presented at the hearing and based upon the evidence and the credibility of the witnesses, the Court finds as follows:

STANDARD OF REVIEW

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"A declaratory judgment action is neither legal nor equitable," and the determination is made according to the underlying issues. Auto Owners Insurance Company v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541; 543 (2009).

The construction of a clear and unambiguous deed is a question of law for the court. Hammond v. Lindsay, 277 S.C. 182, 184, 284 S.E.2d 581; 582 (1981); Hunt v. Forestry Comm'n, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct.App.2004); *see also* Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct.App.1986) ("The construction of an unambiguous deed is a question of law, not fact."). When a deed is reasonably susceptible to more than one interpretation it is ambiguous, and the question of its construction is for the finder of fact. *See* S.C. Dept. of Nat. Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001).

"In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009) (internal quotation marks omitted). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Id. "The intention of the grantor must be found within the four corners of the deed." Id.

FINDINGS OF FACT

(1) This is a case concerning a condominium regime located on a 3.724 acre parcel of property on Edisto Island, South Carolina and commonly known as The Retreat at Edisto Horizontal Property Regime (the "Regime").

(2) The Defendants argue that they have a right to develop a Phase II on the 3.724 acre parcel of property and continue to have such right into the future. The HOA argues that even if the Defendants had a right to develop Phase II in the past, the Defendants never exercised any right to develop Phase II and any legal ability to exercise such right has now expired.

(3) On or about December 13, 2000, Defendants executed the Master Deed of the Retreat at Edisto Horizontal Property Regime (the "Master Deed"). The Master Deed was recorded on January 11, 2001 at the Colleton County Register of Deeds at Book 924, Page 138. The Master Deed originally contained language creating seven (7) separate apartment buildings, each containing four (4) units, to be located on a 3.724 acre parcel of property. At the time of the filing of the Master Deed, the entire 3.724 acre parcel of property as well as the other property described in Exhibit A of the Master Deed became "common elements" in which each of the twenty eight (28) "apartments" retained an undivided ownership right.[2] There is no language in the Master Deed stating that the 3.724 acre parcel is divisible or is comprised of more than one legal lot.

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(4) Sometime after the filing of the Master Deed, Defendants encountered problems with zoning and permitting of all seven (7) buildings by the Town of Edisto Beach, the United States Army Corps of Engineers, and the South Carolina Department of Health and Environmental Control's Office of Coastal Resource Management.

(5) The Defendants were not able to develop the twenty-eight 28 units and seven (7)

[2] The words "common elements" and "apartments" are terms of art and are defined in the Master Deed as well as the South Carolina Horizontal Property Act, codified at S.C. Code Ann. §§ 27-31-10 *et seq.*

buildings proposed in the Master Deed. There was no evidence presented at the hearing that the Defendants were granted approval of the permits necessary to implement Phase II.

(6) In response to permitting and zoning problems, on or about July 27, 2001, prior to any sales of the units occurring, Defendants filed the First Amendment to the Master Deed for the Retreat at Edisto Horizontal Property Regime (the "Amendment"). The Amendment is filed at the Colleton County Register of Deeds at Book 945, Page 140. The Amendment reduced the number of units from twenty eight (28) units to twelve (12) units.

(7) Notwithstanding the reduction in the number of units, the Amendment reaffirmed its submission of the entire 3.724 acre parcel of property to the Regime that now consisted of three (3) buildings, each with four (4) units and each of the units having an undivided interest in the common elements for the entire 3.724 acre property.

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(8) Howard Yates, Esq. testified for the HOA. He was qualified as an expert in real estate law. Yates opined to a reasonable degree of certainty that the entire 3.724 acres was submitted to the Regime by the Master Deed and the Amendment and the Defendants did not have any vested property rights in the 3.724 acre property at any time from July 27, 2001 up to the time of the hearing in this matter. W. Mark Steedley testified that the Defendants did not have any fee interest in the 3.724 acres after the property was submitted to the Regime.

(9) The Amendment went on to state that the Defendants could develop a second phase, Phase II, if certain actions and measures were taken, these measures and actions were both included in the Amendment and required by law. Yates testified that these actions and measures were required to be taken by the Defendants in order to vest any right to develop Phase II because according to the express language of the Amendment, Defendants were under no obligation to develop any portion of Phase II. *See* Amendment, ¶ 7. Yates testified to a reasonable degree of certainty that because the Amendment did not vest any property rights in Defendants, it was necessary pursuant to the language of the Amendment to have a subsequent

filing that was required to vest a property right in the Defendants. Yates testified that title to property must be vested somewhere. At the time of the filing of the Amendment, the title to the property was with the 12 units.

(10) A subsequent filing never occurred. All property rights, therefore, continue to be vested in the 12 unit owners.

(11) In pertinent part, the Amendment stated as follows:

"The Grantor hereby adds the following new Article XXXV to read as follows:

EXPANSION OF REGIME

The Town of Edisto Beach (hereinafter the "Town") originally approved a twenty-eight unit condominium project for the real property hereby submitted to the Regime. Due to unforeseen circumstances, the Town has granted final approval for twelve (12) units and the Grantor has agreed to the development of the project in stages or phases as defined herein. **The Town has not granted final approval for Phase II and Grantor is under no obligation to develop Phase II of the Regime.**

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Development Stages. The Grantor proposes to develop the real estate shown on the site plan marked Exhibit "C" to the Master Deed as a single regime by constructing seven (7) buildings as depicted on Exhibit "B" and "C" to the Master Deed. **Phase I is compromised of Buildings 6, 7 and 5 and Phase II may include a maximum of four (4) additional buildings containing (4) apartments each, pending approval by the Town and the election of Grantor to proceed with the development with all or a portion of Phase II.**

Maximum Number of Apartments. The maximum number of apartments in Phase II shall be sixteen (16) Apartments. The plot plans and floor plans shall be as depicted in Exhibits "B" and "D" to the Master Deed. **All improvements in Phase II shall be completed prior to submission to the Regime** and shall be used for residential purposes.

Timetable. The Grantor, its successors and assigns, or any person or entity owning the right to develop and construct proposed Phase II, Buildings 1, 2, 3 and 4 as shown on Exhibit "B" to the Master Deed may, at their sole discretion, stage the development and construction of the improvements into two stages, with no guarantee to the purchasers of Apartments in Phase I that subsequent stages or phases will be developed. It is the Grantor's intention to develop the proposed Phase II, Buildings 1, 2, 3, and 4 as Phase II of the regime. **The Grantor, it's successors and assigns on persons/entities owning the adjoining property hereby reserve the right and privilege to determine on or before July 31, 2005, whether or not to proceed with the additional stage of development** and the parties hereto agree that if the Grantor so decides, the Apartments shall be in a

regime which consist of two stages or phases. The determination of the Grantor, its successors and assigns or person/entities owning the adjoining property as to the stages of the project may be on, before or after the sale of Apartments in Phase I.

Percentage Interest Chart. The percentage interests in the General and Limited Common Elements of each Apartment owner before and after addition of Phase II of proposed development shall be according to the chart attached hereto as Exhibit "E" to the Master Deed.

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Master Deed Amendment for Phase II. **To add Phase II pursuant to the option reserved under this article, the Grantor shall prepare, execute, and record an amendment to this Master Deed that shall contain a plot plan showing the location of the Buildings and any other improvements, and a set of floor plans of the Buildings which shall show graphically the dimensions, area, and location of each Apartment therein and the location of General and Limited Common Elements affording access to each Apartment. The plans shall show graphically insofar as possible and describe in detail the Common Elements in the Buildings, both Limited and General. The plans shall be certified by an engineer or architect authorized and licensed to practice in this state. Instead of recording new plot plans and floor plans as required, the Grantor may record new certifications by a licensed engineer or architect of plot plans and floor plans previously recorded if those plans show all of improvements required by this section.**

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Easements for Phase II Development. The Grantor hereby reserves unto itself, its successors and assigns, a commercial easement, which shall be transferable to Grantor's successors and assigns, for ingress, egress, access and for the installation of utilities and other improvements over and under common elements to facilitate in all respects the construction of the Phase II buildings. The parties hereto acknowledge that the interest and rights reserved by Grantor herein include the right to exclude any Co-owners, their invitees and licensees, from using the common elements around the proposed building pads (see Exhibit "B" to the Master Deed) during the course of the construction of Phase II Buildings. **This commercial easement shall automatically terminate on July 31, 2005."**

(Emphasis Added).

(12) Defendants' authorized representative drafted the Master Deed and the Amendment. Defendants unilaterally selected the terms of the Amendment including the deadline of July 31, 2005 to "add Phase II pursuant to the option reserved."

(13) There have not been any additional amendments to the Master Deed, either prior to July 31, 2005 or up to the time of the hearing on this matter.

(14) When the language of the Master Deed and Amendment is read as a whole, Defendants were under no obligation to develop Phase II at the time of the filing of the Amendment. Defendants were required to take certain steps to create and develop Phase II. The Amendment does say that it was Defendants' "intention to develop the proposed Phase II: Buildings 1, 2, 3, and 4 as Phase II of the regime" at the time of the filing of the Amendment. however, when the instrument is read as a whole, it was the Defendants' intention not to be required to develop Phase II. *See* Article XXXV of Amendment ("Grantor is under no obligation to develop Phase II of the Regime."). Therefore, in order to actually have the right and the obligation to develop Phase II, Defendants were required to comply with the terms of the Amendment as a whole. To the extent these provisions create an ambiguity, I find that the intention of Defendants was to have the option to develop Phase II without the requirement to do so. As such, it was the intention of Defendants, as evidenced in the language of the Amendment, to include additional requirements to add Phase II if it so desired. It was also the intention of the Defendants to be clear about what obligations it had to develop a Phase II. At the time of the filing of the Amendment it had none. The Defendants included the additional requirements to add Phase II in order to be clear whether or not it assumed an obligation and what the exact terms of the obligation it assumed were going to be. This construction is consistent with the language of the Amendment and the evidence presented at the hearing.

(15) There was no evidence that prior to or after July 31, 2005 Defendants drafted, created, or filed a second amendment to the Master Deed creating Phase II. Yates testified that he searched the title and there was no subsequent filing to the Amendment. There is no evidence that any construction ever took place for Phase II. There was no evidence presented to the Court of any final approval given by the Town prior to July 31, 2005, to implement Phase II. It is

undisputed that no building permits were issued for any construction in Phase II prior to July 31, 2005. It is undisputed that prior to July 31, 2005, Defendants did not obtain the requisite state or federal permits. It is undisputed that prior to July 31, 2005, Defendants did not file the certification of an engineer or an architect for the plans for Phase II or any variation of the plans. It is undisputed that Defendants did not convey any express intention, oral or written, to HOA, or anyone else, of their intent to develop Phase II prior to July 31, 2005. 30(b)(6) Deposition of Retreat at Edisto, LLC, pp. 113-114 (offered into evidence at hearing).

(16) It is undisputed that the "Commercial Easement" held by Defendants automatically expired on July 31, 2005 by its express terms. Any construction at the Regime would require a commercial easement over the common elements as they have already been conveyed to unit owner. This is further evidence of the intention of Defendants that any right to develop Phase II expired on July 31, 2005.

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(17) Steedley testified that Defendants, prior to July 31, 2005, engaged in some initial efforts to evaluate if and how Phase II could be developed, including hiring an engineer to evaluate permitting. Steedley argues that this evidences Defendants' intention to develop Phase II. Steedley was forthright and honest with the Court, and his testimony leads this Court to believe that Steedley did desire to implement Phase II at some indeterminate time in the future. However, I find that the testimony of Steedley does not change the written language of the Master Deed and Amendment and their attendant requirements. While this finding arguably works a hardship on Steedley, it does not change the fact that the Master Deed and Amendment must be complied with before Phase II can be implemented. If it were to grant Steedley relief, this Court would be in the untenable position of rewriting the Master Deed and Amendment to conform to Steedley's stated intention in his testimony. That is not the task of the Court.

(18) It is undisputed that the Phase II cannot be developed other than with four more buildings with four units each. There was no evidence presented at the hearing as to what

Defendants' intention was as it relates to how it proposes to develop Phase II. The language of the Master Deed and Amendment clearly require an election to proceed with a defined Phase II including recorded plans and engineering drawings as well as a percentage interest chart.

(19) There was no evidence presented at the hearing as to any time frame in which Defendants intended to develop Phase II if the July 31, 2005, time frame is read out of the document. Therefore, the intention of Defendants and the language of the Master Deed and Amendment was to have the July 31, 2005, date be a deadline so that all who purchased and all who searched the title would be able to tell what property was part of the Regime and what undivided interest each unit had in the common elements.

(20) It was the intention of Defendants in the Master Deed and the Amendment to have a right but not an obligation to develop Phase II. It was the intention of the Defendants to have the deadline of July 31, 2005, to exercise the right to develop Phase II. It was the intention of the Defendants to include certain provisions in the Amendment that were required to exercise its right to develop Phase II. The Defendants have not complied with the required provisions to exercise its right to develop Phase II prior to or after July 31, 2005. The Master Deed and Amendment is construed accordingly, and the Defendants have no present rights in the 3.724 acres.

FINDINGS OF LAW

(21) HOA presented the 30(b)(6) testimony of the Defendant Retreat at Edisto, LLC wherein it testified that the Amendment and the terms of Amendment alone provide it with the alleged present right to develop Phase II of the common elements of the Regime. 30(B)(6) Deposition of Retreat at Edisto, LLC, p. 105, line 25 – p. 107, line 7.

(22) The Amendment states that "[t]he Town has not granted final approval for Phase II and Grantor is under no obligation to develop Phase II of the Regime." Therefore, at the time of the filing of the Amendment the Town had not granted final approval for Phase II. According

to the plain language of the Amendment, in order for the Defendants to have any right or obligation to develop Phase II on the property encumbered by the Regime, the Defendants must have secured final approval by the Town for a specific Phase II development. *See* Amendment, ¶ 7. There is currently no evidence that the Town granted final approval for any type of Phase II development prior to July 31, 2005 or after.

(23) Paragraph 7 of the Amendment goes on to require, in pertinent part, as follows:

> **"To add Phase II pursuant to the option reserved under this article, the Grantor [Defendant/Developer] shall..."**

The Amendment lists a number or actual requirements by which Defendants might "add" Phase II. This is coupled with the plain language that Defendants were under no obligation to develop Phase II. As such, the Amendment itself did not create any present property rights in the Defendants. It only provided notice that there may be a Phase II in the future if the Defendants took certain measures, legal and otherwise. Yates testified that this language created the option to develop Phase II and that there were conditions precedent necessary to exercise the option, most important the recordation of an instrument showing that Phase II was to be developed.

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(24) "[S]trict compliance with time limits contained in a contract will not ordinarily be enforced, except with regard to option contracts." Alexander's Land Co., LLC v. M&M&K Corp., 390 S.C. 582, 703 S.E.2d 207 (2010) (citing Faulkner v. Millar, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995) ((citing Dargan v. Page, 222 S.C. 520, 73 S.E.2d 705 (1952))). "When an option is subject to a condition precedent, in addition to manifesting acceptance within the stated time, the optionee must satisfy the conditions, and the contract will not be specifically enforced until any such conditions are met. Alexander's Land Co., LLC, 703 S.E.2d at 214 (2010) (citing 25 Richard A. Lord, Williston on Contracts § 67:84 (4th ed. 2002)). "It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and

against the optionee. Id. "Furthermore, if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required." Id.

(25) In the Amendment, Defendants gave themselves the deadline of July 31, 2005, to complete the conditions precedent required in order to develop Phase II. The terms of a deed must be construed against its drafter. *See* Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 458 S.E.2d 561 (Ct.App. 1995). It is undisputed that the foregoing requirements were not complied with prior to July 31, 2005.

(26) Notwithstanding the failure to comply with the foregoing, Defendants contend that they in fact made a "determination" to develop Phase II prior to July 31, 2005. However, the Defendants concede that is was not made in writing. It is undisputed that nothing was recorded. It is undisputed that no one was notified of the determination. See 30(B)(6) Deposition of Retreat at Edisto, LLC, pp. 112-113 offered at hearing.

(27) The Court disagrees that a mere determination by Defendants was all that was required for the Defendant to exercise any developments rights it may have had pursuant to the Amendment. However, the manner in which the Defendant contends such election was made—without a writing and without any notification to anyone—is itself legally insufficient. In South Carolina, the statute of frauds requires that an interest in property must be manifested by a writing. S.C. Code Ann. § 32-3-10, as amended. Here, it is undisputed that no such writing exists because the language of the Amendment does not vest or convey any property interests in the Defendants.

(28) Moreover, in the Amendment Defendants reserved themselves a commercial construction easement necessary to actually develop Phase II; however, the easement "automatically" terminated on July 31, 2005. "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). Even if this Court

were to disregard the foregoing conditions precedent and the failure to properly create Phase II, Defendants no longer hold the required construction easement necessary to actually develop Phase II. This deadline is read by the Court to further support its holding that July 31, 2005 was the final date to develop Phase II.

(29) Additionally, the law demands that covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Hyer v. McRee, 306 S.C. 210, 410 S.E.2d 604 (Ct.App.1991). Where there is doubt, the doubt must be resolved in favor of the property's free use. Id.

(30) If this Court were to adopt the position of Defendants, then no potential purchaser of the existing units would have any notice of the intentions of Defendants with regard to Phase II, and there would be no deadline in which such intentions would be known. The existing unit owners would be incapable of freely disposing of their interest in their unit as well as the accompanying interest in the common elements as that would be unknown indefinitely.

(31) Therefore, the fee use and alienation of the property is significantly encumbered. Any doubt in the construction of the deed is therefore resolved in favor of the HOA.

(32) Pursuant to the language of the Master Deed and Amendment and the evidence offered at the hearing, the Defendants do not have the right to develop a Phase II on the 3.724 acres constituting the Regime.

CONCLUSION

For all the foregoing reasons, I find in favor of the HOA and declare as follows:

(A) That Defendant W. Mark Steedley and Defendant Retreat at Edisto, LLC, their successors and/or assigns, have no legal property interest in the common elements of the Regime, specifically including, but not limited to, that 3.724 acre parcel of property described as

Exhibit A to the Master Deed of the Retreat at Edisto Horizontal Property Regime, recorded at the Colleton County Register of Deeds at Book 924, Page 138.

(B) That Defendant W. Mark Steedley, Defendant Retreat at Edisto, LLC, their successors and/or assigns, do not have any legal right to develop any portion of the 3.724 acre parcel of property described as Exhibit A to the Master Deed of the Retreat at Edisto Horizontal Property Regime, recorded at the Colleton County Register of Deeds at Book 924, Page 138, or to expand the Retreat at Edisto Horizontal Property Regime, or to control or cause to be commenced any construction of structures on the Property.

(C) It is further ordered that the Register of the Office of Deeds for Colleton County shall accept and record this Order in the Direct and Cross Indexes to Deeds and Miscellaneous Instruments. The Register of the Office of Deeds shall file this Order in the name of Defendant Retreat at Edisto, LLC and in both the Direct and Cross Indexes to Deeds and Miscellaneous Instruments.

IT IS SO ORDERED!

The Honorable Perry M. Buckner

Walterboro, South Carolina
June 6, 2013