

2012-212211

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Thomas Kemmerlin, Jr , Special Referee

Case No 2004-CP-07-2036
Court of Appeals Unpublished Opinion No 2012-UP-217

Forest Beach Owner's Association, Inc ,
and Trevor Howard,

Respondents,

vs

Carolyn S Austin formerly known as
Carolyn S Bair

Petitioner

APPENDIX - VOL 1 OF 3

RECEIVED

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S.C. Supreme Court

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Beaufort, South Carolina
June 11, 2012

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BLAUFORT COUNTY
Court of Common Pleas

Thomas Kemmerlin, Jr
Special Referee

Case No 2004-CP-07-2036

Forest Beach Owner's Association,, Inc ,
and Trevor Howard,

Respondents,

v

Carolyn S Austin, formerly known as
Carolyn S Bair,

Appellant

RECORD ON APPEAL
Volume I

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C A NO 04-CP-07-2036
	)	
	)	
FOREST BEACH OWNER'S	)	
ASSOCIATION, INC and	)	
TREVOR HOWARD,	)	ORDER
	)	
Plaintiffs,	)	
	)	
vs	)	
	)	
CAROLYN S BAIR,	)	
	)	
Defendant	)	
_____	)	

Pursuant to an Order of Reference, which Order referred this case to me with finality, any appeal to be directly to the appropriate appellant court, I held a reference and took the testimony and other evidence offered and I now make the following findings of fact and conclusions of law

FINDINGS OF FACT

1 The Atlantic ocean laps upon the beach at Hilton Head Island This beach runs in a generally north and south direction The Hilton Head Company owned a strip of land which on its eastern-side was bounded by the mean high water mark

2 In the 1950s the Hilton Head Company developed five residential subdivisions in the North Forest Beach area of the Island These were known as Hilton Head Beach Subdivisions Each of the subdivisions was separately platted and in each

case the subdivision plats showed residential lots and streets

3 As a part of that development, a plat of Hilton Head Beach Subdivision No 1 was prepared and recorded. This plat shows lot 5 (the Defendant's lot) as being a beach front lot which adjoins A (now Avocet) street on the lot's southern side. Avocet street is the last street in the subdivision. The first lot in the adjoining subdivision has built upon it a motel. The lots in Hilton Head Beach Subdivision No 1 were sold in reference to the plat.

4 The plat shows Dune Lane running parallel to the beach. There is one row of lots which look out over the ocean in front and which back upon the eastern-side of Dune Lane. On the western side of dune Lane there is a second row of lots and this pattern continues as one moves away from the beach. A number of streets named A street (now Avocet), B street, and "C" street, etc., are shown as running from west to east from Baynard Drive (now called N Forest Beach Drive) to the beach.

5 The plat of Hilton Head Beach Subdivision No 1 was recorded in Beaufort County Plat Book 9, page 4. It shows that the east-west streets, including Avocet, do not end when they hit Dune Lane but continue across Dune Lane to the end of the front row lot lines. (See a copy of the plat attached

hereto) Between the lot lines and the high water mark the Hilton Head Company which held title established for all lot holders what is called by various names I have chosen as the name of this property 'The Strand Property

6 The original property owner's association was Forest Beach Association For reasons unimportant to this decision, what was the Forest Beach Association is now Forest Beach Owner's Association, Inc , one of the Plaintiffs here The other Plaintiff is a lot holder of a lot which does not front on the beach

7 Therefore, every lot holder has an easement to use all platted roads to reach the beach and to use the beach strand property The Hilton Head Company by covenant in 1956 established certain of the areas between groups of lots as 'Park Areas to provide beach access to interior landowners Of course, the lot ends were already shown on the plat as beach access It rose by any name would smell as sweet, it does not matter whether the road ends are designated as 'Park areas' or as streets running to the ocean The purpose is clearly to give beach access to lot owners who have houses on back rows

8 The Hilton Head Company designated the platted streets and beach strand property to be held in trust forever as a common' for the benefit of all lot holders in the

subdivision. In fact this was no trust because there were no duties given to the settler-trustee, so that under the statute of uses the property said to be held in trust would have passed to the beneficiaries, the lot holders. But there were no lot holders (other than the Hilton Head Company which already owned them) to take title, so what if any thing did the trust language accomplish? It created a covenant under which all platted ways and the beach strand property remain open for the benefit of the lot holders yet to be. Legal title to the streets and the beach strand property remained in the Hilton Head Company.

9 The lots on the front row and the beach access streets like Avocet are platted with an eastern boundary which runs generally north and south. Between the line of lots and streets and the mean high water mark is the area called the beach strand property. The declaration at DB 74, p. 206 states

said area to be declared a common for the use and benefit of all present and all future owners of property located in Hilton Head Beach Subdivision No. 1 and extension thereof.

Again by the same logic which left legal title to the streets in the Hilton Head Company the legal title to the beach strand property also lay in the Hilton Head Company.

10 The Defendant owns lot 5 in Hilton Head Beach subdivision No 1 and shares a common boundary with Avocet Street. The other side of Avocet abuts on a piece of property on which a motel is located. This motel is not in the subdivision with which we are concerned.

11 The Defendant Bair obtained her lot 5 on April 25, 1984. Since she acquired this lot, Mrs. Bair (now Mrs. Robert E. Austin, the wife of one of her attorneys in this case) has treated the end of Avocet Street as though she owned it, making various improvements within the end of Avocet Street.

12 Over the years the Defendant began to take over the end of Avocet Street which shared a boundary with her lot 5. This culminated when she put up large brick columns on either side of Avocet and hung a wrought iron gate which when closed completely denies the other lot holders, including Mr. Trevor Nowald, a Plaintiff here, from using Avocet as a means of beach access. In addition Mrs. Bair claims as her own a block of the beach strand property immediately in front of her lot. I will refer to as the "Bair Trust Property."

13 In 1986 The Hilton Head Company declared bankruptcy. At that point all lots in Hilton Head Subdivision No 1 had already been sold. Property Research Holding, Inc. bought from the trustee in bankruptcy under a quit claim deed all

residual rights in a number of subdivisions including Hilton Head Subdivision No

14 Property Research Holdings, Inc could only acquire what the Hilton Head Company owned at the time of the bankruptcy sale. Property Research Holding, Inc claims rights in the streets of the subdivision and to the Beach Trust Property

15 When the trusts failed an implied covenant that the streets, street ends, and beach trust property (all property covered by the 'trusts' would be held for the benefit of all lot holders. When Property Research Holdings, Inc bought the residual rights of the Hilton Head Company, it could have acquired no more than the Hilton Head Company owned

16 On May 23, 2001 the Plaintiff Forest Beach Owner's Association received from Property Research Holdings, Inc title to all the street extensions including the Avocet Street extension and the beach strand property

17 I am asked by this Declaratory Judgment Action to determine title to the street ends and beach strand property. Whatever residual rights the Hilton Head Company held at the time of the bankruptcy sale, which would have included legal title to the beach trust property and title to the streets and street ends, passed to Property Research Holdings, Inc subject, to the covenant under which this property was

declared to be held for the benefit of all lot holders in the subdivision

18 Thus the deed from Property Research Holdings, Inc to the Plaintiff Association conveyed the fee to the beach strand property including the Bair Trust property, and the streets including those which afford beach access

19 Not all lot holders in the subdivision are members of the Plaintiff Association, so while legal title under the deed from Property Research Holdings, Inc passed title to the Association, the Association under the covenant must make no distinction between lots held by members and lots held by non-members

20 The Plaintiffs by their complaint assert three causes of action

First, it seeks a declaratory judgment to have the Court determine who has title to the street extension and beach strand property and to require Mrs Bair to remove her iron gates, block wall and other "improvements" to the beach access

Second, the Court is asked to determine who owns the street extensions and beach strand property if the Forest Beach Owner's Association does not own them

Third, the Plaintiffs seek an order requiring the Defendant Bair to remove various improvements (gates, block

walls, two storage sheds, etc) because she built these without permission of the Forest Beach Owner's Association or the Architectural Review Board, and because she has violated setback requirements

21 The Defendant answered, raising a number of affirmative defenses and counterclaiming, asserting that she owns the disputed properties free and clear of all liens, covenants and restrictions, and the Plaintiff's claims are barred by the statute of limitations

22 Mrs Bair as an affirmative defense asserts that the claims of the Plaintiffs were litigated by a quiet title action which she earlier brought Mrs Bair had under a quit claim deed from Property Research Holdings, Inc acquired title to her property and lot 5 and the adjoining Avocet Street beach access property and the Bair Trust I find that the quiet title action is in no way binding on the Plaintiffs. Mrs Bair never acquired jurisdiction over the Plaintiffs. Well knowing of the Plaintiffs' claims, she chose not to have them properly served. Section 15-67-40 Code of Laws of South Carolina, 1976 provides that there should be joined "also all other persons known, claiming any right, title, estate, interest in or lien upon the real estate described in the complaint herein." The Plaintiffs as parties

were known. It is appears that Mrs. Bair intentionally failed to have the Plaintiffs properly served.

23 In fact Mrs. Bair obtained nothing under her quiet claim deed because the description does not fit, the lines around the lot never close.

24 Other deficiencies exist in Mrs. Bair's quiet title action, but it would serve no useful purpose to list them, since it has already been shown that the Plaintiffs were not affected by the quiet title action.

25 Mrs. Bair asserts that the Plaintiffs have no status to bring this suit. A reading of the pleadings reveals that the Plaintiffs do have status to sue.

26 The Defendant's claims of res judicata and collateral estoppel fail because the theories of both relate back to Mrs. Bair's quiet title action in which I have already ruled the Plaintiffs were not bound.

27 Mrs. Bair asserts the defense that she has acquired rights in the Avocet Street ending and the Bair Trust property by adverse possession. No. She was in effect a tenant in common of other lot holders who had the right to access the beach. Her claim that she held it adversely to her tenants in common cannot be sustained. This presumption, absent an ouster, is that she held it for all lot holders and she had

the right to use the easement along with other lot holders, so her possession was not adverse and not exclusive

28 As one goes eastward on Avocet and approaches Dune Lane, he is met by large block columns, one on each side of the Avocet beach access and a wrought iron gate which stretches from column to column blocking access to the beach over Avocet as platted on the original plat One familiar with the facts of this lawsuit would probably assume that Avocet Street is the driveway of the adjoining land owner, Mrs Bair Even when the gate is open or partly open it still gives that impression That impression is strengthened by a grove of trees at the beach end of Avocet which cuts off all views of the beach

29 Any conclusion of law which in fact is a finding of fact is here adopted

CONCLUSIONS OF LAW

1 Any finding of fact which in fact is a conclusion of law is here adopted

2 legal title to all streets including those which serve as beach access and to the beach strand property rests in the Plaintiff Association, but it is held for the benefit of lot holders, not just those within the Association

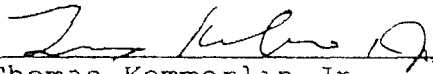
3 The Defendoant has encroached on the beach access portion of Avocet Street and must remove some of the encroachments, so

that a lot holder would view this as a beach access available to him rather than as a part of Mrs Bair's yard. This can be accomplished by the Defendant removing the columns at the edges of Avocet and the wrought iron gate between these columns, and by removing at least twenty horizontal feet of the trees from the eastern end of Avocet so that one can view the beach and ocean. Mrs Bair has infringed on beach strand property by a small amount with her swimming pool but I do not require her to remove that part of her pool because the other lot holders stood by and watched what she created without complaint and the intrusion is small.

4 I still have to deal with the encroachments in the Avocet beach access. There is a problem created in that as long as Mrs Bair keeps up the improvements all looks well, but at anytime she can abandon them and there is no provision for anyone to keep them up. All planters should be removed by Mrs Bair. The area bet een the Avocet line and the Hotel and a lower block wall built by Mrs Blair in which trees are growing I do not regard as a planter and it can be left. Also her storage sheds which violate the setback may remain because they were build in open view of any lot holders who rode by, so the Plaintiffs are estopped from now complaining.

JUDGMENT

The roads are titled as set forth above and the Defendant is required within the next 90 days to clear Avocet Street in accord with my conclusions And it is so Ordered



Thomas Kemmerlin Jr
Special Referee

Beaufort, S C
March 17, 2009



STATE OF SOUTH CAROLINA DEPT. COURT OF COMMON PLEAS
COUNTY OF BEAUFORT DISTRICT JUDICIAL CIRCUIT

FOREST BEAC COUNCIL
ASSOCIATION, INC. and
TREVOR HOWARD,

Plaintiffs,

vs

CAROLIN S. BATT,

Defendant

ORDER
12-CP-07-20

The case is before me upon the Defendant's MOTION TO AMEND FINDINGS OF FACT, TO AMEND THE FINAL ORDER, TO CONFORM TO THE FINDINGS AND TO RETURN THE CASE FOR ADDITIONAL EVIDENCE, AND FOR ORAL ARGUMENT. As made clear by the motion readily reflecting arguments of the case, the case of a proper motion of this type is to give the judge an opportunity to rule upon the merits of the case. I have never class read the entire case to be certain I had not overlooked something. I found nothing and therefore deny the motions.

If previous Order was confused as to what property the defendant had to make the case, the defendant accepted to accept. I will deal with the answer to this question in a Supplemental Order.

11/1/11

Joseph J. '08
Thomas Kemmerlin J
Special Referee

Report, 1
December 11, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 04 CP 07 2036
	)	
FOREST BEACH OWNERS	)	
ASSOCIATION INC. and	)	
IREVOR HOWARD	)	
	)	
Plaintiffs	)	
vs	)	SUPPLEMENTAL ORDER
	)	
CAROLYN S. BAIR	)	
	)	
Defendant	)	
_____	)	

This matter comes before me on the Plaintiff's Motion for Clarification of Order dated April 2, 2009. A hearing was held on said motion on September 11, 2009 commencing at 2:00 p.m. at the Helena House, Port Royal, South Carolina. Appearing on behalf of the Plaintiff was Russell P. Patterson. Appearing on behalf of the Defendant Carolyn S. Bair (Bair) was Robert L. Stepp and Robert E. Austin, Jr.

Plaintiff's motion seeks clarification of the specific improvements or existing structures on the disputed properties this Court is requiring Bair to remove. To avoid further confusion, the following is a listing of the items that must be removed within forty-five (45) days from the date of the service of this Order:

1. Large metal gates and two brick columns.
2. Planters including the low brick wall (Low Brick Wall) two (2) to three (3) bricks high running approximately five (5) feet from the western edge of the Avocet Street Extension and Strand Block.
3. All trees and shrubs in existence between the Low Brick Wall and the high brick wall approximately twelve (12) to thirteen (13) bricks high (High Brick Wall) which runs along the western boundary line of the Avocet Street Extension.

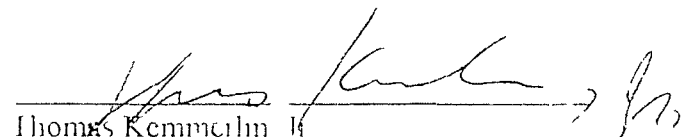
4 Remove all trees, shrubs, plants, planters, pots, benches, automobiles, bollards, rope fences, fences, bird baths, edging, driftwood, and any other improvements or obstructions in the Avocet Street Extension and Strand Block for a minimum width of twenty (20) feet past the existing basketball goal to the beach.

It is the intent of the Court that after the above improvements are removed, the Avocet Street Extension of approximately 36' in width from the end of Avocet Street to the basketball goal will be completely free of improvements or obstructions, except the Luge Brick Wall which shall not be removed. From the basketball goal (which does not need to be removed) to the ocean, there will be at least a 20' wide opening with no trees, shrubs, or improvements of any kind.

Photographs of some but not all of the improvements I have ordered removed are attached hereto, as noted on Trial Exhibit 77.

AND IT IS SO ORDERED.

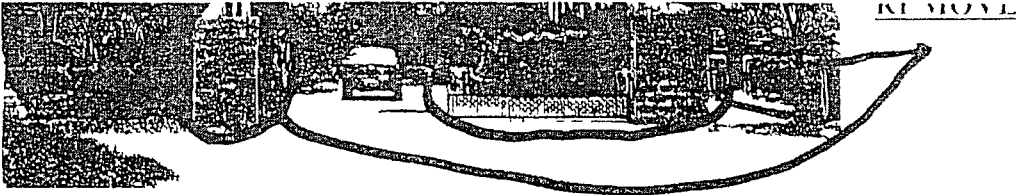
Beaufort, South Carolina
December 30, 2009


Thomas Kemmerlin II
Master In Equity

This Order has been seen by Defense Counsel, reflecting it is consistent with the Judge's ruling on September 11, 2009. The signature(s) below do not reflect or indicate Defendant Bair's consent to this Order.

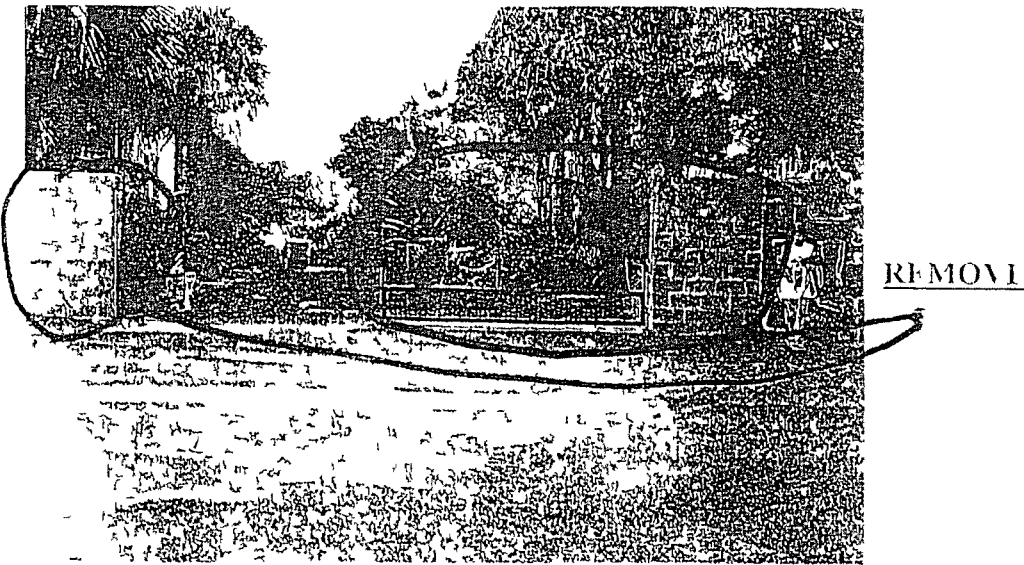
Robert F. Stepp / Date

Robert E. Austin, Jr. / Date



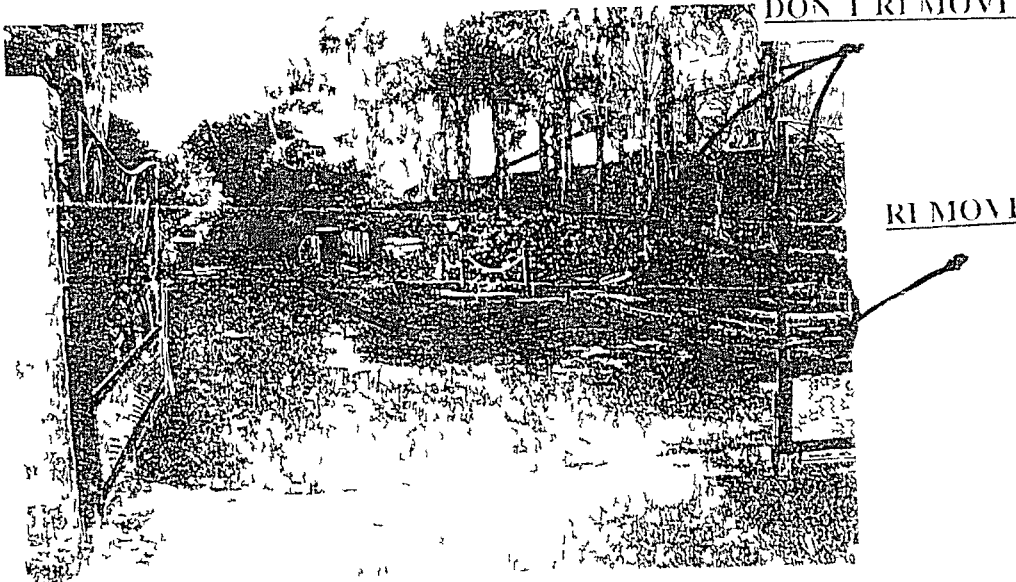
RE MOVE

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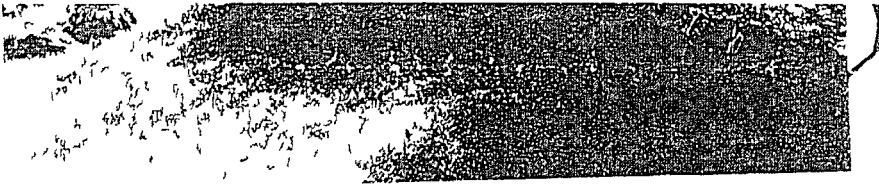
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DON T RE MOVE

RE MOVE

1(c)



2A



2B



RL MOVE

2C

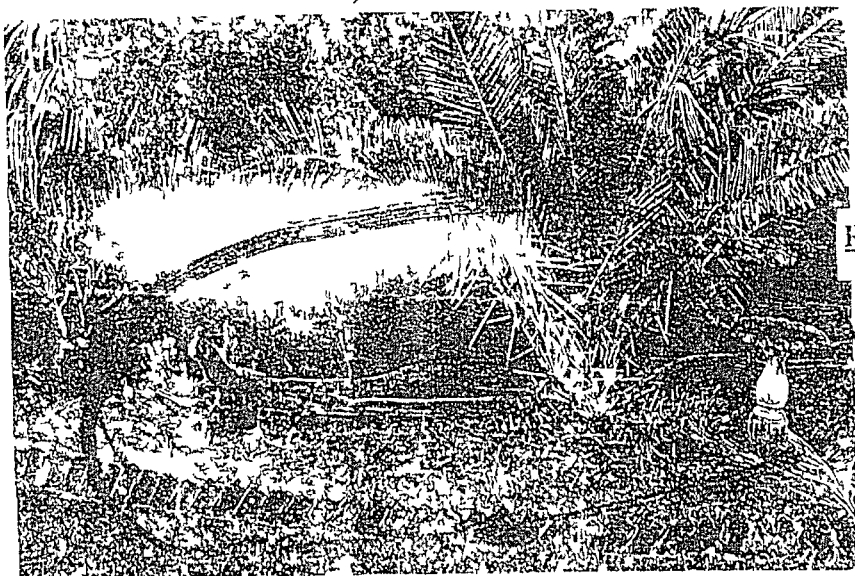


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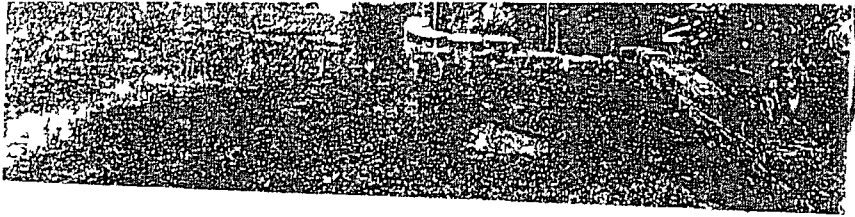
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3B



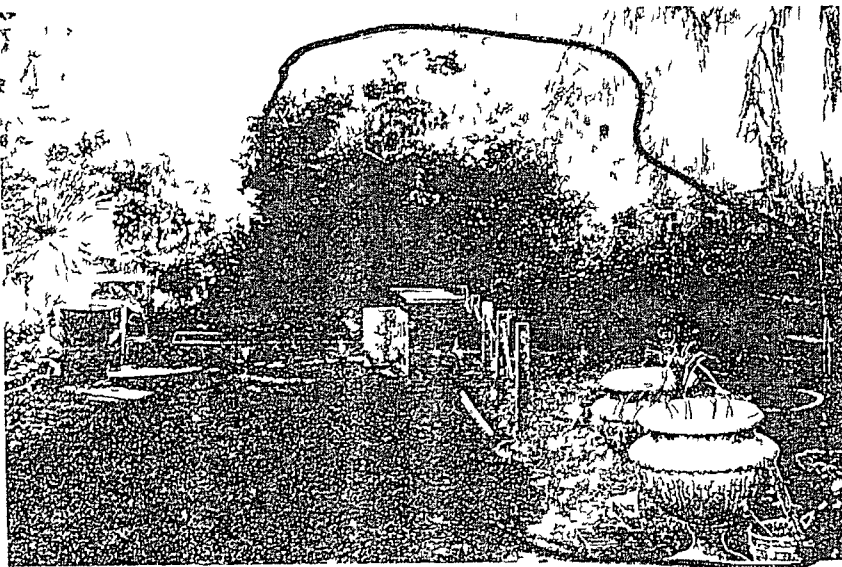
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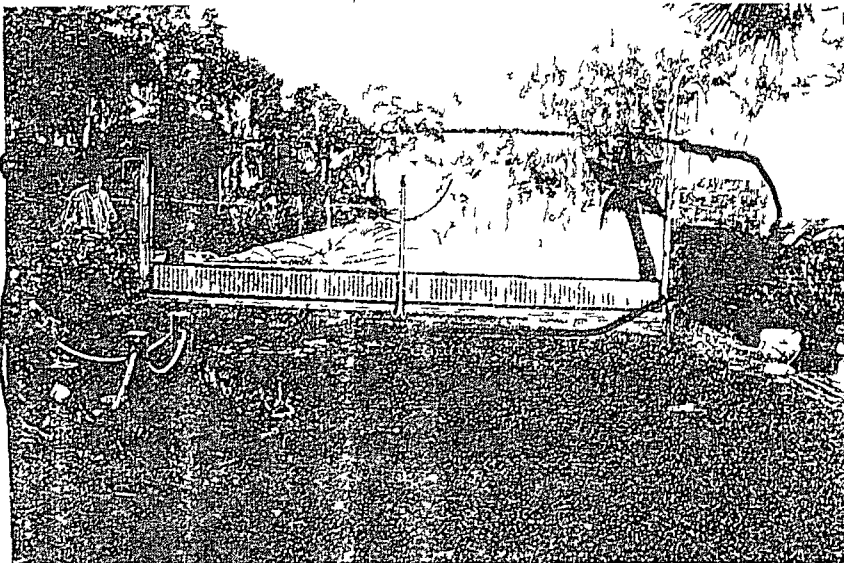
REMOVE

4A



REMOVE

4B



REMOVE

4C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C A NO 04-CP 07 - -
	)	
FOREST BEACH OWNER'S	)	
ASSOCIATION INC	)	
	)	
Plaintiff	)	
	)	COMPLAINT
vs	)	
	)	
CAROLYN S BAIR	)	
	)	
Defendant	)	
	)	

WHEREFORE the Plaintiff complains of the acts of the Defendant which is follows

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

- 1 That the Plaintiff Forest Beach Owner's Association Inc (Association) is a non-profit organization organized and existing under the laws of the State of South Carolina
- 2 That the Plaintiff is informed and believes that the Defendant Carolyn S Bair (Bair) is an individual living and owning real property which is the subject of this action located in Beaufort County South Carolina
- 3 That the Defendant Bair holds record title to Lot 5 Hilton Head Beach Subdivision No 1 (Bair Lot) as reflected on Plat book 7 at Page 4 (Plat)

- 4 That the Plaintiff is informed and believes Hilton Head Beach Subdivision No. 1
was developed and platted by the Hilton Head Company (De Jone)
- 5 That the Plat evidencing the location of the Boulevard reflects A Street (and a
Avocet Street) running along the western boundary of Lot 2 to provide access to
the beaches of the Atlantic Ocean
- 6 That the Developer sold numerous properties in Hilton Head Beach Subdivision
No. 1 making reference in said deeds of conveyance the Plat reflecting the
existence of Avocet Street terminating on the beaches of the Atlantic Ocean. That
as a result of said conveyances making reference to the Plat the Plaintiff and
other real property owners in Hilton Head Beach Subdivision No. 1 have certain
easement rights in said streets including A Street (i/k/a Avocet Street)
- 7 That the Plaintiff is a property owner in Hilton Head Beach Subdivision No. 1 and
along with all other property owners in said subdivision has the right to access the
beach through Avocet Street which should be maintained in a free and open
condition
- 8 That the Defendant Bair, notwithstanding said rights has blocked Plaintiff, and
others, access to Avocet Street to the beach with the construction and placement
of a large heavy metal gate extensive landscaping and other improvements
(collectively "Obstructions")

9 That the Plaintiff is entitled to an Order from this Court establishing its right to use and access Avocet Street and that said street should be maintained in a free and open condition

FOR A SECOND CAUSE OF ACTION
(Injunctive Relief)

10 That the Plaintiff repeats, realleges and incorporates by reference the allegations set forth in paragraphs 1 through 9 above

11 That if the Court determines under the First Cause of Action that the Defendant Barr, has violated the rights of the Plaintiff and other owners in Hilton Head Beach Subdivision No. 1 that the Plaintiff is entitled to a permanent injunction requiring the Defendant to

- a Remove all Obstructions within the boundaries of Avocet Street (A Street) and adjoining Lot 5 and to allow the Plaintiff and other property owners their guests and invitees in Hilton Head Beach Subdivision No. 1 free and unobstructed access to the beach down and through said street
- b Comply in all other respects to the applicable covenants and restrictions of record as to Avocet Street

WHEREFORE the Plaintiff prays as follows

1 That this Court issue a permanent injunction requiring the Defendant Barr to remove all Obstructions within the boundaries of Avocet Street (A Street) and adjoining Lot 5 and to allow the Plaintiff and other property owners their guests

and invitees in Hilton Head Beach Subdivision No. 1 to get unobstructed access to the beach down said street

- 2 Require the Defendant Ba to comply to all applicable covenants and restrictions of record
- 3 For such other and further relief as the Court deems just and proper

JONES PATTERSON SIMPSON & NEWTON P A



RUSSELL P PATTERSON
P O DRAWER 7049
18 POPE AVENUE
HILTON HEAD ISLAND SC 29938

Hilton Head Island South Carolina
November 7 2004

Attorneys for the Plaintiff

cc: Hon. Mary Frances 3:43 PM 11/10/04

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLACES
	)	FOR THE FOURTEENTH JUDICIAL
COUNTY OF BEAUFORT	)	CIRCUIT
	)	CASE NO. 04 CP 07 2056
	)	
FORLST BLACH OWNERS	)	
ASSOCIATION INC	)	ANSWER OF DEFENDANT CAROLYN
	)	S BAIR
Plaintiff	)	
	)	
vs	)	
	)	
CAROLYN S BAIR	)	
	)	
Defendant	)	

The Defendant Carolyn S. Bair (the Defendant) for her Answer to the Plaintiff's Complaint states the following

- 1 All allegations of the Complaint not specifically admitted are hereby denied
- 2 Upon information and belief the Defendant admits the allegations contained in paragraphs one (1) and two (2)
- 3 The allegations contained in paragraph three (3) are based on writings and/or other documents that speak for themselves and that are part of the public record. Any characterization of those writings and/or other documents is denied.
- 4 The Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph four (4) and therefore denies the same.
- 5 The allegations contained in paragraph five (5) are based on writings and/or other documents that speak for themselves. Any characterization of those writings and/or other documents is denied.

6 The Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs six (6) through eight (8) and therefore denies the same

7 The Defendant denies the allegations contained in paragraph nine (9)

8 In response to paragraph ten (10) the Defendant restates and re alleges all of the preceding paragraphs as if restated verbatim herein

9 The Defendant denies the allegations contained in paragraph eleven (11) and all of its subparts

FOR A FIRST DEFENSE
(Failure to State a Claim)

10 The Defendant re alleges all of the preceding paragraphs as if restated verbatim herein
Further answering and as an affirmative defense, the Defendant alleges that the Plaintiff's Complaint fails to state a valid claim against the Defendant and should therefore be dismissed pursuant to Rule 12(b)(6), SCRCF

FOR A SECOND DEFENSE
(Acts of Others)

11 The Defendant re alleges all of the preceding paragraphs as if restated verbatim herein

12 Further answering and as an affirmative defense the Defendant alleges that any damages allegedly sustained by the Plaintiff were caused by the acts of others over whom the Defendant had no control

FOR A THIRD DEFENSE
(Justification)

13 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

14 Further answering and as an affirmative defense any and all actions of the Defendant of which the Plaintiff complains were justified

FOR A FOURTH DEFENSE
(Statute of Limitations)

15 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

16 Further answering and as an affirmative defense to the extent that the Plaintiff's claims
are barred by the applicable statutes of limitation and/or statutes of repose then the Plaintiff's
claims against the Defendant should also be dismissed pursuant to Rule 12(b)(6) SCRPC

FOR A FIFTH DEFENSE
(Waiver/Estoppel/Laches)

17 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

18 Further answering and as an affirmative defense to the extent that the Plaintiff's claims
are barred by the equitable doctrines of waiver and/or estoppel and/or laches then the Plaintiff's
claims against the Defendant should also be dismissed pursuant to Rule 12(b)(6) SCRPC

FOR A SIXTH DEFENSE
(Reservation/Non-Waiver)

19 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

20 Further answering and as an affirmative defense the Defendant specifically reserves any
additional defenses as may be available or revealed to it during the course of its investigation
and/or discovery in the case

Wherefore having fully answered the Plaintiff's Complaint the Defendant demands
judgment as follows

1 That the Court dismiss the Plaintiff's Complaint with an award of costs and attorney's
fees to the Defendant and

2 For such other and further relief as the Court may deem just and proper

BUIST BYARS PEARCE & TAYLOR LLC

Mt Pleasant South Carolina

January 14 2005

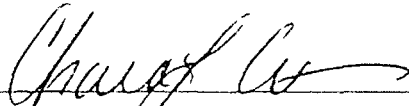
Bv *Chara L. Crane*

Gray B Taylor
Chara L Crane
1051 Chuck Dawley Blvd
Mt Pleasant SC 29464
(843) 856-4488

CERTIFICATE OF MAILING

I hereby certify that on January 14 2005 a copy of the foregoing was mailed postage prepaid to all counsel of record in this matter as follows:

Russell P. Patterson
P O Drawer 7049
18 Pope Ave
Hilton Head Island SC 29938



Chara I. Crane

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C A NO 04-CP 07 2036
	)	
FOREST BEACH OWNER'S	)	
ASSOCIATION, INC ,	)	
	)	
Plaintiff,	)	
	)	AMENDED COMPLAINT
vs	)	
	)	
CAROLYN S BAIR	)	
	)	
Defendant	)	

WHEREFORE, the Plaintiff, complaining of the acts of the Defendant, allege as follows

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

- 1 That the Plaintiff Forest Beach Owner's Association, Inc ("Association") is a non-profit organization organized and existing under the laws of the State of South Carolina
- 2 That the Plaintiff is informed and believes that the Defendant, Carolyn S Bair ("Bair") is an individual living and owning real property which is the subject of this action located in Beaufort County, South Carolina
- 3 That the Defendant, Bair holds record title to Lot 5 Hilton Head Beach Subdivision No 1, (Bair Lot') as reflected on Plat book 9 at Page 4 (Plat ')
- 4 That the Plaintiff is informed and believes Hilton Head Beach Subdivision No 1 was developed and platted by the Hilton Head Company (Developer ')

- 5 That the Plat evidencing the location of the Bair Lot reflects A' Street (n/k/a/ Avocet Street) running along the western boundary of Lot 5, to provide access to the beaches of the Atlantic Ocean
- 6 That the Developer sold numerous properties in Hilton Head Beach Subdivision No 1, making reference in said deeds of conveyance the Plat reflecting the existence of Avocet Street terminating on the beaches of the Atlantic Ocean That as a result of said conveyances, making reference to the Plat, the Plaintiff and other real property owners in Hilton Head Beach Subdivision No 1 have certain easement rights in said streets, including A Street (n/k/a Avocet Street)
- 7 That the Plaintiff is a property owner in Hilton Head Beach Subdivision No 1 and, along with all other property owners in said subdivision, has the right to access the beach through Avocet Street, which should be maintained in a free and open condition
- 8 That the Defendant, Bair, notwithstanding said rights, has blocked Plaintiff, and others, access to Avocet Street to the beach, with the construction and placement of a large, heavy metal gate, extensive landscaping, and other improvements (collectively "Obstructions")
- 9 That the Plaintiff is entitled to an Order from this Court establishing its rights to use and access Avocet Street and that said street should be maintained in a free and open condition

FOR A SECOND CAUSE OF ACTION
(Breach of Covenants)

- 10 That the Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in paragraphs 1 through 9 above
- 11 That the Barr Lot is subject to various recorded restrictive covenants, including but not limited to those recorded at the Beaufort County Register of Deeds at Book 77 at Page 11, Book 74 at Page 20 and Book 78 at Page 306 (collectively "Covenants")
- 12 That under the terms and provisions of the Covenants, no building or improvements can be erected, placed or altered on the Barr lot until the building, architectural plans specifications and plat plans have been approved by the Plaintiff
- 13 That under the terms and provisions of the Covenants no building or improvements can be located nearer than five (5) feet to any lot line
- 14 That Plaintiff is informed and believes that the Defendant has constructed certain improvements bordering adjoining Lot Six (6). Said improvements are graphically illustrated and labeled as storage room, and are depicted on the attached photographs ('Improvements')
- 15 That Plaintiff is informed and believes that said improvements are violative of applicable covenants in that they were never approved by the Plaintiff's architectural approval committee and are located closer than five (5) feet to the adjoining lot line
- 16 That the Plaintiff is entitled to an Order from the Court finding the Defendant has violated said setbacks and that said Improvements should be removed

WHEREFORE, the Plaintiff prays as follows

As to the First Cause of Action

- 1 That this Court issue a permanent injunction requiring the Defendant, Barr, to remove all Obstructions within the boundaries of Avocet Street ('A" Street) and adjoining Lot 5, and to allow the Plaintiff, and other property owners, their guests and invitees in Hilton Head Beach Subdivision No 1, free and unobstructed access to the beach down said property
- 2 Require the Defendant, Barr, to comply to all applicable covenants and restrictions of record

As to the Second Cause of Action

- 3 That the Court determine that the Improvements constructed by the Plaintiff were in violation of the covenants
- 4 That the Plaintiff should be required to remove said improvements
- 5 For such other and further relief as the Court deems just and proper

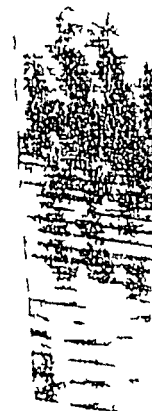
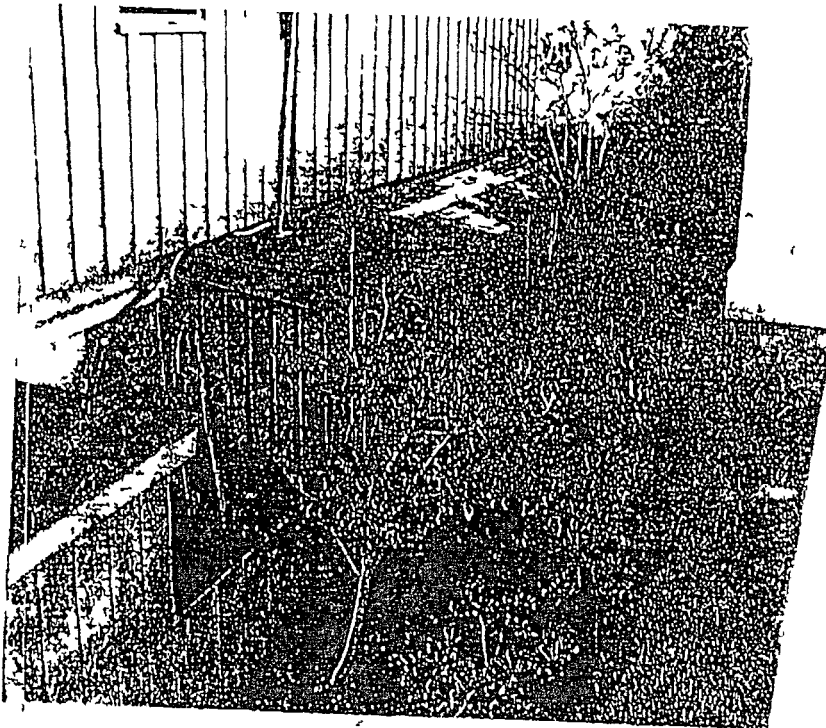
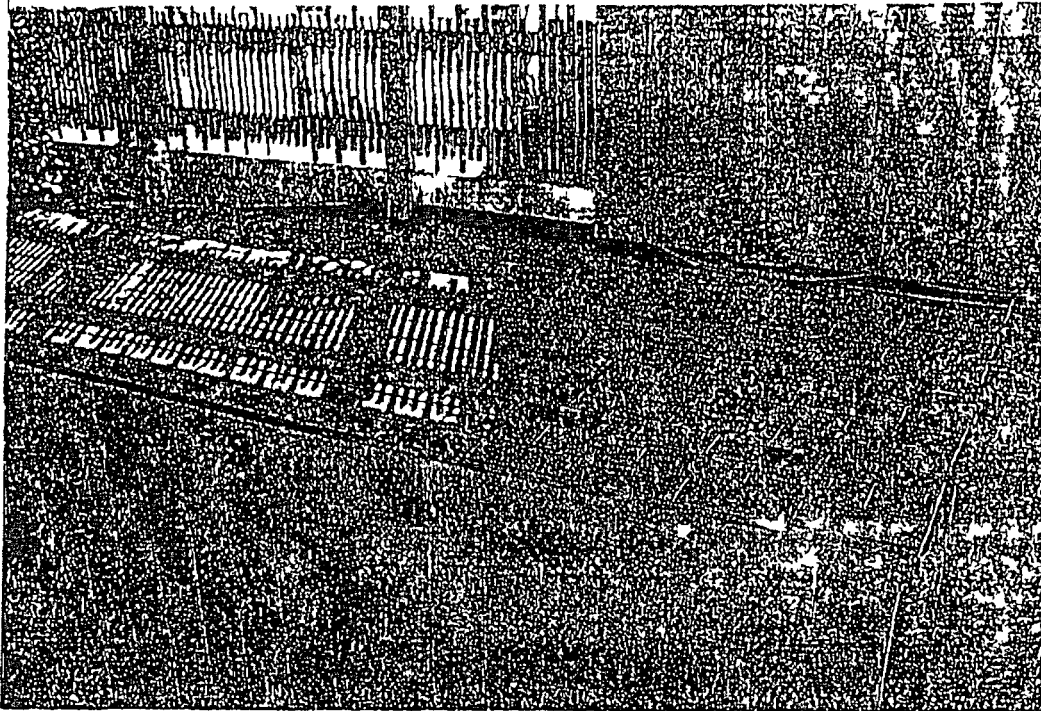
JONES, PATTERSON, SIMPSON & NEWTON, P A



RUSSELL P PATTERSON
P O DRAWER 7049
18 POPE AVENUE
HILTON HEAD ISLAND, SC 29938

Attorneys for the Plaintiff

Hilton Head Island, South Carolina
June 13, 2006



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	14 th JUDICIAL CIRCUIT
	)	
FOREST BEACH OWNERS	)	Civil Action No. 04 CP 07 2036
ASSOCIATION INC	)	
	)	
	)	
Plaintiff	)	
	)	
vs	)	<u>ANSWER TO AMENDED COMPLAINT</u>
	)	
CAROLYN S BAIR	)	
	)	
	)	
Defendant	)	
_____	)	

The Defendant Carolyn S. Austin formerly known as and incorrectly identified in the caption as Carolyn S. Bair (the Defendant) for her Answer to the Plaintiff's Amended Complaint alleges:

FOR A FIRST DEFENSE

1 All allegations of the Amended Complaint not specifically admitted, qualified or explained are hereby denied.

2 Upon information and belief the Defendant admits the allegations contained in paragraph one (1) and two (2).

3 The allegations contained in paragraph three (3) are based on writings and/or other documents that speak for themselves and that are part of the public record. Any characterization of those writings and/or other documents is denied.

4 The Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph four (4) and therefore denies the same.

5 The allegations contained in paragraph five (5) are based on writings and/or other documents that speak for themselves. Any characterization of those writings and/or other documents is denied.

6 The Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs six (6) through eight (8) and therefore denies the same.

7 The Defendant denies the allegations contained in paragraph nine (9).

8 In response to paragraph ten (10) the Defendant restates and re-alleges all of the preceding paragraphs as if restated verbatim herein.

9 The portion of paragraph eleven (11) that alleges the recordation of covenants is admitted upon information and belief. The remaining allegations of paragraph eleven constitute conclusions of law which Defendant neither admits nor denies. To the extent these remaining allegations are deemed to be allegations of fact they are denied.

10 The allegations contained in paragraphs twelve (12) and thirteen (13) are based on writing and/or other documents that speak for themselves and that are part of the public record. Any characterization of those writings and/or other documents is denied.

11 That portion of paragraph fourteen (14) that alleges that Defendant constructed the improvement referred to therein is denied. The remaining allegations of paragraph fourteen (14) are admitted.

12 The allegations of paragraphs fifteen (15) and sixteen (16) constitute conclusions of law that Defendant neither admits nor denies. To the extent these allegations are deemed to be allegations of fact, they are denied.

FOR A SECOND DEFENSE

(Failure to State to State Facts Sufficient to Constitute a Cause of Action)

13 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein.

14 Further, answering and as an affirmative defense, the Defendant alleges that the Plaintiff's Amended Complaint fails to state facts sufficient to constitute a cause of action against the Defendant and should therefore be dismissed pursuant to Rule 12(b)(6) SCRPC.

FOR A THIRD DEFENSE

(Standing)

15 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein.

16 Plaintiff lacks standing to maintain the causes of action in the complaint because upon information and belief, Plaintiff is not the owner of a lot within Hilton Head Beach Subdivision No. 1, and is not otherwise entitled to enforce the rights alleged to belong to the owners of those lots.

17 Additionally, to the extent the interest in real property asserted by Plaintiff is derived from any purported conveyance from Property Research Holdings, Inc., such interest is void because Property Research Holdings, Inc. was not seized or possessed of

my interest in the property that was the subject of that conveyance at the time it was made.

FOR A FOURTH DEFENSE

(Statute of Limitations)

18 The Defendant re alleges all of the preceding paragraphs as if restated verbatim herein.

19 Further answering and as an affirmative defense to the extent that the Plaintiff's claims are barred by the applicable statutes of limitation and/or statutes of repose specifically including but not limited to S.C. Code Ann. § 15-67-90 then the Plaintiff's claims against the Defendant should also be dismissed.

FOR A FIFTH DEFENSE

(Waiver/Estoppel/Laches)

20 Defendant re alleges all of the preceding paragraphs as if restated verbatim herein.

21 Further answering and as an affirmative defense to the extent that the Plaintiff's claims are barred by the doctrines of waiver, estoppel and/or laches then the Plaintiff's claims against the Defendant should also be dismissed.

FOR A SIXTH DEFENSE

(Res Judicata/Collateral Estoppel)

19 Plaintiff's claims are barred by the doctrine of res judicata as a result of the final judgment entered in a prior action styled Carolyn S. Bair v. Property Research Holdings, Inc., et al. (98-CP 7 1721) which judgment is recorded upon information and belief in Judgment Roll 28770 and is also recorded among the real estate records for Beaufort County, South Carolina at Book 1175 Page 1749.

20 Alternatively Plaintiff is estopped to assert facts in this action that are contrary to facts finally established in the prior action.

21 Defendant is therefore informed and believes that she is entitled to an Order denying Plaintiff the relief demanded in the Amended Complaint or any other relief inconsistent with her ownership of the property that is the subject of this action.

FOR A SEVENTH DEFENSE
(Reservation/Non Waiver)

22 The Defendant rec alleges all of the preceding paragraphs as if restated verbatim herein.

23 Further answering and as an affirmative defense the Defendant specifically reserves any additional defenses as may be available or revealed to it during the course of its investigation and/or discovery in the case.

WHEREFORE having fully answered the Plaintiff's Amended Complaint the Defendant demands judgment as follows:

1 That the Court dismiss the Plaintiff's Amended Complaint with an award of costs and attorney's fees to the Defendant and

2 For such other and further relief as the Court may deem just and proper.

SOWELL GRAY STEPP & LAHMEY LLP

By  _____
Robert J. Stepp
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendant Carolyn S. Austin

Columbia, South Carolina
July 12, 2006

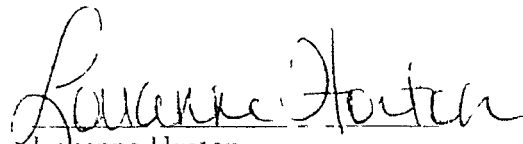
CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Sowell Gray Stepp & Fitts LLC attorneys for Defendant, do hereby certify that I have served a copy of the pleading(s) hereinafter listed via U.S. Mail to the following address(es):

Pleadings Defendant's Answer to Amended Complaint

Parties Served

Russell P. Patterson Esquire
Jones Patterson Simpson & Newton, P.A.
Post Office Drawer 7049
Hilton Head Island, SC 29928


Lorraine Horton

July 12, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. NO. 04-CP 07 2036
	)	
FOREST BEACH OWNER'S	)	
ASSOCIATION INC	)	
TREVOR G. HOWARD	)	
	)	
Plaintiffs	)	
	)	SECOND AMENDED COMPLAINT
vs	)	
	)	
CAROLYN S. BAIR	)	
	)	
Defendant	)	
	)	

WHEREFORE the Plaintiffs complaining of the acts of the Defendant, allege as follows:

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment Title to Property)

1 That the Plaintiff Forest Beach Owner's Association Inc (Association) is a non profit organization organized and existing under the laws of the State of South Carolina. That the Plaintiff Trevor G. Howard, is an individual residing in Beaufort County who owns Lot 33 Hilton Head Beach Subdivision No. 1 pursuant to that certain deed dated October 21, 1994 and recorded in Book 740 at Page 1513.

2 That the Plaintiffs are informed and believe that the Defendant Carolyn S. Bair (Bair) is an individual living and owning real property which is the subject of this action located in Beaufort County, South Carolina.

3 That the Defendant Bair holds record title to Lot 5 Hilton Head Beach Subdivision No. 1 (Bair Lot) as reflected on Plat Book 9 at Page 4 (Plat).

4 That the Plaintiffs are informed and believe that the Defendant Bair, in addition to her undisputed ownership of the Bair Lot, claims title to that portion of Avoct

Street bordering the Bair Lot to the Southwest for approximately 100' (Street Extension) as well as a rectangular parcel of land approximately 70' x 100' to the Southeast of her lot between the platted southeastern boundary of the Bair Lot as shown on the Plat and the mean high water (Bair Trust Property). Both parcels of property claimed by Bair are graphically depicted on Exhibit 4 attached hereto and are collectively referred to as the "Disputed Property or Disputed Properties."

5 That it is the Plaintiffs' position that Bair does not have valid title to either the Street Extension or the Bair Trust Property.

A. STREET EXTENSION

6 That the Plaintiff Association acquired title to the Street Extension and a portion of the Bair Trust Property identified as Parcel A, Bair Trust Property on Exhibit 4 attached hereto by deed from Property Research Holdings, Inc. dated May 23, 2001 and recorded at the Beaufort County Register of Deeds at Deed Book 1450 at Page 753 (PRHI Deed). That the Plaintiff Association is the record title holder to same.

7 The Plaintiffs are informed and believe the Defendant Bair claims title to Disputed Property as a result of that certain civil action captioned Bair v. Property Research Holdings, Inc. (Case No. 98 CP 07 1721) and pursuant to that certain quitclaim deed dated March 8, 2000 from Property Research Holdings, Inc. (PRHI) to the Defendant Bair recorded at the Beaufort County Register of Deeds at Book 1267 at Page 655.

8 That the basis of Bair's claim of ownership of the Street Extension is defective and invalid for one or more of the following reasons:

A Defects In Civil Action (98-1721)

- 1 Bair did not name the appropriate necessary parties being the
- Plaintiffs and all other property owners in the Hilton Head Beach
- Subdivision Nos 1 1A 2 2A and 3 (Subdivisions)
- 2 Service was not properly completed on all required and necessary
- parties
- 3 The property description used throughout said action was defective
- 4 The Summons was defective in that it was directed to only one
- Defendant not all Defendants
- 5 The Affidavit for Publication contained inaccurate and erroneous
- information in that the name and address of additional parties in interest
- were known or easily obtainable by the Plaintiff
- 6 No trial or hearing was ever held.
- 7 For such other reasons to be determined at trial

B Defects in Deed from PRHI to Bair

- 1 The property description is defective
- 9 That the Defendant, Bair notwithstanding said rights of the Plaintiff
- Association has claimed ownership of the Street Extension and has blocked Plaintiffs and
- others access through same to the beach with the construction and placement of a large
- heavy metal gate a large concrete wall extensive landscaping and other improvements
- (collectively Obstructions)

B BAIR TRUST PROPERTY

- 10 That the Bair Lot and the Disputed Property are subject to various
- covenants recorded by The Hilton Head Company at the Beaufort County Register of

Deeds at Book 4 at Page 305 Book 74 at Page 306 Book 77 at Page 180 and Book 77 at Page 181 (collectively "Beach Strand Covenants")

11 That the Beach Strand Covenants provide that the properties to the Southeast (i.e. towards the ocean) of the platted lots in Hilton Head Beach Subdivisions Nos. 1, 2 and 3 lying between the mean high water mark and the Southeastern lot line of the lots in said subdivision are a common held in trust for the use and benefit of all property owners in said Subdivisions.

12 That in addition to filing and recording the Beach Trust Covenants The Hilton Head Company Inc. recorded that certain plat captioned a Portion of Forest Beach Subdivision dated July 1960 in the Beaufort County Register of Deeds at Plat Book 12 at Page 89 That the portion of the land seaward of the Bar Line which includes all of the Bar Trust Property was denoted on said survey as Strand of Hilton Head Beach Subd. No. 1 Trust Property ("Strand Trust Plat")

13 That as a result of the recording of the Beach Trust Covenants and Strand Trust

Flat the Bair Trust Property was and is at all times to be held in trust for the benefit of all

property owners in the Hilton Head Beach Subdivisions and to be used as a common

14 That pursuant to the PRH Decd described in Paragraph 6 herein the Plaintiff Association holds record title to a portion of the Barr Trust Property labeled Parcel A Barr Trust Property as reflected on Exhibit 4.

15 That the Plaintiffs are entitled to an Order from this Court

a Determining that the Plaintiff Association is the lawful owner of the
Street Extension and Parcel A of the Bair Trust Property and that the
remaining Portion of the Bair Trust Property is held in trust for all
property owners in the Subdivisions

b. Requiring the Defendant Bair to remove the Obstructions from said Street Extension and Bair Trust Property

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – Applicability of Easements)

16 That the Plaintiffs repeat reallege and incorporate by reference the allegations
set forth in Paragraphs 1 through 15 above

7 That even if the Court finds for the Plaintiffs as to the ownership of the Disputed Property in the First Cause of Action, a dispute still exists between the parties as to the applicability of certain easements on said Disputed Property.

18 That the Bair Lot and the Disputed Property are subject to various restrictive covenants including but not limited to those recorded by The Hilton Head Company, Inc. in 1956 and recorded at Book 78 at Page 306 at the Beaufort County Register of Deeds (1956 Covenants) as well as the Beach Strand Covenant.

19 That Article V of the 1956 Covenants provides as follows:

PARK AREAS 1 That portion of the lands of The Hilton Head Company shown as the open areas between groups of lots in any subdivision or between subdivisions which constitute means of access to the beach for rear lots and any other areas designated by The Hilton Head Company, its successors or assigns, shall be set aside as park areas to be allowed to stand free of buildings, billboards, etc. or to be landscaped and maintained, for the beautification of the Island and the enjoyment of its residents and visitors."

20 That it is the Plaintiffs' position the Street Extension is a platted street. However if the Court finds otherwise and determines it is not a platted street, it is the Plaintiffs' alternate position said property is a Park Area under Article V of the 1956 Covenants, which must remain free of obstructions to provide access to the beach to property owners, such as the Plaintiffs, who do not live directly on the ocean.

21 That as set forth above as a result of the recording of the Beach Trust Covenants and Strand Trust Plat, the Bair Trust Property was at all times to be held in trust for the benefit of all property owners in the Hilton Head Beach Subdivisions and to be used as a common

22 That the Defendant Bair's claim of ownership and exclusive use of the Bair Trust Property is in violation of the Beach Trust Covenants and the Beach Trust Plat which dedicated said property as trust property and as a "common"

23 That the Plaintiffs are informed and believe that Defendant Bair claims exclusive use and possession of the Bair Trust Property and takes the position there are no easements on same

4 That the Plaintiffs would request the Court determine the rights, duties and obligations of the parties to the Disputed Property and determine answers to the following specific questions

- a What specific covenants and restrictions apply to the Disputed Properties and what are the parties' rights to use and access same?
- b Is the Street Extension a street?
- c Is the Street Extension a Park Area under the 1956 Covenants and subject to provisions of Article V of same?
- d Is the Bair Trust Property subject to the provisions of the Beach Strand Covenants and Beach Trust Plat, and if so what are the rights of the parties to use, own and access same?

Collectively subparagraphs (a) through (d) are referred to as Covenant Issues

FOR A THIRD CAUSE OF ACTION
(Breach of Covenants)

25 That the Plaintiffs repeal reallege and incorporate by reference the allegations set forth in Paragraphs 1 through 24 above.

26 That the Bair Lot and Disputed Property are subject to various recorded restrictive covenants including but not limited to those recorded at the Beaufort County Register of Deeds at Book 77 at Page 11 Book 74 at Page 20 and Book 75 at Page 306 (collectively "Covenants").

27 That under the terms and provisions of the Covenants no building or improvements can be erected placed or altered on the Bair Lot until the building, architectural plans, specifications and plat plans have been approved by the Plaintiffs.

28 That under the terms and provisions of the Covenants no building or improvements can be located nearer than five (5) feet to any lot line.

29 That Plaintiff is informed and believes that the Defendant has constructed a large metal gate constructed a large masonry wall installed landscaping and constructed other improvements bordering adjoining Lot Six (6) and the Sea Crest Motel property. Said improvements are generally graphically illustrated and depicted on the survey attached as Exhibit 28 hereto ("Improvements").

30 That Plaintiffs are informed and believe that said improvements are violative of applicable covenants in that they were never approved by the Plaintiffs architectural approval committee are not built on Defendant Bair's property violate applicable setbacks and are inconsistent with the uses of the property as provided for under all applicable covenants and restrictions. Further improvements adjoining Lot 6 and to the property to the Southwest are located closer than five (5) feet to the adjoining lot line.

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31 That the Plaintiffs are entitled to an Order from the Court finding the Defendant has violated said setbacks and covenant provisions and that said Improvements should be removed.

WHEREFORE the Plaintiffs pray as follows

As to the First Cause of Action

- 1 That the Court determine the Plaintiff Association owns the Street Extension
2 That the Court determine the property owners in the Hilton Head Beach Subdivision
3 1A 2 LA and 3 own the Bath Trust Property in trust.

As to the Second Cause of Action

- 3 That this Court inquire into the Covenant Issues and answer said outstanding
Covenant Issues in dispute between the parties

As to the Third Cause of Action

- 4 That the Court determine that the Improvements constructed by the Defendant are
in violation of the covenants
- 5 That the Defendant should be required to remove said Improvements
- 6 For such other and further relief as the Court deems just and proper

JONES PATTERSON SIMPSON & NEWTON P.A.

[Signature]

RUSSELL P PATTERSON
P O DRAWER 7049
18 POPE AVENUE
HILTON HEAD ISLAND SC 29928

Attorneys for the Plaintiffs

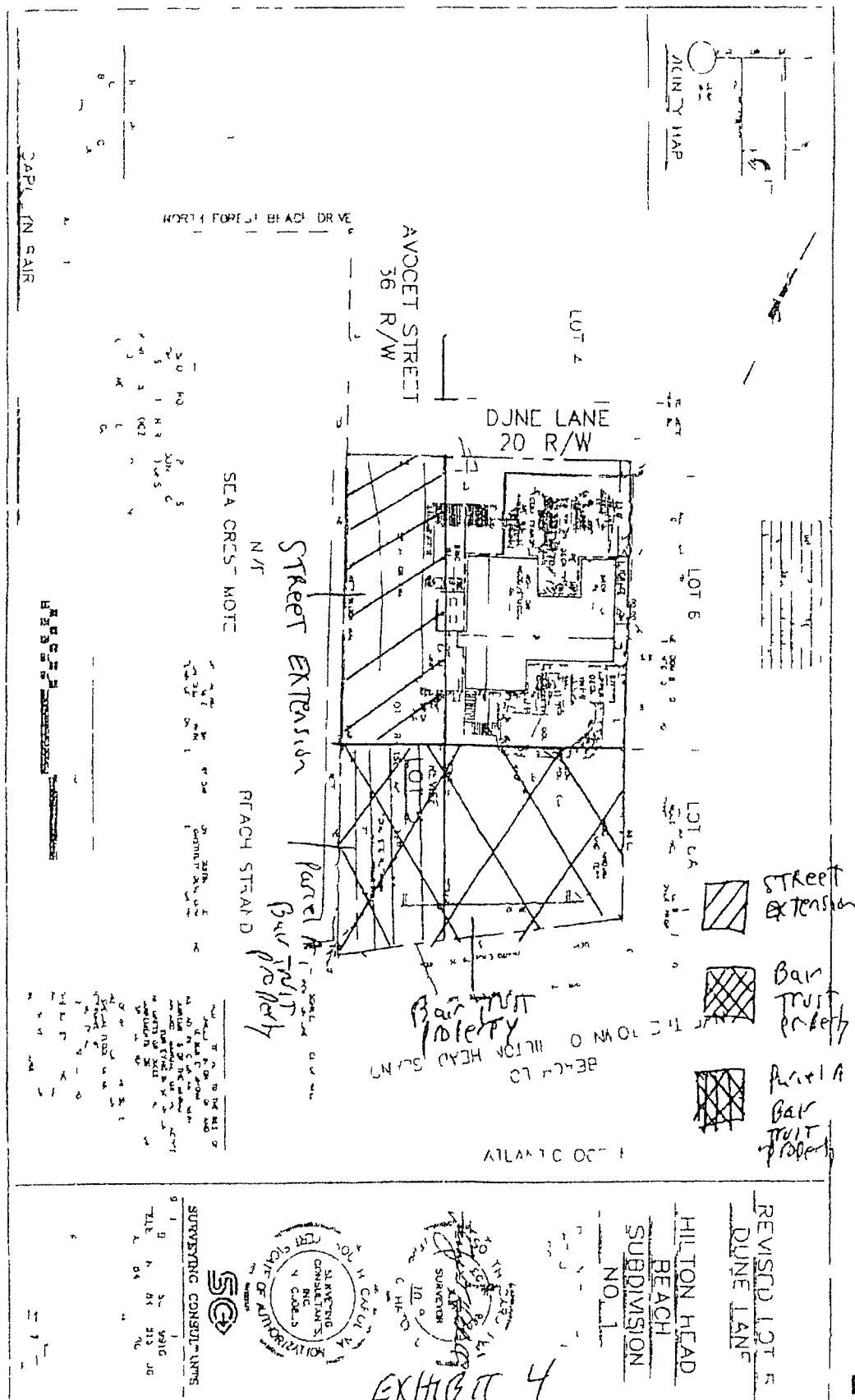
Hilton Head Island, South Carolina
April 20, 1907

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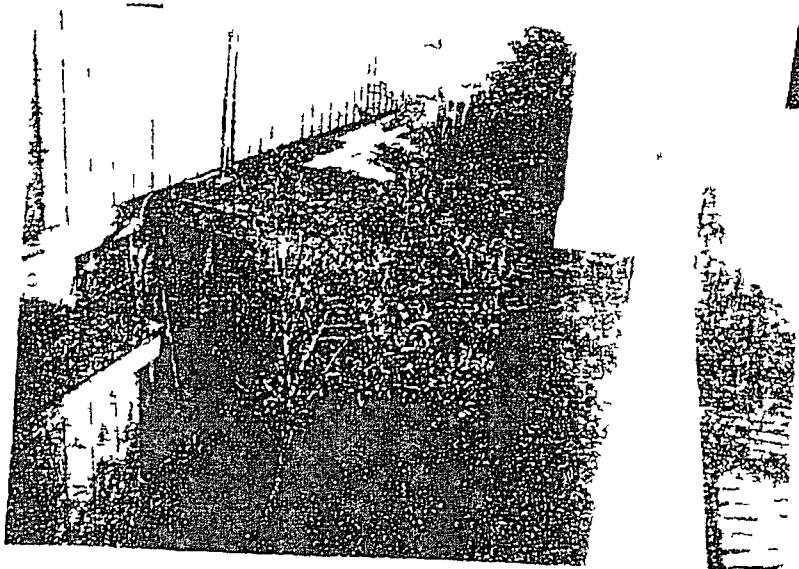
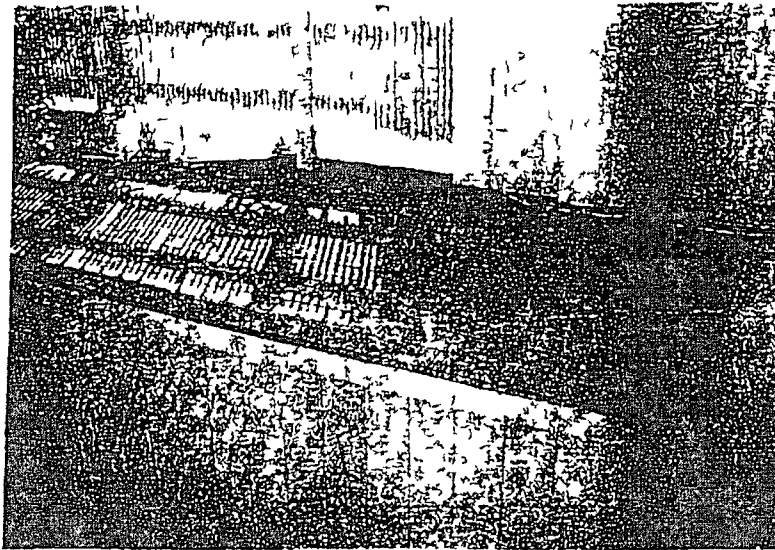


Exhibit 28(B)

R-55

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	14 th JUDICIAL CIRCUIT
	)	
FORREST BACHOWNERS	)	Civil Action No. 04 CP 07 2036
ASSOCIATION INC. TRIVOR G	)	
HOWARD	)	
	)	
	)	
	)	<u>ANSWER TO SECOND AMENDED</u>
vs	)	<u>COMPLAINT</u>
	)	
CAROLYN S. BAIR	)	
	)	
	)	
Defendant	)	

The Defendant Carolyn S. Austin formerly known as and incorrectly identified in the caption as Carolyn S. Bair (the Defendant) for her Answer to the Plaintiff's Second Amended Complaint alleges

FOR A FIRST DEFENSE

- 1 All allegations of the Amended Complaint not specifically admitted qualified or explained are hereby denied
- 2 Upon information and belief the Defendant admits the allegations contained in paragraph one (1) and two (2)
- 3 The allegations contained in paragraph three (3) and four (4) are admitted
- 4 The Defendant denies the allegations contained in paragraph five (5)
- 5 The allegations contained in paragraph six (6) are based on writings and/or other documents that speak for themselves. Any characterization of those writings and/or other documents is denied
- 6 The Defendant admits the allegations contained in paragraph seven (7)
- 7 The Defendant denies the allegations of paragraph eight (8)

8 The Defendant admits that portion of paragraph nine(9) that alleges that she claims ownership of the Street Extension Defendant denies the remaining allegations contained in paragraph nine (9)

9 The allegations of paragraphs ten (10) eleven (11) and twelve (12) are based on writings and/or other documents that speak for themselves and that are part of the public record Any characterization of those writings and/or other documents is denied

10 The Defendant denies the allegations contained in paragraphs thirteen (13) fourteen (14) and fifteen (15)

11 The above allegations are repeated in response to the allegations of paragraph sixteen (16)

12 The Defendants denies the allegations of paragraphs (17) through twenty two (22)

13 The Defendant admits the allegations of paragraph twenty three (23)

14 Paragraph 24 does not contain any allegations which Defendant is required to admit or deny

15 The above allegations are repeated in response to paragraph twenty five (25)

16 The allegations contained in paragraphs twenty seven (27) and twenty eight (28) are based on writing and/or other documents that speak for themselves and that are part of the public record Any characterization of those writings and/or other documents is denied

17 The Defendant admits that certain improvements were constructed by her but denies the allegations of paragraph twenty nine (29) as stated

18 The Defendant denies the allegations of paragraphs thirty (30) and thirty one (31)

FOR A SECOND DEFENSE

(Failure to State to State Facts Sufficient to Constitute a Cause of Action)

19 The Defendant re alleges all of the preceding paragraphs as if restated verbatim herein

20 Further answering and as an affirmative defense the Defendant alleges that the Plaintiff's Second Amended Complaint fails to state facts sufficient to constitute a cause of action against the Defendant and should therefore be dismissed pursuant to Rule 12(b)(6) SCRCP

FOR A THIRD DEFENSE

(Standing)

21 The Defendant re alleges all of the preceding paragraphs as if restated verbatim herein

22 Plaintiff lacks standing to maintain the causes of action in the complaint because upon information and belief Plaintiff is not the owner of a lot within Hilton Head Beach Subdivision No. 1 and is not otherwise entitled to enforce the rights alleged to belong to the owners of those lots

23 Additionally to the extent the interest in real property asserted by Plaintiff is derived from any purported conveyance from Property Research Holdings, Inc. such interest is void because Property Research Holdings, Inc. was not seized or possessed of

any interest in the property that was the subject of that conveyance at the time it was made.

FOR A FOURTH DEFENSE

(Statute of Limitations)

24 The Defendant alleges all of the preceding paragraphs as if restated verbatim herein.

25 Further answering and as an affirmative defense to the extent that the Plaintiff's claims are barred by the applicable statutes of limitation and/or statutes of repose specifically including but not limited to S.C. Code Ann. § 15-67-90 then the Plaintiff's claims against the Defendant should also be dismissed.

FOR A FIFTH DEFENSE

(Waiver/Estoppel/Laches)

26 Defendant alleges all of the preceding paragraphs as if restated verbatim herein.

27 Further answering and as an affirmative defense, to the extent that the Plaintiff's claims are barred by the doctrines of waiver, estoppel and/or laches then the Plaintiff's claims against the Defendant should also be dismissed.

FOR A SIXTH DEFENSE

(Res Judicata/Collateral Estoppel)

19 Plaintiff's claims are barred by the doctrine of res judicata as a result of the final judgment entered in a prior action styled Carolyn S. Bair v. Property Research Holdings, Inc. et al., (98 CP 7 1721) which judgment is recorded upon information and belief in Judgment Roll 28770 and is also recorded among the real estate records for Beaufort County, South Carolina at Book 1175 Page 1749.

20 Alternatively Plaintiff is estopped to assert facts in this action that are contrary to facts finally established in the prior action

21 Defendant is therefore informed and believes that she is entitled to an Order denying Plaintiff the relief demanded in the Amended Complaint or any other relief inconsistent with her ownership of the property that is the subject of this action

FOR AN SEVENTH DEFENSE
(Abandonment)

22 Any rights that Plaintiffs may have had at any time in any of the properties that are the subject of this action have been abandoned

FOR A EIGHTH DEFENSE
(Reservation/Non Waiver)

23 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

24 Further answering and as an affirmative defense the Defendant specifically reserves any additional defenses as may be available or revealed to it during the course of its investigation and / or discovery in the case

FOR A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM

25 The Defendant re-alleges all of the preceding paragraphs as if restated verbatim herein

26 To the extent the prior judgment referred to above establishing title in favor of Defendant is found to be defective or otherwise not binding upon Plaintiff Defendant is informed and believes that she is entitled to a decree from this Court establishing title to the property that is the subject of this action in her free and clear of

any easements, restrictions, liens or encumbrances except those expressly created by Defendant.

27 Defendant has been in continuous, hostile, actual, notorious and exclusive possession of the property that is the subject of this action for more than the requisite time necessary to establish her title by adverse possession.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, the Defendant demands judgment as follows:

1 That the Court dismiss the Plaintiff's Second Amended Complaint, with an award of costs and attorney's fees to the Defendant, and

2 For such other and further relief as the Court may deem just and proper, including to the extent that the prior decree establishing title in Defendants is defective or otherwise not binding upon Plaintiff, a decree that Defendant is the owner of the fee simple absolute title to the property, free and clear of any liens, encumbrances, easements, restrictions or conditions except those that may have expressly been created by her.

SOWELI GRAY SILPP & LAFFITTE LLC

By _____
Robert E. Stepp
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

ATTORNEYS FOR DEFENDANT
CAROLYN S. AUSTIN

Columbia, South Carolina
May ___, 2007

CERTIFICATE OF SERVICE

I the undersigned employee of the law offices of Sowell Gray Stepp & Jaffitte LLC attorneys for Defendant do hereby certify that I have served a copy of the pleading(s) hereinbelow listed via US Mail to the following address(es)

Pleadings **AMENDED ANSWER TO AMENDED COMPLAINT**

Parties Served Russell P. Patterson Esquire
Jones Patterson Simpson & Newton PA
Post Office Drawer 7049
Hilton Head Island SC 29938

Glee Henderson Paralegal

May 4 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLFAS
	)	FOR THE 14 TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
FOREST BEACH OWNER'S	)	CIVIL ACTION NO 04-CP-07 2036
ASSOCIATION, INC ,	)	
	)	
Plaintiff,	)	
	)	
v	)	<u>AFFIDAVIT OF RODNEY WALKER</u>
	)	
CAROLYN S BAIR,	)	
	)	
Defendant	)	
_____	)	

PERSONALLY APPEARED before me, Rodney Walker, who, being first duly sworn, does state as follows

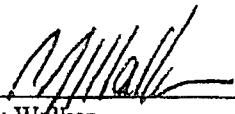
- 1 He is an adult and competent to make this affidavit
- 2 That at all times relevant he was an employee of Atlantic Surveying, Inc
- 3 That he is the chief draftsman and survey manager for Rudy W Wheeler, who has been a licensed surveyor in the State of South Carolina since July, 1978 (RLS #7263)
- 4 That he has reviewed the legal description set forth in the Amended Notice of Lis Pendens dated January 25, 1999, and in the Final Judgment dated May 19, 1999, copies of which are attached hereto as Exhibits 1 and 2, respectively, in connection with the quiet title action filed by the Defendant (C A 98 CP-07-1721)
- 5 That attached hereto as Exhibit 4 is a graph of said property description he prepared using the metes and bounds description in Exhibits 1 and 2 As noted, there are

numerous deficiencies and errors in said metes and bounds property description, as follows

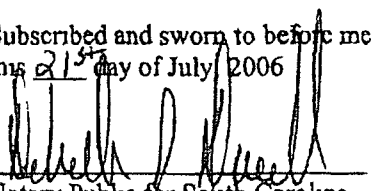
- a The property description does not close
- b The property description does not accurately reflect any parcel or property

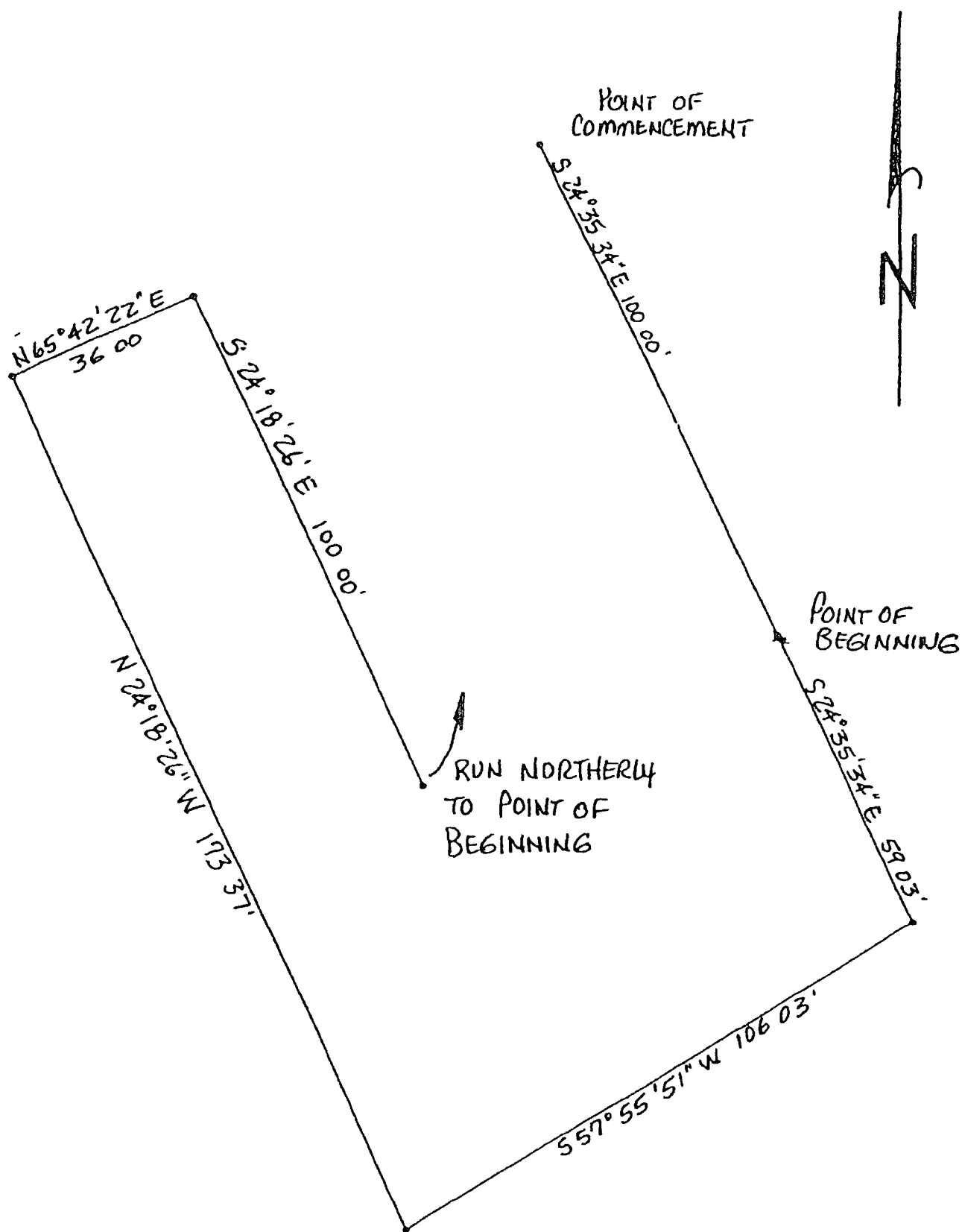
6 That the metes and bounds description set forth in the Amended Notice of Lis Pendens and Final Judgment clearly does not represent the property depicted in the survey attached to the November 20, 1998 Summons and Complaint in said action, a copy of which is attached hereto as Exhibit 3

FURTHER deponent sayeth not


Rodney Walker

Subscribed and sworn to before me
this 21st day of July 2006


Notary Public for South Carolina
My Commission Expires June 18, 2007



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R-64 2

108046

STATE OF SOUTH CAROLINA)
CAROLYN S BAIR,)
Plaintiff,)
vs)
PROPERTY RESEARCH)
HOLDINGS, INC , ALSO ALL)
OTHER PERSONS, UNKNOWN,)
CLAIMING ANY RIGHT,)
TITLE, ESTATE, INTEREST)
IN OR LIEN UPON THE REAL)
ESTATE DESCRIBED IN THE)
COMPLAINT HEREIN)
Defendants)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO 98-CP-7-1721

99-LP-775

99 JAN 25 AM 11 38
CLERK OF COURT
BEAUFORT, SC

AMENDED NOTICE OF LIS PENDENS

TO DEFENDANT PROPERTY RESEARCH HOLDINGS, INC , ALSO ALL
OTHER PERSONS, UNKNOWN, CLAIMING ANY RIGHT, TITLE, ESTATE,
INTEREST IN OR LIEN UPON THE REAL ESTATE DESCRIBED IN THE
COMPLAINT HEREIN, AND ALL OTHERS WHOM IT MAY CONCERN

YOU ARE NOTIFIED of the institution of this action on
November 20, 1998, by the plaintiff against you seeking to quiet
the title to that certain real estate in Beaufort County, South
Carolina, described more particularly

From the northwestern corner of Lot 5, Hilton Head
Beach Subdivision No 1, run South 24°35'34" East for
100 feet to the point of beginning, thence run South
24°35'34" East for 59 03 feet, thence run South
57°55'51" West for 106 03 feet, thence run North
24°18'26" West for 173 37 feet, thence run North
65°42'22" East for 36 feet, thence run South 24°18'26"
East for 100 feet, thence run northerly to the point of
beginning

DATED on January 25, 1999

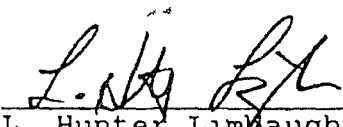

L Hunter Limbaugh
111 Clark Ridge Road
Columbia SC 29223
803-699-6358
Attorney for Plaintiff

Exhibit 1

R-65

STATE OF SOUTH CAROLINA)
)
CAROLYN S BAIR,)
)
Plaintiff,)
vs)
)
PROPERTY RESEARCH)
HOLDINGS, INC , ALSO ALL)
OTHER PERSONS, UNKNOWN,)
CLAIMING ANY RIGHT,)
TITLE, ESTATE, INTEREST)
IN OR LIEN UPON THE REAL)
ESTATE DESCRIBED IN THE)
COMPLAINT HEREIN)
)
Defendants)
/

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO 98-CP-7-1721

99 MAY 19 PM 2 05
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT SC

FINAL JUDGMENT

This action came before the Court on plaintiff's motion for entry of final judgment under Rules 55 and 56, SCRPC

The Court finds that default was properly entered against the unknown parties not otherwise represented by James B Richardson as guardian ad litem

The Court further finds that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law Accordingly,

IT IS ORDERED AND ADJUDGED

1 The title of plaintiff, Carolyn S Bair, to the following real estate in Beaufort County, South Carolina

From the northwestern corner of Lot 5, Hilton Head Beach Subdivision No 1, run South 24°35'34" East for 100 feet to the point of beginning, thence run South 24°35'34" East for 59 03 feet, thence run South 57°55'51" West for 106 03 feet, thence run North 24°18'26" West for 173 37 feet, thence run North 65°42'22" East for 36 feet, thence run South 24°18'26" East for 100 feet, thence run northerly to the point of beginning,

being the real estate described in Exhibit "A" attached to the complaint, is a good title against any and all claims of defendants and of all persons claiming by, through, or under

Exhibit 2

R-66

Bair v Property Research, et al
Final Judgment

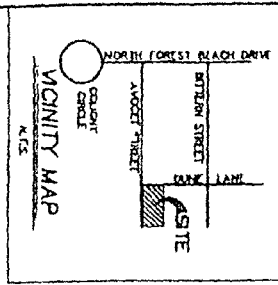
defendants or any of them since the filing of the notice of lis pendens

2 Those claims or purported claims are canceled, and the title to the real estate is forever quieted in plaintiff, Carolyn S Bair, against all of such claims

3 Plaintiff, Carolyn S Bair, is declared to hold title to the real estate in fee simple absolute free and clear of all pledges, mortgages, security interests, liens, charges, restrictions, conditions, other encumbrances, claims, options, and interests

Dated at Beaufort, South Carolina, this 19 day of May 1999

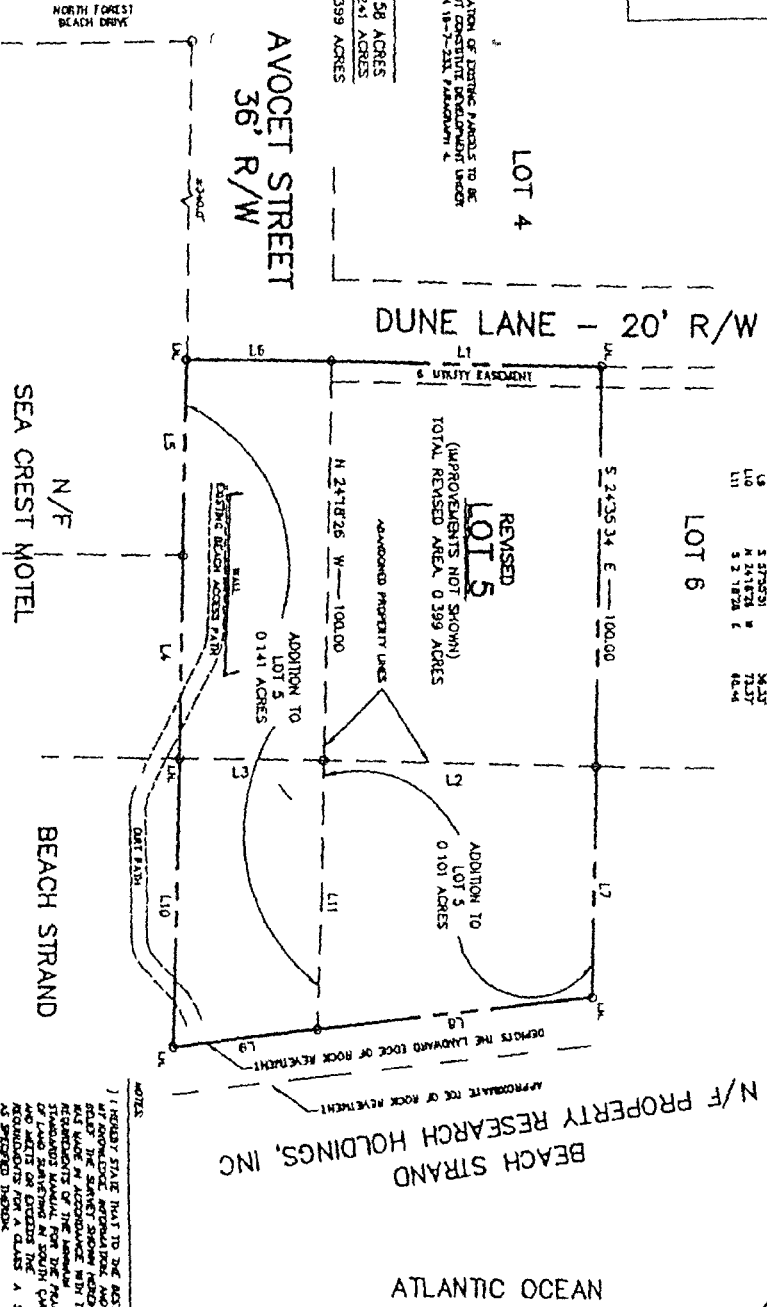
5/Donald W Beatty



SPECIAL NOTE:
LOT 5 REVEALED TO SHOW A RECONSTRUCTION OF EXISTING PARCELS TO BE CONSOLIDATED WITH LOT 4. DOES NOT CONSTITUTE DEVELOPMENT UNDER FORM OF HILTON HEAD LAND SECTION 18-7-21A PARAGRAPH 4.

AREA TABLE

ORIGINAL LOT	=	0.158 ACRES
ADDITION	=	0.241 ACRES
TOTAL REVISED LOT	=	0.399 ACRES



LINE	DIRECTION	DISTANCE
L1	N 89° 12' 30" E	64.78
L2	S 89° 12' 30" E	64.78
L3	N 89° 12' 30" E	64.78
L4	S 89° 12' 30" E	64.78
L5	N 89° 12' 30" E	64.78
L6	S 89° 12' 30" E	64.78
L7	N 89° 12' 30" E	64.78
L8	S 89° 12' 30" E	64.78
L9	N 89° 12' 30" E	64.78
L10	S 89° 12' 30" E	64.78
L11	N 89° 12' 30" E	64.78
L12	S 89° 12' 30" E	64.78
L13	N 89° 12' 30" E	64.78
L14	S 89° 12' 30" E	64.78
L15	N 89° 12' 30" E	64.78
L16	S 89° 12' 30" E	64.78
L17	N 89° 12' 30" E	64.78
L18	S 89° 12' 30" E	64.78
L19	N 89° 12' 30" E	64.78
L20	S 89° 12' 30" E	64.78
L21	N 89° 12' 30" E	64.78
L22	S 89° 12' 30" E	64.78
L23	N 89° 12' 30" E	64.78
L24	S 89° 12' 30" E	64.78
L25	N 89° 12' 30" E	64.78
L26	S 89° 12' 30" E	64.78
L27	N 89° 12' 30" E	64.78
L28	S 89° 12' 30" E	64.78
L29	N 89° 12' 30" E	64.78
L30	S 89° 12' 30" E	64.78
L31	N 89° 12' 30" E	64.78
L32	S 89° 12' 30" E	64.78
L33	N 89° 12' 30" E	64.78
L34	S 89° 12' 30" E	64.78
L35	N 89° 12' 30" E	64.78
L36	S 89° 12' 30" E	64.78
L37	N 89° 12' 30" E	64.78
L38	S 89° 12' 30" E	64.78
L39	N 89° 12' 30" E	64.78
L40	S 89° 12' 30" E	64.78
L41	N 89° 12' 30" E	64.78
L42	S 89° 12' 30" E	64.78
L43	N 89° 12' 30" E	64.78
L44	S 89° 12' 30" E	64.78
L45	N 89° 12' 30" E	64.78
L46	S 89° 12' 30" E	64.78
L47	N 89° 12' 30" E	64.78
L48	S 89° 12' 30" E	64.78
L49	N 89° 12' 30" E	64.78
L50	S 89° 12' 30" E	64.78
L51	N 89° 12' 30" E	64.78
L52	S 89° 12' 30" E	64.78
L53	N 89° 12' 30" E	64.78
L54	S 89° 12' 30" E	64.78
L55	N 89° 12' 30" E	64.78
L56	S 89° 12' 30" E	64.78
L57	N 89° 12' 30" E	64.78
L58	S 89° 12' 30" E	64.78
L59	N 89° 12' 30" E	64.78
L60	S 89° 12' 30" E	64.78
L61	N 89° 12' 30" E	64.78
L62	S 89° 12' 30" E	64.78
L63	N 89° 12' 30" E	64.78
L64	S 89° 12' 30" E	64.78
L65	N 89° 12' 30" E	64.78
L66	S 89° 12' 30" E	64.78
L67	N 89° 12' 30" E	64.78
L68	S 89° 12' 30" E	64.78
L69	N 89° 12' 30" E	64.78
L70	S 89° 12' 30" E	64.78
L71	N 89° 12' 30" E	64.78
L72	S 89° 12' 30" E	64.78
L73	N 89° 12' 30" E	64.78
L74	S 89° 12' 30" E	64.78
L75	N 89° 12' 30" E	64.78
L76	S 89° 12' 30" E	64.78
L77	N 89° 12' 30" E	64.78
L78	S 89° 12' 30" E	64.78
L79	N 89° 12' 30" E	64.78
L80	S 89° 12' 30" E	64.78
L81	N 89° 12' 30" E	64.78
L82	S 89° 12' 30" E	64.78
L83	N 89° 12' 30" E	64.78
L84	S 89° 12' 30" E	64.78
L85	N 89° 12' 30" E	64.78
L86	S 89° 12' 30" E	64.78
L87	N 89° 12' 30" E	64.78
L88	S 89° 12' 30" E	64.78
L89	N 89° 12' 30" E	64.78
L90	S 89° 12' 30" E	64.78
L91	N 89° 12' 30" E	64.78
L92	S 89° 12' 30" E	64.78
L93	N 89° 12' 30" E	64.78
L94	S 89° 12' 30" E	64.78
L95	N 89° 12' 30" E	64.78
L96	S 89° 12' 30" E	64.78
L97	N 89° 12' 30" E	64.78
L98	S 89° 12' 30" E	64.78
L99	N 89° 12' 30" E	64.78
L100	S 89° 12' 30" E	64.78

REFERENCE PLAT

HILTON HEAD BEACH
SUBDIVISION NO. 1
DATED APRIL-JUNE 1992
BY FRED C. HAYES S.C.R.L.S. NO. 1377

NOTES:

1. THIS SURVEY DOES NOT REFLECT BEACH SET BACK LINE A STRAIGHT LINE.

2. AREA CONTAINED WITHIN THE PROPERTY BEING ADDED TO THE LOT FOR THE PURPOSE OF THE ROCK REVEALMENT CONTROL STRUCTURE.

NOTES:

1. THESE LOTS ARE LOCATED IN ZONE 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 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, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

2. THE PLAT IS FOR CLOSING PURPOSES ONLY AND SHOULD NOT BE USED FOR ANY OTHER PURPOSE.

3. THE PLAT IS FOR CLOSING PURPOSES ONLY AND SHOULD NOT BE USED FOR ANY OTHER PURPOSE.

FOR CAROLYN BAIR



Exhibit 3

APPENDIX000

BOUNDARY
PLAT OF
REVISED LOT 5
DUNE LANE
A PORTION OF
HILTON HEAD BEACH
SUBDIVISION NO. 1
HILTON HEAD ISLAND
BEAUFORT COUNTY
SOUTH CAROLINA

Fred C. Hayes
FRED C. HAYES
S.C.R.L.S. NO. 11059



SURVEYING CONSULTANTS
401 Bow Circle Park Place
Hilton Head Island SC 29928
TELEPHONE: (803) 842-3304
FAX: (803) 785-7886

SCALE 1" = 30'
DATE 4/24/97
JOB NO. 89207A

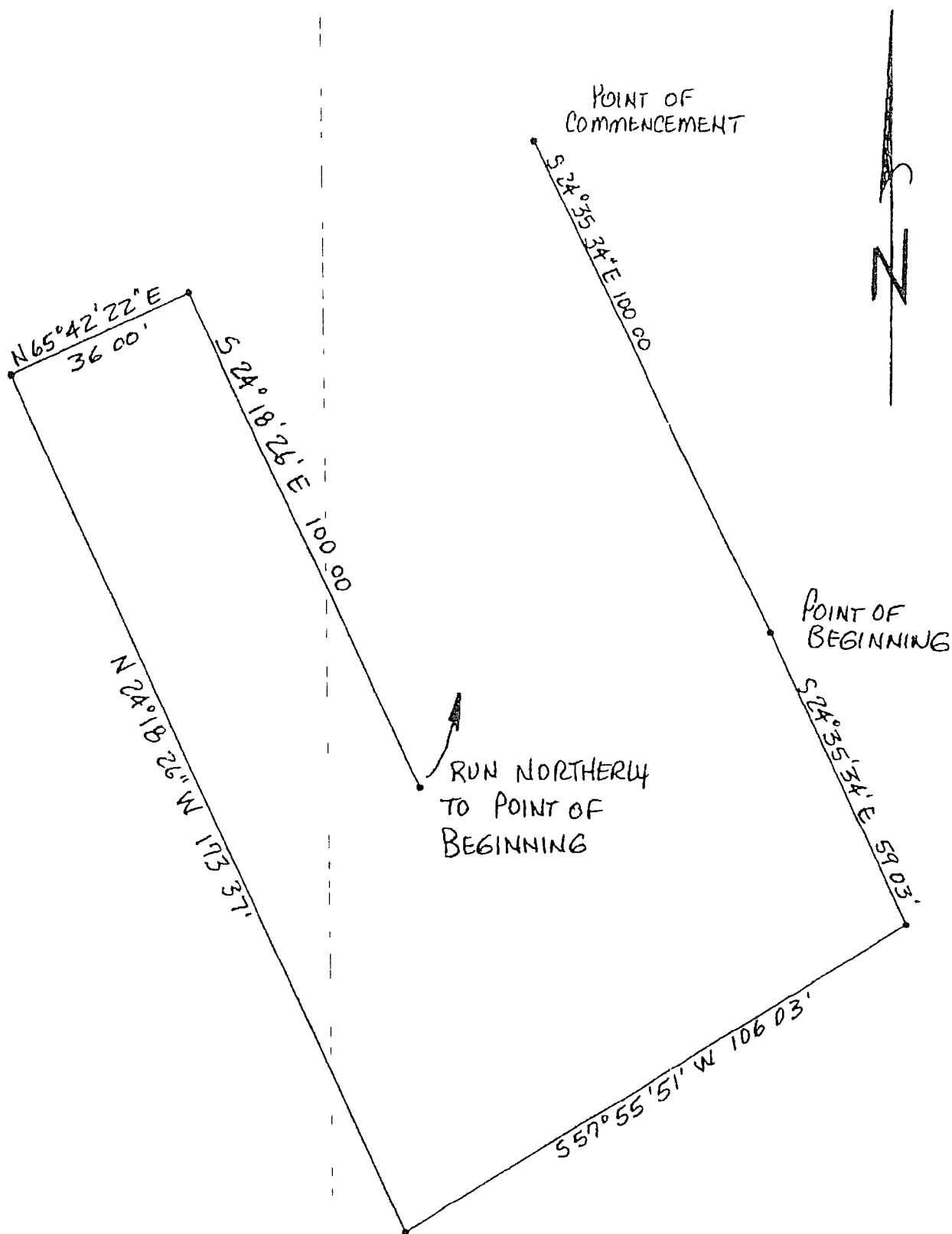


Exhibit 4

R-69

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

FOREST BEACH OWNER S
ASSOCIATION, INC, TREVOR
HOWARD

Plaintiffs,

vs

CAROLYN S BAIR,

Defendant

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO 04-CP-07-2036

PLAINTIFFS' REPLY TO
COUNTERCLAIM

The Plaintiffs respond to the Counterclaim asserted by the Defendant as follows

FOR A FIRST DEFENSE

(General Denial)

1 That the Plaintiffs deny each and every allegation of the Defendant's Counterclaim not hereinafter admitted, qualified or explained

2 That the Plaintiffs deny the allegations of paragraphs 38 and 40 of the Defendant's Counterclaim and demand strict proof thereof

FOR A SECOND DEFENSE

(Unclean Hands)

3 That the Plaintiffs repeat , re-allege and incorporate by reference the allegations of paragraphs 1 through 2 above

4 That as a result of the conduct of the Defendant in this action, as well as other litigation involving this and other property, the Defendant is barred from the relief she is seeking by the doctrine of unclean hands This includes orchestrating a purported action to quiet title to the Disputed Properties through litigation which was intentionally designed to not include or

provide notice to various interested parties, including the Plaintiffs , who held an interest in said property and whom the Defendant knew would object

FOR A THIRD DEFENSE
(Waiver Estoppel, Laches)

5 That the Plaintiffs repeat , re-allege and incorporate by reference the allegations of paragraphs 1 through 4 above

6 That as a result of the Defendant failing to properly and timely assert her rights, and through her participation and testimony in other litigation in a manner totally inconsistent with the positions she has asserted in this action, the Defendant is barred by the doctrine of waiver, estoppel and laches

FOR A FOURTH DEFENSE
(Statute of Limitations)

7 That the Plaintiffs repeat , re-allege and incorporate by reference the allegations of paragraphs 1 through 6 above

8 That the Defendant's claim to title to the property is barred by the applicable statute of limitations

FOR A FIFTH DEFENSE
(Collateral Estoppel, Res Judicata)

9 That the Plaintiffs repeat , re-allege and incorporate by reference the allegations of paragraphs 1 through 8 above

10 That the Defendant is barred from asserting title to the Disputed Properties in this action based on her prior inconsistent testimony under oath and contrary positions asserted in prior litigation as well as binding court decisions in other cases in which she was a party

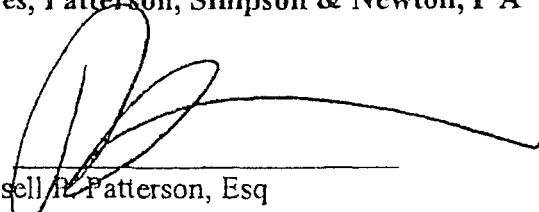
Wherefore, the Plaintiffs pray as follows

- 1 That the Defendant's Counterclaim be dismissed with prejudice
- 2 For such other and further relief as this Court may deem just and proper

Hilton Head, South Carolina

September 6, 2008

Jones, Patterson, Simpson & Newton, P A

By 
Russell H. Patterson, Esq
PO Drawer 7049
Hilton Head Island, SC 29938
843-842-6111

Attorney for the Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

FOREST BEACH OWNERS
ASSOCIATION INC. and
TREVOR HOWARD

Plaintiffs

vs

CAPOLYN S BAIR

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
C A NO 04 CP 07 0036

PLAINTIFF'S PRE-TRIAL BRIEF

The Plaintiffs Forest Beach Owners Association Inc (FBOA) and Trevor Howard (Howard) respectfully submit the r Pre Trial Brief in connection with this matter set for trial September 9th and 10th 2008

A INTRODUCTION

The Plaintiff FBOA is a voluntary property owner's association for various sections of North Forest Beach an ocean front community lying generally to the south of Colony Plaza located in Hilton Head Island South Carolina. The FBOA is involved with various subdivisions (Nos. 1, 2, 3, 1A, 2A, Lawton Beach) that were initially formed and platted by The Hilton Head Company (HHCO) in the early 1950's and are subject to various restrictive covenants and plats of record (Exs. 10-79-85). The Plaintiff Howard owns Lot 33 in Hilton Head Beach Subdivision No. 1 (Exs. 69A-10).

The original property owner's association for this subdivision was Forest Beach Association Inc (FBA) which was formed in October 1974 and continued in existence until September 1999 when it was administratively dissolved by the South Carolina Secretary of State.

(Exs 35A-16) Prior to reinstatement parties hostile to the interest of FBA seized the corporate name FBA. A new entity FBOA was then formed on October 6, 2000 and all assets and rights were transferred by FBA as part of winding up its affairs under Section 27 of 1406 of the SEC Code of Laws (1976) into FBOA pursuant to a recorded Absolute Assignment (Exs 16-35B)

The Defendant Carolyn S. Bair (Bair) is the owner of Lot 5 Hilton Head Beach Subdivision No. 1 which is an ocean-front lot adjacent to a street known as A or Avocet Street. Her April 25, 1984 deed (Ex 9) as well as the deeds to all other lots in Hilton Head Beach Subdivision No. 1 were conveyed pursuant to a subdivision plat recorded at Plat Book 9 at Page 4 (Ex 10 copy attached as Ex. A). This plat shows a series of streets labeled A through I running from the main public road, Barnard Avenue all the way to the beach. As reflected on the plat the streets serve as the only access for the interior lot owners to the beach. In addition to the subdivision plat showing Avocet Street the HHCO by covenant in 1956 established certain areas between groups of lots as "Park Areas" to provide beach access to interior land owners (Ex 13 - 1956 HHCO Covenants). Arguably the Avocet Street extension would qualify also as a Park Area. Finally by recorded plat and covenants the HHCO also designated the areas seaward of the platted lots and the end of the platted streets to be held in trust forever as a common for the benefit of all property owners in the development (Exs 84-88). Thus two specific properties are in dispute in this case graphically depicted on Ex. B attached hereto as follows:

1. The end of Avocet Street next to Lot 5 owned by Bair, which is either a street or a "Park Area" (hereinafter "Street Extension")

2. The land seaward of the Bair lot and seaward of the end of Avocet Street (hereinafter "Beach Trust Property")

When Bair purchased her lot in April 1984, she was very much aware that adjoining property owners used the Street Extension to access the beach and that they had the legal right to do so. In fact, she has acknowledged in her deposition in this case and in sworn testimony in other cases that people regularly traversed said property to access the beach as was intended under the original plan of development. (Bair Dep. pp. 24-25, 47-48; Reference Hearing 8/31/94 FBA v. PRHI Ex. 61(a) p. 77. There is a beach access right in front of the parking lot. People go down the side of the planter to the beach absolutely every day.)

On November 20, 1998, Ms. Bair filed what was styled as a quiet title action in the Beaufort County Court of Common Pleas where she claimed title by adverse possession to the Street Extension and the Beach Trust Property adjacent to her lot (hereinafter Bair QTA). Exs. 38-52. There was only one named defendant, Property Research Holdings, Inc. (PRHI), an entity controlled by Frank Guscio, which claimed title to all of the street extensions and all of the Strand Blocks in Hilton Head Subdivision No. 1. As will be discussed below in more detail, although Bair was well aware of the existence of the FBA and its claimed rights to the property, the easement rights of interior lot owners to access the beach down Avocet Street, as well as the rights of all lot owners to use said area as a beach access, these known parties were intentionally not named in the Bair QTA.

On March 8, 2000, after completion of the QTA which did not name required parties, PRHI for no consideration executed a quit claim deed (Ex. 73A) to Bair which contained a metes and bounds description that is completely erroneous. The metes and bounds property description does not close. It is the position of the Plaintiffs this deed thus conveys no property whatsoever.

On May 23, 2001, FBOA received title to all of the street extensions in Hilton Head Subdivision No. 1 from PRH (LXs 24-25) in which the Avocet Street Extension and a portion of the Beach Trust Property seaward of said street end (i.e., a clear path and the way to the ocean).

On or about August 2004, some five (5) years after the Bait QTA was completed, Bait completely blocked off the access to the beach through Avocet Street by the erection of a very large iron gate, a large block wall and the placement of heavy landscaping (LX 77). Just three (3) months after the gate and wall were constructed, FBOA filed this action seeking a permanent injunction requiring Bait to remove all obstructions within the boundaries of the Street Extension and Beach Trust Property to allow the Plaintiffs and the adjoining owners, their guests and invitees in Hilton Head Beach Subdivision No. 1 free and unobstructed access to the beach.

B. PLAIDINGS - ISSUES TO BE TRIED

The Plaintiffs' original Complaint was filed November 15, 2004. Pursuant to a Second Amended Summons and Complaint dated April 20, 2007, the Plaintiffs have asserted three (3) causes of action which can be summarized as follows:

1. COA Number 1 - A Declaratory Judgment action requesting the Court determine who holds valid title to the disputed Street Extension and the Beach Trust Property. In addition, the Plaintiffs seek to require Bait to remove the iron gate, block wall and other obstructions from said parcels.

2. COA Number 2 - If the Court determines that FBOA does not own the Street Extension and Beach Trust Property (collectively, Disputed Properties), FBOA requests the Court answer the following questions:

A. What specific covenants and restrictions apply to the Disputed Properties and what are the parties' rights to use and access same?

B Is the Street Extension a street?

C Is the Street Extension Park Area under the 1956 HICO Covenants (Ex 13) and subject to provisions of Article V of same?

D Is the Beach Trust Property subject to the provisions of the Beach Trust Covenants and Beach Trust Plat (Exs 84 88) and if so what are the rights of the parties to use own and access same?

3 COA Number 3 – The Plaintiffs request that this Court order Bair to remove various improvements (gate block wall two storage sheds etc.) she constructed on her property without FBOA architectural review board approval and in violation of certain setbacks.

4 Bair Counterclaim – The Defendant filed an Answer to the Second Amended Complaint dated June 22, 2007, raising various affirmative defenses and asserting a Counterclaim seeking a determination that Bair owns the Disputed Properties free and clear of all liens, covenants and restrictions based on adverse possession. The Plaintiffs filed a Reply to said Counterclaim on September 6, 2008.

C. LEGAL DISCUSSION

1. Property Rights Held by the Plaintiffs

The FBOA claims legal title to the Disputed Properties and both Plaintiffs claim various easement rights over same. A discussion of these property interests follows.

A FBOA Holds Fee Simple Title to the Street Extension and Beach Trust Property

Pursuant to the deed into FBOA from PRHI of May 23, 2001 (Exs 24 25) the FBOA holds valid title to the Street Extension and the portion of the Beach Trust Property seaward of the end of said platted Street. As is discussed below, the 1998 Bair QTA, which did not name FBA or the FBOA or any other parties who had an interest in the properties, is not binding

against the Plaintiffs. In addition, the prior plat recorded from PR III to Barr (Ex 73A) has an invalid legal description that conveys no property whatsoever.

Finally, as to the Beach Trust Property, the IBOA claims title to same on behalf of all property owners, as said property was dedicated forever as common by the HHCO in 1953 by both recorded plat and covenants. (Exs 84-88)

B. Plaintiffs' Easement Rights Created Under Subdivision Plat (PB 9/4 Ex 10)

Pursuant to a very long line of unbroken authority, when a developer sells land pursuant to a recorded plat reflecting streets, open spaces, parks, etc., all subsequent purchasers acquire easement rights in all such areas shown on said plats. Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950); Outlaw v. Morse, 222 S.C. 24, 71 S.E.2d 509 (1952); Newton v. Batson, 223 S.C. 545, 77 S.E.2d 212 (1953); Epps v. Freeman, 261 S.C. 375, 200 S.E.2d 233 (1973); Blue Ridge Realty Company v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965). There is no question the Street Extension is shown as a street on the April 1952 Plat recorded at PB 9 at P 4 (Ex 10) and is specifically referenced in all ten (10) deeds in Barr's chain of title (Exs 1-9). In addition, the testimony at trial will show the Avocet Street Extension has been used by vehicles for decades including up to the time Barr installed the iron gates.

C. Plaintiffs' Easement Rights Under 1956 HHCO Covenants (DB 78 P. 306 Ex 13)

The Barr lot is subject to the 1956 HHCO Covenants at DB 78/306 (Ex 13). In Section V, said covenants provide areas between groups of lots shall be set aside as Park Areas to provide means of access to the beach for rear lots. This covenant clearly provides easement rights for access to the beach to the Plaintiffs.

D Plaintiffs Easement Rights Under Beach Trust Covenants and Plats

Finally the Plaintiffs also have easement rights over the Disputed Properties pursuant to the dedication of the Beach Trust Properties defined as areas between the platted lots and the ends of platted streets and the ocean, pursuant to the two covenants applicable to Hilton Head Beach Subdivision No. 1 executed by the HHCO in March 1953 (Lxs 85-86). The HHCO dedicated said Beach Trust Property to be held in trust as a common, forever for the use and benefit of all present and future property owners in Hilton Head Subdivision No. 1. A common is defined as an area belonging or shared equally by more than one and as a tract of land set apart by city or town for use by the general public. Formerly such land was to be used for common pasturage. Now usually called Parks. Black's Law Dictionary 5th Edition (1979).

In addition to the dedication of said properties by recorded covenants forever as a common the same areas were dedicated by plat pursuant to PB 12 at Page 89 dated July 1965 (Ex 54). Said plat designates this property as follows: Strand at Hilton Head Beach Subd No. 1 Trust Property. As noted above South Carolina has long recognized a dedication occurs when such a plat is recorded with specific designations. (See Cason et al)

Not only do these documents create easement rights but the use of the term common clearly indicates said property is not to be titled or controlled by an individual owner but held in trust for use by all the owners (i.e. FBOA property owner's association).

2 Plaintiffs' Claims Are Not Barred By the 1998 BIA QIA

A Not Binding on Known Parties Not Namee

Barr's reliance to her claim of title on the 1998 Barr QIA is misplaced since there are numerous jurisdictional and other fatal defects in said action. The foremost of these defects is

but she intentionally did not name parties she knew had an interest in the properties and who would object. Only PRH was a party Defendant in the action (Ex 38). By representing to the Court she did not know of any other parties claiming an interest in the case and relied on § 67-40 to name unknown parties (Ex 47).

Although the South Carolina Code authorizes the use of fictitious defendants in real property actions, such is meant only for those defendants whom the plaintiff cannot reasonably glean from the appropriate land records or other means as having some right, title or interest in the subject property. S.C. Code Ann. § 15-67-40 provides that "[I]n any action brought to determine adverse claims to real property within this State the plaintiff may insert in the title thereof in addition to the names of such persons as are known or appear of record to have some right, title, interest, estate or lien in or on the real property in controversy, the following: Also all other persons known claiming any right, title, estate, interest in or lien upon the real estate described in the Complaint herein.

As summarized in 67 A.C.J.S. Parties § 171:

The purpose of the rule governing fictitious parties is to provide a mechanism to bring in known, but unidentified, responsible parties who may only be ascertained through the use of judicial mechanisms such as discovery. Filing an action against a fictitious party is only appropriate when circumstances exist in which the identity of the unknown defendant is reasonably capable of discovery.

The plaintiff has no duty to exercise reasonable diligence to ascertain the true facts before filing a complaint designating a defendant by a fictitious name, however the ignorance of the name must be real, and not willful, ignorance or such as might be removed by mere inquiry or a resort to means of information. So, an action to quiet title against unknown defendants does not affect owners of record who cannot be classified as unknown persons, and they are not made parties by such designation (emphasis added).

In 74 C.J.S. Quieting Title § 90, it provides as follows:

Final judgment in action to quiet title cannot be entered even as between the parties where persons other than the parties may have an estate or interest in the

property. Thus, a judgment in an action to quiet title in which the owners of the land are not made parties is void.

See also 74 C.J.S., *supra* § 92 ("Where the jurisdiction of the court is wrongfully invoked by false allegations in the bill the decree may be canceled in a direct proceeding or vacated on motion") (citing Buckhannon v. Nash, 216 F. Supp. 843 (1 D. Ark. 1963) (direct proceeding); Sawyer v. Gustaso, 96 Fla. 611, 57 So. 57 (1928) (by motion)); 49 C.J.S. *supra* § 336 ("The absolute nullity of a judgment may be raised at any time. LaBove v. Theriot, 597 So. 2d 1007, 1011 (La. 1992), including a lack of either personal jurisdiction Succession of Scott, 480 So. 2d 1022 (La. Ct. App. 1985), or subject matter jurisdiction Barry v. Parry, 606 So. 2d 1391 (La. Ct. App. 1992)).

There will be ample evidence at trial that Bair was well aware of the existence and identity of the property owners association and the other lot owners in Hilton Head Subdivision No. 1 at the time of the filing of the 1998 Bair QTA, including the following:

(1) The identity of all property owners in the subdivision was a matter of public record at the courthouse,

(2) Bair was aware around 1990, some eight (8) years prior to filing the QTA of the existence of the FBA because she sought their approval to build a pool on her lot as required under the covenants,

(3) The FBA filed suit against Bair personally for violation of various covenants in the same neighborhood on another oceanfront lot she owned on June 2, 1994, some four (4) years prior to the Bair QTA. These violations included building improvements in another street extension providing beach access to interior lot owners next to another oceanfront lot owned by Bair (FBA v. Bair, 94-CP-07-925 – Exhibit 62). Bair personally attended the reference hearing on October 20, 1994 wherein a settlement was reached (Ex. 62(b)). When

Barr failed to comply with the Settlement Order she was held in Contempt of Court (Exs 62(d) 67(c)). She eventually removed all improvements on the street extension in the same neighborhood.

(4) On August 31, 1994 Barr testified on behalf of PRHI in another lawsuit filed by IBA against PRHI and others as to certain land disputes. She was cross examined by IBA's attorney specifically about the Avocet Street Extension which serves as a beach access. It was at this hearing in 1994 some four (4) years prior to her filing the Barr QTA that she acknowledged the street extension was a beach access (Ex 61(a)).

It is thus abundantly clear that when Barr filed the QTA on November 11, 1998 she intentionally did not name the parties most likely to object to her adverse possession claim the property owner's association which was actively looking out for the property owner's rights and the property owners themselves.

This devious plan by Barr and her husband was further buttressed by the letter of L Hunter Limbaugh dated April 27, 1999 to Judge Donald W. Beatty (Ex 51) when he made the very unusual request in an adverse possession case for an Order to be issued without any live testimony or other evidence.

"This case is completely uncontested. All proper steps have been followed to be sure that anyone with any possible adverse position has been notified."

In fact, no effort was made to name anyone who did have an interest since Barr knew her claim to title would be met with vehement opposition.

Barr did not name the correct parties in her QTA even though she clearly knew otherwise. Rather than using reasonable efforts to track down the appropriate parties Barr simply named 'John Does' and effected service by publication in Beaufort, not Hilton Head. However, the use of fictitious defendants is meant only when plaintiffs do not know who the parties are. In the

instant case. Bair used fictitious defendants in an obvious effort to avoid notifying persons Bair knew would object. The Bair QTA is not binding on the Plaintiff or other property owners who were not named parties.

B. Other Defects in Bair QTA

In addition to the fatal flaw of not naming known parties who had an interest in the Disputed Properties, the following defects are present in the ill-fated QTA:

(1) Legal Descriptions Invalid. Bair's 1998 QTA purports to affirm that Bair is the owner of certain real estate based upon adverse possession and provides a legal description of the property she claimed ownership. However, there was a critical fatal mistake in the metes and bound description in the publication of the legal description for the Amended Lis Pendens (Exs. 45, 49) and the legal description in the Final Decree (Ex. 52). The property description does not close and does not describe any property. This will be confirmed by the testimony of Rodney Walker, who is a local surveyor.

Clearly, it was Bair's burden to establish her title in the quiet title action. Hoogenboom v. City of Beaufort, 315 S.C. 306, 313, 433 S.E.2d 875, 881 (Ct. App. 1992). A significant element of Bair's quiet title claim was to identify the land in question. Although a quiet title petition "need not describe the land with the particularity or definiteness . . . the description contained in a petition must not be so indefinite that it would not support an order making the rule absolute." 74 C.I.S. *supra* § 97. See also Powers v. Raviles, 119 S.C. 134, 112 S.E. 78, 86 (1922) ("The sole purpose of a description of land as contained in a deed is to identify the subject-matter of the grant.")

Because Bair failed to adequately describe the subject property, her quiet title action is not valid or binding. See Ford v. Watson, 252 S.C. at 70, 316 S.E.2d at 431 (§ 15-67-90 will

preclude a subsequent litigation only as to those who are bound by the previous litigation) Boone v. Prichett 289 N.C. 226, 228, 150 S.E.2d 288, 289-90 (1967) (a complaint failed to state a cause of action to quiet title when it was based on a deed void for vagueness and uncertainty of description in that the land could not be identified) Deans v. Deans 241 N.C. 17, 81 S.E.2d 321, 325 (1954) (in a quiet title action the description must identify the land or [else] the description is void for uncertainty). It should be noted the same erroneous legal description was used in the March 8, 2000 quit claim deed from PRHI to Bair (Ex. 73A). Due to this fatal defect, no land was conveyed per this deed.

(2) Fraudulent Affidavit for Publication Bair signed and filed a Petition and Affidavit dated January 23, 1999 (Ex. 47) used as the basis to serve the unknown parties by publication. Bair represented to the Court in Paragraph 2 the following:

[b]ecause such fictitiously designated parties are presently unknown to the undersigned or to the Plaintiff it is impossible to find such unknown parties within Beaufort County and South Carolina nor are the last addresses of said unknown parties known to the undersigned or to the Plaintiff. Accordingly, it is impossible with any amount of diligence to effect service of the Summons and Complaint upon such unknown parties exception (sic) by publication.

As discussed above in detail Bair was very much aware of the existence of the IBA¹ as well as the identity of the other owners in the subdivision which had clear rights to access and use both properties in 1998 when the QIA was filed.

(3) Improper Summons – The Summons filed with the Complaint was only directed to PRHI not the other unknown Defendants in violation of Rule 4(b) SCRCP. This is a jurisdictional defect,

¹ The FBA was in existence on November 20, 1988 when Bair filed her QIA and at the time she submitted the Petition and Affidavit of Publication. It was not dissolved by forfeiture until September 20, 1999 (Exhibits 1-16) four months after the final order was signed.

(4) Newspaper Used for Publication of Summons - The Summons and Amended Petitions was published in the Beaufort Gazette, not the local Island Packet. While both papers are legally valid papers of general circulation in Beaufort County, it is well known very few people on Hilton Head read the Beaufort Gazette.

(5) Selection of Guardian Ad Litem - James B. Richardson, Jr., a well known Columbia, South Carolina attorney, was appointed guardian ad litem. Given his location, it would be very unlikely he would have any direct knowledge of the location or use of the subject property and is certainly a questionable choice for a Beaufort County real estate dispute. He waived all notices (Ex. 50) and took little or no action in this QTA.

(6) Easement Rights Not Impacted by QTA - The survey attached to the Bain Complaint (Ex. 38 - Ex. A) clearly reflects the easement rights sought to be protected by the Plaintiffs in this action. The pathway to the beach, used for years by the property owners, is clearly labeled 'Existing beach access path' on her own survey.

Judge Patrick Michael Duffy, South Carolina U.S. District Court Judge, issued an Order on April 26, 2007, involving this identical factual background in the case of Investors Title Insurance Company v. Carolyn B. (C.A. 9:05-1474, U.S. District Court, Ex. 66(b) - copy attached hereto as Ex. C). This was a declaratory judgment action by the title company against Bain seeking an Order that there was no title insurance coverage concerning this very lawsuit. Bain had asked the title company to defend her in the suit now before the Court. Judge Duffy considered the testimony of Bain, her husband Robert Austin, and others and found no coverage based on Bain's prior knowledge of the existence of the title claims of LBOA and the lot owners.

As to the 1998 Bain QTA, Judge Perry basically ruled it was a carefully designed sham orchestrated by Bain and her husband Robert Austin. Included in his findings

- 1 Bair never explained why she did not name FBOA and the four lot owners behind
her house (§ 15)
- 2 Bair and her husband acted as a team in the QTA (§ 16)
- 3 Bair could not explain why she chose a Beaufort newspaper for publication other
than The Island Packet which serves Hilton Head (§ 17)
- 4 Bair admitted she wanted to keep the QTA lawsuit quiet (§ 17)
- 5 Bair had knowledge prior to the filing of the 1989 Bair QTA of the existence of
claims of title to the Avocet Street Extension (§ 35)
- 6 Bair and her husband filed a QTA in which they failed to name parties in which
Bair knew had an interest in the property in dispute (§ 37)

Any one of these issues raises a red flag. When the Court looks at all of these serious defects, it is clear the 1989 QTA was a sham and cannot be upheld.

3. Three Year Statute of Limitations Under 57-67-90 Not Applicable

The three (3) year statute of limitations to re-open a judgment quieting title is clearly not applicable under the facts in this case. This is true since the Bair QTA is not binding on the Plaintiffs who were known parties and intentionally not named. A review of the three (3) South Carolina cases construing this section and just basic common sense leads to this conclusion.

In Ford v. Watson, 282 S.C. 66, 316 S.E.2d 429 (Ct. App. 1984), the Court in construing 15-67-90 held that this section will preclude a subsequent litigation only as to those who are "bound by" the previous litigation. In Ford, the party seeking the protection of 15-67-90 had filed a prior QTA listing unknown defendants and served same by publication. The Court held that although Code § 15-67-40 provides "authorization to serve certain unknown persons," it is doubtful that an adverse claimant in possession can be properly served with process by being

designated as an unknown and served by publication. Ford p. 431 n.4. In essence, the Court held that section 15-67-90 does not mandate an absolute stamp of validity after three (3) years for every OIA – only those that were properly completed. The Court noted you cannot serve one in possession by publication under a John Doe. As to the application of Section 15-67-90, the Court stated at page 431 as follows: "It is clear that this section, which operates as a statute of limitation, will preclude the instant action only as to those heirs who are bound by the prior actions. For the reasons noted above, the Plaintiffs were not bound by the fraudulent Bair QIA. If Section 15-67-90 is to be construed as Bair asserts today, the Court in Ford would not care if service by publication was completed properly in connection with said possession claim."

A Beaufort County case perhaps best illustrates how the Court applies this statute when parties are intentionally omitted. In Perry v. Heirs at Law & Distributors of Gadsden, 313 S.C. 296, 301, 437 S.E.2d 174, 177 (Ct. App. 1993) modified on other grounds 316 S.C. 224, 449 S.E.2d 250 (1996), a son had committed actionable fraud by not mentioning the existence of children or siblings in an action to quiet title. The lower Court had ruled 15-67-90 was not available as a defense when the undisclosed siblings surfaced after three years to dispute the earlier action. Judge Kemmerlin, the Trial Judge, eloquently stated the possible misapplication of 15-67-90 as an absolute bar after three (3) years with the following language quoted by the appellate court in Perry at p. 178:

If this is true, I can eat Christmas dinner with my sister each year in Sumter during which time I secretly bring a suit alleging that I am the sole heir to a piece of property in Beaufort County left to us as tenants in common by our intestate father, in which suit I, of course, do not name nor serve my sister, so that three Christmases after a decree in my favor, I can announce to my sister as I approach her sideboard for a second serving of turkey and oyster stuffing, "hereafter I will not appear at your home for Christmas because I will celebrate the holidays at our old ancestral [sic] home in Beaufort, in which home, incidentally, you have no interest, and to which you are not invited!"

By including this portion of Judge Kemmerlin's Order in its opinion, the Court in Perry is in Ford provided clear guidance as to the application of 15-67-90. This statute is clearly not an absolute but after three (3) years if necessary parties are not included in the original action or if the original action was not properly completed.

Under Bair's interpretation of 15-67-90 following Judge Kemmerlin's eloquent Christmas story, Plaintiffs' counsel could file suit in Beaufort County claiming title by adverse possession to the Dukes residence at 791 Ribaut Road. I could name just John Doe defendants appoint a guardian ad litem from Oconee County and seek a default judgment without a hearing. I publish my notice in The Island Packet on Hilton Head. I advise the out of town administrative judge I have made every effort to notify all interested parties. I then wait three years and politely ask your Honor to move out of 'my house,' all under the protection of 15-67-90. However absurd such a result may appear Bair would argue this section mandates said action.

The only other South Carolina case mentioning or construing 15-67-90 is Yarborough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990). In that case Richardson filed a quiet title action in 1979 naming Yarborough as a party. A judgment was rendered in Richardson's favor in 1980. One year later Yarborough also filed a quiet title action naming Richardson's successors in interest involving the same property and subsequently lost. Some eight (8) years later in 1988 Yarborough filed another action seeking to set aside the 1980 Richardson judgment based upon intrinsic fraud. The Court of Appeals dismissed the 1988 action under 15-67-90 but only after noting Yarborough was a named party in the 1979 action and that Yarborough had actual knowledge or could have by reasonable diligence acquired full knowledge of all the facts constituting an extrinsic fraud claim prior to three years of filing the

1988 action. The Court clearly concluded the three (3) year time period starts only after a party should have known of the existence of the claim. In the instant case, until Bain installed her large gates blocking the access in August 2004, the FBOA, nor any other property owner, could have no way to know of the existence of the Bain 1998 QTA.

In analogous situations, various other jurisdictions have reached the same. See Porter v. Coco, 2006 WL 3103157 (N.H. 2006) (the omission of landowners' predecessors in interest as expressly named defendants in a previous action to quiet title brought by the predecessors in interest of adjoining property owners, despite the fact that the landowners' predecessors in interest were persons known to have an interest in the subject property of such action, resulted in a failure to meet statutory requirements for quieting title and rendered the court that issued judgment in the action void of jurisdiction, and therefore, landowners could collaterally attack the previous quiet title decree that held that disputed portion of property was part of the adjoining land); Konantz v. Stern, 283 Minn. 33, 44-45, 167 N.W.2d 19, 10 (1969) (an owner deprived of possession can be required to seek his legal remedy promptly or not at all, but an owner whose possession has not been contested to his knowledge cannot be expected to bring suit against parties unknown to protect his property from adverse claims of which he is unaware).

All three South Carolina cases interpreting 15-67-90 (Ford, Perry, and Yarborough) all have looked at the original QTA to determine if it was properly completed and included the correct, lawful parties. Even a cursory review of the 1998 Bain QTA reveals numerous substantial defects. Section 15-67-90 does not serve as a bar to the claims of FBOA under these facts.

In addition, the 1998 Bain QTA clearly did not impact any easement rights on the Disputed Property. If Bain truly intended to adjudicate the *fee and all easement rights* associated

with the property then Bair's Complaint and other pleadings (Exs 38-39) to quiet title should have expressly so stated. See Hoogenboom, 15 S.C. at 313-433 S.E.2d at 881 (it is the petitioner's burden to establish title in a quiet title action). Because Bair's quiet title petition did not do so, Bair's quiet title decree did not extinguish or even rule upon the subject easement. See 74 C.I.S. *supra* § 90 ("A judgment by default in an action to quiet title may not indulge presumptions which are not supported in the complaint.") (citing Woodard v. Moss, 202 Miss. 33, 30 So. 2d 420 (1947)). The Bair QTA Complaint (Ex. 38) makes no reference to easement rights.

4. Plaintiffs Have Standing to Bring This Action

Both of the Plaintiffs clearly have standing to bring this action. The Plaintiff Howard has owned a home on Lot 33 in Hilton Head Subdivision No. 1 since October 1994 (Ex. 69A). FBOA has owned since December 1994 numerous lots and parcels in Hilton Head Subdivision No. 1 (Exs. 19-22, 24, 25-27). FBOA has held the rights to enforce the covenants since 1990 (Exs. 16-22) and has been paying taxes on various parcels including the Disputed Properties since at least 2004 (Ex. 33).

5. Plaintiffs' Claims Are Not Barred By the Doctrine of Collateral Estoppel

Under the doctrine of collateral estoppel, issues actually and necessarily litigated and determined in a prior action are conclusive on a party to said action in a subsequent action. Beall v. Doe, 281 S.C. 363, 15 S.E.2d 186 (Ct. App. 1984). Bair relies on her 1998 QTA to assert that the issues of ownership and the existence of an easement to access the beach over the Disputed Properties has previously been determined.

The Bair 1998 QTA Complaint (Ex. 38) never seeks to eliminate any easement rights held by anyone. It merely stated Bair held title to the Disputed Properties by adverse possession.

The Complaint did not ask or seek any relief concerning any easements. Thus, even if the actions were properly completed, Bair cannot now, in and her Complaint none pro tunc to try to use collateral estoppel to modify said Complaint to include easement rights held by third parties.

In addition, the numerous defects in the Bair QIA filed by Bair, at best a sham and at worst a fraud upon the Court, cannot be relied upon under this doctrine to eliminate the easement rights asserted by the Plaintiffs. The Bair QIA was defective on numerous grounds, as discussed above (failure to name necessary parties, defective Summons, improper legal description, easement rights identified in survey attached to Complaint, no trial, no hearing or evidence submitted, Bair not entitled to adverse possession as a matter of law).

6. Plaintiff's Claims Not Barred By Doctrine of Res Judicata

For many of the same reasons as collateral estoppel does not bar Plaintiffs' claim, the doctrine of res judicata also does not apply. Various required elements of this doctrine are not met. The first element is identity of parties. Plum Creek Development Company, Inc. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The FBOA, its predecessor FBA, the Plaintiff Howard, nor any other property owner, were made parties to the Bair QIA. The easement rights asserted and claimed by FBOA do not originate from PRHI, but result from the subdivision plat (Ex. 10), the 1956 HHCO Covenants (Ex. 13), and the easements created under the Beach Trust covenants and plats (Exs. 84-88).

The second and third elements of res judicata are also not met. There also must be identity of the subject matter and an adjudication of the issue in the former suit. Plum Creek. Clearly the issues of the easement rights created by the recordation of the subdivision plat and the other covenants and plats listed above were not the subject of the 1988 Bair QIA, nor were they

involved in said litigation. The 1998 Bar Comp. mt. (Ex. 38) makes no reference whatsoever to any easement rights. The interest to eliminate same or of a request for a Court Order extinguishing said rights. As discussed above, if she had referenced the existence of said easement rights, her claim for adverse possession would have been rejected as a matter of law.

7. Covenants and Restrictions are Applicable to Bar Lot 5

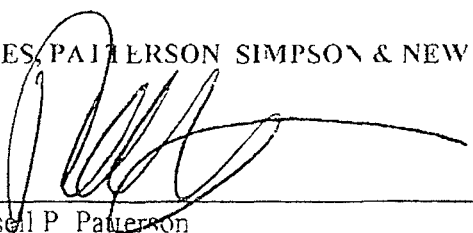
In an effort to avoid the requirements for architectural review board approval under the recorded covenants, it is possible the Defendant may assert at trial that Lot 5 is not subject to any covenants and restrictions. This argument is based on the case of Stylecraft, Inc. v. Thomas, 250 S.C. 475, 159 S.E.2d 647 (1968). Stylecraft involved a conveyance by deed where by the granting clause in the deed purported to convey fee simple title and the second part of the deed set forth a reversionary interest stating if the land was not used for school purposes, title would revert to the original grantor. The Court held that fee simple title may not be reduced by subsequent words in a deed and refused to recognize the reversionary interest.

However, Stylecraft, nor any of the cases before or after same, dealt with the applicability of restrictive covenants, which of course, are mere restrictions on use and do not divest or otherwise reduce ownership. In fact, Plaintiff's counsel has not found a single South Carolina case applying the Stylecraft rule to restrictive covenants. A review of the large number of South Carolina cases concerning the requisites and validity of express covenants finds no such requirement, condition or rule as to their validity or their enforceability. S.E. Digest, Covenants §§ 1-7. Architectural restrictions, as found in the present case, have been expressly approved by our South Carolina Courts. Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1984). Defendant's position is simply not the law in South Carolina and the numerous restrictive covenants cited throughout Bar's chain of title are valid and enforceable.

D. CONCLUSION

This Court has an opportunity to address a carefully designed sham perpetrated on the Court in 1998 and to fully protect beach access to lot owners in Hilton Head Subdivision No. 1. Ban and her husband have attempted to secretly claim title to property clearly intended to be conveyed to the property owners by the original developer and protected with multiple layers of covenants and recorded plats designed to protect and keep open said properties forever. As Judge Duffy concluded under these same facts the 1998 QTA was nothing more than an ill advised scheme that should be dismantled. Just as President Reagan demanded of the Soviets, this Court should tell the Defendant: Ms. Ban, tear down that wall!

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Attorneys for the Plaintiff

Hilton Head Island, South Carolina
September 8, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C A NO 04-CP 07 2036
	)	
FOREST BEACH OWNER'S)	)	
ASSOCIATION, INC and	)	
TREVOR HOWARD,	)	
	)	
Plantiffs,	)	
vs	)	PLAINTIFFS' AMENDED
	)	PRE-TRIAL BRIEF
CAROLYN S BAIR,	)	
	)	
Defendant	)	

The Plaintiffs, Forest Beach Owners Association, Inc (FBOA) and Trevor Howard (Howard) respectfully submit their Amended Pre-Trial Brief in connection with this matter set for trial October 14 and 15, 2008

A INTRODUCTION

The Plaintiff, FBOA, is a voluntary property owners association for various sections of North Forest Beach, an ocean-front community lying generally to the south of Coligny Plaza, located in Hilton Head Island, South Carolina. The FBOA is involved with various subdivisions (Nos 1, 2, 3 1-A 2-A, Lawton Beach) that were initially formed and platted by The Hilton Head Company (HHCO) in the early 1950's and are subject to various restrictive covenants and plats of record (Exs 10, 79-85). The Plaintiff, Howard, owns Lot 33 in Hilton Head Beach Subdivision No 1 (Exs 69A, 10).

The original property owner's association for this subdivision was Forest Beach Association, Inc (FBA) which was formed in October, 1974 and continued in existence until September, 1999 when it was administratively dissolved by the South Carolina Secretary of State (Exs 35A, 16). Prior to reinstatement parties hostile to the interest of FBA seized the corporate name FBA. A new entity, FBOA, was then formed on October 6, 2000 and all assets and rights

were transferred by FBA as part of winding up its affairs under Section 37 31-1406 of the S C Code of Laws (1976) into FBOA pursuant to a recorded Absolute Assignment (Exs 16, 35B)

The Defendant Carolyn S Bair (Bair), is the owner of Lot 5, Hilton Head Beach Subdivision No 1 which is an ocean-front lot adjacent to a street known as "A" or Avocet Street. Her April 25, 1984 deed (Ex 9), as well as the deeds to all other lots in Hilton Head Beach Subdivision No 1, were conveyed pursuant to a subdivision plat recorded at Plat Book 9 at Page 4 (Ex 10, copy attached as Ex A). This plat shows a series of streets, labeled "A" through "T", running from the main public road, Baynard Avenue all the way to the beach. As reflected on the plat, the streets serve as the only access for the interior lot owners to the beach. In addition to the subdivision plat showing Avocet Street, the HHCO by covenant in 1956 established certain areas between groups of lots as "Park Areas" to provide beach access to interior land owners (Ex 13-"1956 HHCO Covenants"). Arguably, the Avocet Street extension would qualify also as a Park Area. Finally, by recorded plat and covenants, the HHCO also designated the areas seaward of the platted lots and the end of the platted streets to be held in trust forever as a "common", for the benefit of all property owners in the development (Exs 84-88). Thus two specific properties are in dispute in this case, graphically depicted on Ex B attached hereto, as follows:

1 The end of Avocet Street next to Bair's Lot 5, which is either a street or a "Park Area" (hereinafter "Street Extension")

2 The land seaward of the Bair lot and seaward of the end of Avocet Street (hereinafter "Beach Trust Property")

When Bair purchased her lot in April, 1984, she was very much aware that adjoining property owners used the Street Extension and Beach Trust Property to access the beach. She acknowledged that they had the legal right to do so. In fact, she has acknowledged in her deposition in this case and in sworn testimony in other cases that people regularly traversed said

property to access the beach, as was intended under the original plan of development (Bair Dep pp 24-25, 47-48, Reference Hearing 8/31/94, FBA v PRHI, Ex 61(a), p 77- There is a beach access right in front of the parking lot People go down the side of the planter to the beach, absolutely every day)

On November 20, 1998, Ms Bair filed what was styled as a quiet title action in the Beaufort County Court of Common Pleas where she claimed title by adverse possession to the Street Extension and the Beach Trust Property adjacent to her lot (hereinafter "Bair QTA"- Exs 38-52) There was only one named defendant, Property Research Holdings, Inc ("PRHI"), an entity controlled by Frank Guscio, which claimed title to all of the street extensions and all of the Strand Blocks in Hilton Head Subdivision No 1 As will be discussed below in more detail, although Bair was well aware of the existence of the FBA and its claimed rights to the property, the easement rights of interior lot owners to access the beach down Avocet Street, as well as the rights of all lot owners to use said area as a beach access, these known parties were intentionally not named in the Bair QTA

On March 8, 2000 after completion of the QTA which did not name required parties, PRHI for no consideration, executed a quit claim deed (Ex 73A) to Bair which contained a metes and bounds description that is completely erroneous The metes and bounds property description does not close It is the position of the Plaintiffs this deed thus conveys no property whatsoever In addition, under the Statute of Uses the Plaintiff contends PRHI did not own the Beach Trust Property, thus the quit claim deed conveyed nothing These issues are discussed in detail below

On May 23, 2001, FBOA received title to all of the street extensions in Hilton Head Subdivision No 1 from PRHI (Exs 24 25) including the Avocet Street Extension and a portion of the Beach Trust Property seaward of said street end (i e , a clear path all the way to the ocean)

On or about August, 2004 some five (5) years after the Barr QTA was completed Barr completely blocked off the access to the beach through Avocet Street by the erection of a very large iron gate, a large block wall and the placement of heavy landscaping (Ex 77)-photo-Ex C attached Just three (3) months after the gate and wall were constructed, FBOA filed this action seeking a permanent injunction requiring Barr to remove all obstructions within the boundaries of the Street Extension and Beach Trust Property to allow the Plaintiffs and the adjoining owners, their guests and invitees in Hilton Head Beach Subdivision No 1 free and unobstructed access to the beach

B PLEADINGS - ISSUES TO BE TRIED

The Plaintiffs' original Complaint was filed November 15, 2004 Pursuant to a Second Amended Summons and Complaint, dated April 20 2007 the Plaintiffs have asserted three (3) causes of action, which can be summarized as follows

1 COA Number 1 - A Declaratory Judgment action requesting the Court determine who holds valid title to the Street Extension and the Beach Trust Property (collectively 'Disputed Properties') In addition the Plaintiffs seek to require Barr to remove the iron gate, block wall and other obstructions from said parcels

2 COA Number 2 - If the Court determines that FBOA does not own the Street Extension and Beach Trust Property, FBOA requests the Court answer the following questions

A What specific covenants and restrictions apply to the Disputed Properties and what are the parties' rights to use and access same?

B Is the Street Extension a street?

C Is the Street Extension a 'Park Area' under the 1956 HHCO Covenants (Ex 13) and subject to provisions of Article V of same?

D Is the Beach Trust Property subject to the provisions of the Beach Trust Covenants and Beach Trust Plat (Exs 84 88) and if so, what are the rights of the parties to use, own and access same?

3 COA Number 3 – The Plaintiffs request that this Court order Bair to remove various improvements (gate, block wall two storage sheds, etc) she constructed on her property without FBOA architectural review board approval and in violation of certain setbacks

4 Bair Counterclaim – The Defendant filed an Answer to the Second Amended Complaint, dated June 22, 2007, raising various affirmative defenses and asserting a Counterclaim seeking a determination that Bair owns the Disputed Properties free and clear of all liens, covenants and restrictions based on adverse possession The Plaintiffs filed a Reply to said Counterclaim on September 6, 2008

C LEGAL DISCUSSION

1 Property Rights Held by the Plaintiffs

The FBOA claims legal title to the Disputed Properties and both Plaintiffs (FBOA and Trevor Howard) claim various easement rights over same A discussion of these property interests follows

A FBOA Holds Fee Simple Title to the Street Extension and Beach Trust Property

Pursuant to the deed into FBOA from PRHI of May 23, 2001 (Exs 24, 25), the FBOA holds valid title to the Street Extension and the portion of the Beach Trust Property seaward of the end of said platted Street As is discussed below starting at page 11, the 1998 Bair QTA, which did not name FBA or the FBOA, or any other parties who had an interest in the properties, is not binding against the Plaintiffs

In addition to the very questionable 1988 QTA, Bair is relying on the March 8, 2000 quit claim deed from PRHI (Ex 73(A)) as a basis of her claim of title to both the Street Extension and the Beach Trust Property. There are two (2) reasons this deed conveys no property whatsoever to Bair.

(1) **Bair Deed Contains an Erroneous Property Description**

As will be confirmed by the expert testimony of surveyor Rodney Walker, the metes and bounds legal description used in the March 8, 2000 quit claim deed (Ex 73(A)) does not close and in fact describes not property at all. A deed which contains an invalid property description is wholly ineffective to convey any property whatsoever. 26A CJS, Deeds § 53 (deed inoperative where the area is not defined), Floyd v. Carswell, 211 Ga. 36, 83 S.E.2d 586 (1954)—metes and bounds description with no starting point fatally defective, Herrington v. Church of the Lord Jesus Christ, 222 Ga. 542, 150 S.E.2d 805 (1966)—deed containing an indefinite terminal point and indefinite course is insufficient and renders deed inoperable.

The subject deed from PRHI, which only uses a metes and bounds description, is clearly inoperative under these authorities as the description does not close and thus there is no valid property description. As such, this deed should be ignored by the Court. The subsequent May 23, 2001 deed by PRHI to the FBOA (Ex 24) which contains a valid description of the Street Extension and a portion of the Beach Trust Property, should be held to convey said parcels to the FBOA. The FBOA does not contend this deed conveys title to the Beach Trust Property immediately in front of Lot 5, as said parcel is clearly not included in the property description for said deed.

(2) Under the Statute of Uses, Title to the Beach Trust Property is Held by All Property Owners in Hilton Head Subdivision No. 1

Regardless of how the Court interprets the legal description of the quit-claim deed from PRHI into Bair, said deed still conveys no property interest. As this Court suggested in its January 30, 2001 Order in Petersburg v. Sokol, et al. (C.A. No. 99-CP-07-427, copy of Order attached as Ex. E, Trial Ex. 63 1(a)) it is the Plaintiff's position that the HHCO Beach Trust Covenants recorded in 1953 (Exhibits 85, 86) and the accompanying recorded plat confirming the Beach Trust Property was subject to said covenants (Ex. 84) created a naked or dry trust for the benefit of all property owners in Hilton Head Subdivision No. 1.¹

Under the Statute of Uses (§62-7-418(a)–S.C. Code of Laws (1976) as amended) and a long line of South Carolina cases, since the HHCO as trustee, had no duties or obligations under the trust it created, the legal and equitable title to the Beach Trust Property claimed by Bair was transferred by operation of law to all of the owners in said subdivision. Faber v. Police, 10 S.C. 376 (1878); Spann v. Carson, 123 S.C. 371, 116 S.E. 427 (1923); Welborn v. Holder, 143 S.C. 277, 141 S.E. 448 (1928); Frerison v. Porter Academy, 217 S.C. 168, 60 S.E.2d 82 (1950). As stated by the Court in All Saints v. The Protestant Episcopal Church, 358 S.C. 209, 223, 595 S.E.2d 253, 260 (2004), the Statute of Uses “has a double effect in turning the equitable interest of one person into a legal interest and extinguishing the legal interest of another.”

As the Beach Trust Property was not owned by the HHCO when it filed for bankruptcy in 1986 (it had conveyed all the lots to third parties in Hilton Head Subdivision No. 1), under the above authorities, the Bankruptcy Trustees' quit-claim deed to PRHI on January 30, 1989 (Ex. 14) did not convey any of the Beach Trust parcels in any of the three oceanfront North Forest Beach Subdivisions (Nos. 1, 2, 3). The subsequent quit-claim deed from PRHI to Bair on

¹ This is the identical argument presented by Bair to your Honor in Bair v. W.J. Enterprises. See Ex. 64(c).

March 8, 2000 (Ex 73(A)) also did not convey to her the Beach Trust Property subject to this action as PRHI did not own same. A review of the applicable case authorities applying these long-established principles is helpful.

The leading South Carolina case applying this rule is clearly Faber. In Faber, under a father's will, property was left in trust to a trustee for the use and benefit of his son, John Faber, for his life, then upon his death to John Faber's son. The Court found fee simple title was held by John Faber since the trustees had no duties under the trust. The Court stated the rule as follows:

"The rule undoubtedly is that where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him to properly perform such duty, the Statute of Uses executes the use and carries the legal title to the *cestri que use*."²

In Spann, the Court was again interpreting a trust created in a will. The Court found the trustee had no duties whatsoever other than to hold legal title. Title was deemed held by the beneficiary of the trust as a matter of law.

The Court in Johnston provided further guidance as to the application of this rule. The Court set forth the following analysis on active versus passive trusts, at page 127:

"For a trust to be active it is essential that the interposition of the trustee be necessary to carry out the valid purposes of the trust, the test being that, with respect to the control, protection, management or disposition of the trust property, the trustee has imposed on him, expressly or by implication, some active or substantial duty to perform or useful purpose to subserve" (emphasis added).

Applying the above rules to the trust created by the HHCO for the beach trust properties, it is clear the HHCO as trustee had absolutely no active or substantial duties of any kind related to said properties.

² The person who holds the right to receive the profits and benefits of the estate, but legal title and possession reside in another. Blacks Law Dictionary (5th ed 1979).

The covenants at DB 74 P 305 (Ex 85) provide as follows

“That the Hilton Head Company, its successors and assigns, shall forever hold in Trust the following described lands for the use and benefit of all present and future property owners of any lot or lots in Hilton Head Subdivision No 1 ”

The declaration at DB 74/306 (Ex 86) contains similar language as to the lands seaward of the platted subdivision

“Said area to be declared a common for the use and benefit of all present and all future owners of property located in Hilton Head Beach Subdivision No 1 and extension thereof ”

The HHCO clearly has no duties under the trusts created under both documents Under All Saints and the other cases discussed above the equitable interest of the property owners of said Subdivisions is converted into a legal interest (i e , title) and the legal interest of the HHCO, and all those taking title from same (i e , PRHI Bair) is extinguished as a matter of law

FBOA would candidly concede that if the Court follows its decision in Petersburg (Ex E attached hereto) and the legal authorities discussed herein, that the application of this rule would also mean FBOA also did not receive title in its deed from PRHI (Ex 24) to the portion of the beach trust property immediately seaward of the end of the Street Extension However, since the Street Extension is not subject to the Beach Trust Covenants, title to the Street Extension would still remain vested in the FBOA

B Plaintiffs' Easement Rights Created Under Subdivision Plat (PB 9/4, Ex 10)

Pursuant to a very long line of unbroken authority, when a developer sells land pursuant to a recorded plat reflecting streets, open spaces, parks, etc , all subsequent purchasers acquire easement rights in all such areas shown on said plats Cason v Gibson, 217 S C 500, 61 S E 2d 58 (1950), Outlaw v Moise, 222 S C 24, 71 S E 2d 509 (1952), Newton v Batson, 223 S C 545, 77 S E 2d 212 (1953), Epps v Freeman, 261 S C 375, 200 S E 2d 233 (1973), Blue Ridge Realty Company v Williamson, 247 S C 112, 145 S E 2d 922 (1965) There is no question the

Street Extension is shown as a street on the April 1952 Plat recorded at PB 9 at P 4 (Ex 10-Ex attached hereto) and is specifically referenced in all ten (10) deeds in Bair's chain of title (Exs 1-9) In addition, the testimony at trial will show the Avocet Street Extension has been used by vehicles for decades, including up to the time Bair installed the iron gates

C Plaintiffs' Easement Rights Under 1956 HHCO Covenants (DB 78 P 306-Ex 13)

The Bair lot is subject to the 1956 HHCO Covenants at DB 78/306 (Ex 13) In Section V, said covenants provide areas between groups of lots shall be set aside as 'Park Areas' to provide means of access to the beach for rear lots This covenant clearly provides easement rights for access to the beach to the Plaintiffs

D Plaintiffs' Easement Rights Under Beach Trust Covenants and Plats

Finally, the Plaintiffs also have easement rights over the Disputed Properties pursuant to the dedication of the Beach Trust Properties, defined as areas between the platted lots and the ends of platted streets and the ocean, pursuant to the two covenants applicable to Hilton Head Beach Subdivision No 1 executed by the HHCO in March, 1953 (Exs 85, 86) The HHCO dedicated said Beach Trust Property to be held in trust as a "common", forever for the use and benefit of all present and future property owners in Hilton Head Subdivision No 1 A 'common' is defined as an area 'belonging or shared equally by more than one' and as a 'tract of land set apart by city or town for use by the general public' Formerly such land was to be used for common pasturage Now usually called 'Parks' Blacks Law Dictionary, 5th Edition (1979)

In addition to the dedication of said properties by recorded covenants forever as a "common" and to be held in trust, the same areas were dedicated by plat pursuant to PB 12 at Page 89, dated July 1965 (Ex 84) Said plat designates this property as follows "Strand at Hilton Head Beach Subd No 1 Trust Property" As noted above, South Carolina has long

recognized a dedication occurs when such a plat is recorded with specific designations (See Cason, et al)

Not only do these documents create easement rights, but the use of the term "common" clearly indicates said property is not to be titled or controlled by an individual owner, but held in trust for use by all the owners (i.e., FBOA property owner's association)

2 Plaintiffs' Claims Are Not Barred By the 1998 Bair QTA

A Not Binding on Known Parties Not Named

Bair's reliance to her claim of title to the Disputed Properties on the 1998 Bair QTA is misplaced since there are numerous jurisdictional and other fatal defects in said action. The foremost of these defects is that she intentionally did not name parties she knew had an interest in the properties and who would object. Only PRHI was a party Defendant in said action (Ex 38). Bair represented to the Court she did not know of any other parties claiming an interest in the case and relied on § 15-67-40 to name "unknown" parties (Ex 47).

Although the South Carolina Code authorizes the use of fictitious defendants in real property actions, such is meant only for those defendants whom the plaintiff cannot reasonably glean from the appropriate land records or other means as having some right, title, or interest in the subject property. S.C. Code Ann. § 15-67-40 provides that "[I]n any action brought to determine adverse claims to real property within this State the plaintiff may insert in the title thereof, in addition to the names of such persons as are known or appear of record to have some right, title, interest, estate or lien in or on the real property in controversy, the following 'Also all other persons known, claiming any right, title, estate interest in or lien upon the real estate described in the Complaint herein'."

As summarized in 67 A C J S Parties, § 171

"The purpose of the rule governing fictitious parties is to provide a mechanism to bring in known, but unidentified, responsible parties who may only be ascertained through the use of judicial mechanisms such as discovery. Filing an action against a fictitious party is only appropriate when circumstances exist in which the identity of the unknown defendant is reasonably capable of discovery

The plaintiff has no duty to exercise reasonable diligence to ascertain the true facts before filing a complaint designating a defendant by a fictitious name, however, the ignorance of the name must be real, and not willful, ignorance, or such as might be removed by mere inquiry or a resort to means of information. So, an action to quiet title against unknown defendants does not affect owners of record who cannot be classified as unknown persons, and they are not made parties by such designation (emphasis added)

In 74 C J S , Quieting Title, § 90, it provides as follows

Final judgment in action to quiet title cannot be entered, even as between the parties, where persons other than the parties may have an estate or interest in the property. Thus, a judgment in an action to quiet title in which the owners of the land are not made parties, is void

See Also 74 C J S , *supra*, § 92 ("Where the jurisdiction of the court is wrongfully invoked by false allegations in the bill, the decree may be canceled in a direct proceeding or vacated on a motion ") (citing Buckhannon v Nash, 216 F Supp 843 (E D Ark 1963) (direct proceeding), Sawyer v Gustason, 96 Fla 6, 118 So 57 (1928) (by motion)), 49 C J S , *supra*, § 336 ("The absolute nullity of a judgment may be raised at any time," LaBove v Theriot, 597 So 2d 1007, 1011 (La. 1992), including a lack of either personal jurisdiction, Succession of Scott, 480 So 2d 1022 (La Ct App 1985), or subject-matter jurisdiction, Barry v Barry, 606 So 2d 1391 (La. Ct App 1992))

There will be ample evidence at trial that Bair was well aware of the existence and identity of the property owners association and the other lot owners in Hilton Head Subdivision No 1 at the time of the filing of the 1998 Bair QTA, including the following

(1) The identify of all property owners in the subdivision was a matter of public record at the courthouse,

(2) Bair was aware around 1990, some eight (8) years prior to filing the QTA, of the existence of the FBA because she sought their approval to build a pool on her lot, as required under the covenants

(3) The FBA filed suit against Bair personally for violation of various covenants in the same neighborhood on another oceanfront lot she owned on June 2, 1994, some four (4) years prior to the Bair QTA. **These violations included building improvements in another street extension providing beach access to interior lot owners next to another oceanfront lot owned by Bair (FBA v Bair, 94-CP-07-925 – Exhibit 62)** Bair personally attended the reference hearing on October 20, 1994 wherein a settlement was reached (Ex 62(b)) When Bair failed to comply with the Settlement Order, she was held in Contempt of Court (Exs 62(d), 62(e)) She eventually removed all improvements on the street extension in the same neighborhood

(4) On August 31, 1994, Bair testified on behalf of PRHI in another lawsuit filed by FBA against PRHI and others as to certain land disputes. She was cross-examined by FBAs attorney specifically about the Avocet Street Extension which serves as a beach access. It was at this hearing in 1994, some four (4) years prior to her filing the Bair QTA, that she acknowledged the street extension was a beach access (Ex 61(a))

It is thus abundantly clear that when Bair filed the QTA on November 11, 1998, she intentionally did not name the parties most likely to object to her adverse possession claim, the property owners association which was actively looking out for the property owner's rights and the property owners themselves

This devious plan by Bair and her husband was further buttressed by the letter of L. Hunter Limbaugh, dated April 27, 1999, to Judge Donald W. Beatty (Ex. 51) when he made the very unusual request in an adverse possession case for an Order to be issued without any live testimony or other evidence.

"This case is completely uncontested. All proper steps have been followed to be sure that anyone with any possible adverse position has been notified."

In fact, no effort was made to name anyone who did have an interest since Bair knew her claim to title would be met with vehement opposition.

Bair did not name the correct parties in her QTA even though she clearly knew otherwise. Rather than using reasonable efforts to track down the appropriate parties, Bair simply named "John Does" and effected service by publication in Beaufort, not Hilton Head. However, the use of fictitious defendants is meant only when plaintiffs do not know who the parties are. In the instant case, Bair used fictitious defendants in an obvious effort to avoid notifying persons Bair knew would object. The Bair QTA is not binding on the Plaintiffs or other property owners who were not named parties.

B. Other Defects in Bair QTA

In addition to the fatal flaw of not naming known parties who had an interest in the Disputed Properties, the following defects are present in the ill-fated QTA:

(1) Legal Descriptions Invalid - Bair's 1998 QTA purports to affirm that Bair is the owner of certain real estate based upon adverse possession, and provides a legal description of the property she claimed ownership. However, there was a critical, fatal mistake in the metes and bound description in the publication of the legal description for the Amended Lis Pendens (Exs. 45, 49) and the legal description in the Final Decree (Ex. 52). The property description

does not close and does not describe any property. This will be confirmed by the testimony of Rodney Walker, who is a local surveyor.

Clearly, it was Bair's burden to establish her title in the quiet title action. Hoogenboom v City of Beaufort, 315 S C 306, 313, 433 S E 2d 875, 881 (Ct App 1992). A significant element of Bair's quiet title claim was to identify the land in question. Although a quiet title petition "need not describe the land with the particularity or definiteness the description contained in a petition must not be so indefinite that it would not support an order making the rule absolute." 74 C J S *supra*, § 97. See also Powers v Rawles, 119 S C 134, 112 S E 78, 86 (1922) ("The sole purpose of a description of land as contained in a deed is to identify the subject-matter of the grant.")

Because Bair failed to adequately describe the subject property, her quiet title action is not valid or binding. See Ford v Watson, 282 S C at 70, 316 S E 2d at 431 (§ 15-67 90 will preclude a subsequent litigation "only as to those who are 'bound' by" the previous litigation), *e g*, Boone v Pritchett, 259 N C 226, 228, 130 S E 2d 288, 289-90 (1963) (a complaint failed to state a cause of action to quiet title where it was based on a deed void for vagueness and uncertainty of description in that the land could not be identified), Deans v Deans, 241 N C 1, 7, 84 S E 2d 321, 325 (1954) (in a quiet title action, "[t]he description must identify the land, or [else] the description is void for uncertainty"). It should be noted the same erroneous legal description was used in the March 8, 2000 quit-claim deed from PRHI to Bair (Ex 73A). Due to this fatal defect, no land was conveyed per this deed.

(2) Fraudulent Affidavit for Publication – Bair signed and filed a Petition and Affidavit, dated January 23, 1999 (Ex 47) used as the basis to serve the "unknown" parties by publication. Bair represented to the Court in Paragraph 2 the following

[b]ecause such fictitiously designated parties are presently unknown to the undersigned or to the Plaintiff, it is impossible to find such unknown parties within Beaufort County and South Carolina, nor are the last addresses of said unknown parties known to the undersigned or to the Plaintiff. Accordingly, it is impossible with any amount of diligence to effect service of the Summons and Complaint upon such unknown parties exception (sic) by publication”

As discussed above in detail, Bair was very much aware of the existence of the FBA³ as well as the identity of the other owners in the subdivision which had clear rights to access and use both properties in 1998 when the QTA was filed

(3) Improper Summons—The Summons filed with the Complaint was only directed to PRHI, not the other “unknown” Defendants in violation of Rule 4(b) SCRCP. This is a jurisdictional defect

(4) Newspaper Used for Publication of Summons—The Summons and Amended Lis Pendens was published in the Beaufort Gazette, not the local Island Packet. While both papers are legally valid papers of general circulation in Beaufort County, it is well known very few people on Hilton Head read the Beaufort Gazette

(5) Selection of Guardian Ad Litem — James B. Richardson Jr., a well known Columbia, South Carolina attorney, was appointed guardian ad litem. Given his location, it would be very unlikely he would have any direct knowledge of the location or use of the subject property and is certainly a questionable choice for a Beaufort County real estate dispute. He waived all notices (Ex. 50) and took little or no action in this QTA.

(6) Easement Rights Not Impacted by QTA — The survey attached to the Bair Complaint (Ex. 38 – Ex. A) clearly reflects the easement rights sought to be protected by the Plaintiffs in this action. The pathway to the beach used for years by the property owners is clearly labeled, “Existing beach access path” on her own survey,

³ The FBA was in existence on November 20, 1988 when Bair filed her QTA and at the time she submitted the Petition and Affidavit of Publication. It was not dissolved by forfeiture until September 20, 1999 (Exhibits 1, 16) four months after the final order was signed.

Judge Patrick Michael Duffy, South Carolina U S District Court Judge, issued an Order on April 26, 2007 involving this identical factual background in the case of Investors Title Insurance Company v Carolyn S Bair a/k/a Carolyn Songer Austin (C A 9 05-1434 – U S District Court – Ex 66(d) – copy attached hereto as Ex D) This was a declaratory judgment action by the title company against Bair seeking an Order that there was no title insurance coverage concerning this very lawsuit Bair had asked the title company to defend her in the suit now before the Court Judge Duffy considered the testimony of Bair, her husband, Robert Austin, and others and found no coverage based on Bair's prior knowledge of the existence of the title claims of FBOA and the lot owners

As to the 1998 Bair QTA, Judge Perry basically ruled it was a carefully designed sham orchestrated by Bair and her husband, Robert Austin Included in his findings

- 1 Bair never explained why she did not name FBOA and the four lot owners behind her house (§ 15)
- 2 Bair and her husband acted as a team in the QTA (§ 16)
- 3 Bair could not explain why she chose a Beaufort newspaper for publication rather than The Island Packet, which serves Hilton Head (§ 17)
- 4 Bair admitted she wanted to keep the QTA lawsuit "quiet" (§ 17)
- 5 Bair had knowledge prior to the filing of the 1989 Bair QTA of the existence of claims of title to the Avocet Street Extension (§ 35)
- 6 Bair and her husband filed a QTA in which they failed to name parties in which Bair knew had an interest in the property in dispute (§ 37)

Any one of these issues raises a red flag When this Court, like Judge Perry, looks at all of these serious defects it is clear the 1998 QTA was a sham and cannot be upheld

3 Three Year Statute of Limitations Under 57-67-90 Not Applicable

The three (3) year statute of limitations to re-open a judgment quieting title is clearly not applicable under the facts in this case. This is true since the Bair QTA is not binding on the Plaintiffs who were known parties and intentionally not named. A review of the three (3) South Carolina cases construing this section, and just basic common sense, leads to this conclusion.

In Ford v. Watson, 282 S.C. 66, 316 S.E.2d 429 (Ct. App. 1984), the Court, in construing 15-67-90, held that this section will preclude a subsequent litigation "only as to those who are 'bound' by" the previous litigation. In Ford, the party seeking the protection of 15-67-90 had filed a prior QTA listing unknown defendants and served same by publication. The Court held that although Code § 15-67-40 provides "authorization to serve certain unknown persons" it is doubtful that an adverse claimant in possession can be properly served with process by being designated as an unknown and served by publication. Ford, p. 431, n. 4. In essence, the Court held that section 15-67-90 does not mandate an absolute stamp of validity after three (3) years for every QTA—only those that were properly completed. The Court noted you cannot serve one in possession by publication under a "John Doe." As to the application of Section 15-67-90, the Court stated at page 431 as follows: "It is clear that this section, which operates as a statute of limitation, will preclude the instant action only, as to those heirs who are 'bound' by the prior actions. For the reasons noted above, the Plaintiffs were not bound by the fraudulent Bair QTA. If Section 15-67-90 is to be construed as Bair asserts today, the Court in Ford would not care if service by publication was completed properly in connection with said possession claim."

A Beaufort County case heard by your Honor perhaps best illustrates how the Court applies this statute when parties are intentionally omitted. In Perry v. Heirs at Law & Distributees of Gadsden, 313 S.C. 296, 301, 437 S.E.2d 174, 177 (Ct. App. 1993) modified on other grounds 316 S.C. 224, 449 S.E.2d 250 (1996), a son had committed actionable fraud by

not mentioning the existence of children or siblings in an action to quiet title. Your Honor ruled 15-67-90 was not available as a defense when the "undisclosed" siblings surfaced after three years to dispute the earlier action. You eloquently stated the possible misapplication of 15-67-90 as an absolute bar after three (3) years, with the following language quoted by the appellate court in Perry, at p. 178:

"If this is true, I can eat Christmas dinner with my sister each year in Sumter during which time I secretly bring a suit alleging that I am the sole heir to a piece of property in Beaufort County left to us as tenants in common by our intestate father, in which suit I, of course, do not name nor serve my sister, so that three Christmases after a decree in my favor, I can announce to my sister as I approach her sideboard for a second serving of turkey and oyster stuffing, 'hereafter I will not appear at your home for Christmas because I will celebrate the holidays at our old ancestral [sic] home in Beaufort, in which home, incidentally, you have no interest, and to which you are not invited!'

By including this portion of your Order in its opinion, the Court in Perry, as in Ford, provided clear guidance as to the application of 15-67-90. This statute is clearly not an absolute bar after three (3) years if necessary parties are not included in the original action or if the original action was not properly completed.

Under Bair's interpretation of 15-67-90, following your eloquent Christmas story, Plaintiffs' counsel could file suit in Beaufort County claiming title by adverse possession to the Kemmerlin residence at 20 Fen Lane. I could name just "John Doe," defendants, appoint a guardian ad litem from Oconee County and seek a default judgment without a hearing. I publish my notice in *The Island Packet* on Hilton Head. I advise the out-of-town administrative judge I have made every effort to notify all interested parties. I then wait three years and politely ask your Honor to move out of "my house," all under the protection of 15-67-90. However absurd such a result may appear, Bair would argue this section mandates said action.

The only other South Carolina case mentioning or construing 15-67-90 is Yarborough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990). In that case, Richardson filed a quiet title

action in 1979 naming Yarborough as a party. A judgment was rendered in Richardson's favor in 1980. One year later, Yarborough also filed a quiet title action, naming Richardson's successors in-interest involving the same property and subsequently lost. Some eight (8) years later, in 1988, Yarborough filed another action seeking to set aside the 1980 Richardson judgment based upon intrinsic fraud. The Court of Appeals dismissed the 1988 action under 15-67-90, but only after noting Yarborough was a named party in the 1979 action and that Yarborough ' had actual knowledge or could have by reasonable diligence acquired full knowledge of all the facts constituting' her extrinsic fraud claim prior to three years of filing the 1988 action. The Court clearly concluded the three (3) year time period starts only after a party should have known of the existence of the claim. In the instant case, until Bair installed her large gates blocking the access in August, 2004, the FBOA, nor any other property owner, would have no way to know of the existence of the Bair 1998 QTA.

In analogous situations, various other jurisdictions have reached the same. See Porter v Coco, 2006 WL 3103157 (N.H. 2006) (the omission of landowners' predecessors in interest as expressly named defendants in a previous action to quiet title brought by the predecessors in interest of adjoining property owners, despite the fact that the landowners' predecessors in interest were persons known to have an interest in the subject property of such action, resulted in a failure to meet statutory requirements for quieting title and rendered the court that issued judgment in the action void of jurisdiction, and therefore, landowners could collaterally attack the previous quiet title decree that held that disputed portion of property was part of the adjoining land), Konantz v Stein, 283 Minn. 33, 44-45, 167 N.W.2d 1, 9-10 (1969) (an owner deprived of possession can be required to seek his legal remedy promptly or not at all, but an owner whose possession has not been contested to his knowledge cannot be expected to bring suit against parties unknown to protect his property from adverse claims of which he is unaware).

All three South Carolina cases interpreting 15 67 90 (Ford, Perry and Yarborough) all have looked at the original QTA to determine it was properly completed and included the correct, lawful parties. Even a cursory review of the 1998 Bair QTA reveals numerous, substantial defects. Section 15-67-90 does not serve as a bar to the claims of FBOA under these facts.

In addition, the 1998 Bair QTA clearly did not impact any easement rights on the Disputed Property. If Bair truly intended to adjudicate the fee *and all easement rights* associated with the property, then Bair's Complaint and other pleadings (Ex. 38, 39) to quiet title should have expressly so stated. See Hoogenboom, 315 S.C. at 313, 433 S.E.2d at 881 (it is the petitioner's burden to establish title in a quiet title action). Because Bair's quiet title petition did not do so, Bair's quiet title decree did not extinguish, or even rule upon, the subject easement. See 74 C.J.S., *supra*, § 90 ("A judgment by default in an action to quiet title may not indulge presumptions which are not supported in the complaint") (citing Woodard v. Moss, 202 Miss. 33, 30 So. 2d 420 (1947)). The Bair QTA Complaint (Ex. 38) makes no reference to easement rights.

4. Plaintiffs Have Standing to Bring This Action

Both of the Plaintiffs clearly have standing to bring this action. The Plaintiff Howard has owned a home on Lot 33 in Hilton Head Subdivision No. 1 since October 1994 (Ex. 69A). FBOA has owned, since December, 1994, numerous lots and parcels in Hilton Head Subdivision No. 1 (Exs. 19, 22, 24, 25, 27), has held the rights to enforce the covenants since 1990 (Exs. 16, 22) and has been paying taxes on various parcels, including the Disputed Properties, since at least 2004 (Ex. 33).

5 Plaintiff's Claims Are Not Barred By the Doctrine of Collateral Estoppel

Under the doctrine of collateral estoppel, issues actually and necessarily litigated and determined in a prior action, are conclusive on a party to said action in a subsequent action Beall v. Doe, 281 S C 363, 315 S E 2d 186 (Ct App 1984) Bair relies on her 1998 QTA to assert that the issues of ownership and the existence of an easement to access the beach over the Disputed Properties has previously been determined

The Bair 1998 QTA Complaint (Ex 38) never seeks to eliminate any easement rights held by anyone It merely stated Bair held title to the Disputed Properties by adverse possession The Complaint did not ask or seek any relief concerning any easements Thus, even if the action were properly completed, Bair cannot now amend her Complaint nunc pro tunc to try to use collateral estoppel to modify said Complaint to include easement rights held by third parties

In addition, the numerous defects in the Bair QTA filed by Bair, at best a sham and at worst a fraud upon the Court, cannot be relied upon under this doctrine to eliminate the easement rights asserted by the Plaintiffs The Bair QTA was defective on numerous grounds, as discussed above (failure to name necessary parties, defective Summons, improper legal description, easement rights identified in survey attached to Complaint, no trial, no hearing or evidence submitted, Bair not entitled to adverse possession as a matter of law)

6 Plaintiff's Claims Not Barred By Doctrine of Res Judicata

For many of the same reasons as collateral estoppel does not bar Plaintiffs' claim, the doctrine of res judicata also does not apply Various required elements of this doctrine are not met The first element is identity of parties Plum Creek Development Company Inc v City of Conway, 334 S C 30, 512 S E 2d 106 (1999) The FBOA, its predecessor FBA, the Plaintiff Howard, nor any other property owner, were made parties to the Bair QTA The easement rights

asserted and claimed by FBOA do not originate from PRHI, but result from the subdivision plat (Ex 10), the 1956 HHCO Covenants (Ex 13) and the easements created under the Beach Trust covenants and plats (Exs 84-88)

The second and third element of res judicata are also not met. There also must be identity of the subject matter and an adjudication of the issue in the former suit Plum Creek. Clearly the issues of the easement rights created by the recordation of the subdivision plat and the other covenants and plats listed above were not the subject of the 1988 Bair QTA, nor were they involved in said litigation. The 1998 Bair Complaint (Ex 38) makes no reference whatsoever to any easement rights, her interest to eliminate same, or of a request for a Court Order extinguishing said rights. As discussed above, if she had referenced the existence of said easement rights, her claim for adverse possession would have been rejected as a matter of law.

7 Covenants and Restrictions are Applicable to Bair Lot 5

In an effort to avoid the requirements for architectural review board approval under the recorded covenants, it is possible the Defendant may assert at trial that Lot 5 is not subject to any covenants and restrictions. This potential argument by Bair is apparently based on the case of Stylecraft, Inc. v. Thomas, 250 S.C. 495, 159 S.E.2d 46, 47 (1968). Stylecraft involved a conveyance by deed whereby the granting clause in the deed purported to convey fee simple title and the second part of the deed set forth a reversionary interest, stating if the land was not used for school purposes, title would revert to the original grantor. The Court held that fee simple title may not be reduced by subsequent words in a deed and refused to recognize the reversionary interest.

However, Stylecraft, nor any of the cases before or after same, dealt with the applicability of restrictive covenants, which of course, are mere restrictions on use and do not divest or otherwise reduce ownership. In fact, Plaintiffs' counsel has not found a single South Carolina

case applying the Stylecraft rule to restrictive covenants. A review of the large number of South Carolina cases concerning the requisites and validity of express covenants finds no such requirement, condition or rule as to their validity or their enforceability. S.E. Digest, Covenants §§ 1-7. Architectural restrictions, as found in the present case have been expressly approved by our South Carolina Courts. Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1984). Defendant's position is simply not the law in South Carolina and the numerous restrictive covenants cited throughout Bair's chain of title are valid and enforceable.

It should be noted that in the case Carolyn Bair Austin initiated and tried before your Honor in 2004 (Austin v. W.J. Enterprises, et al., Exs. 64(a)–64(f)), Bair relied on many of these same restrictive covenants in an attempt to have two oceanfront homes moved. Bair is barred from taking a completely opposite position in a virtually identical case just several years later.

8. Bair's Counterclaim for Adverse Possession Should be Denied

This Court is well aware of the required elements Bair must prove to establish title to the Disputed Properties by adverse possession. Bair fails to meet numerous elements, as discussed below.

A. Adverse and Hostile Possession

If possession is permissive or through some legal right, possession clearly does not meet the hostile and adverse requirements. Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727 (1923), Young v. Nix, 286 S.C. 134, 332 S.E.2d 773 (1985), Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986). There can be no adverse possession against a co-tenant unless it is adverse to all co-tenants. Curtis v. DesChamps, 290 S.C. 315, 350 S.E.2d 201 (1986).

As discussed above in detail, the Plaintiffs, as well as the Defendant Bair, held rights to use and occupy the Disputed Properties under a variety of covenants, plats and deed restrictions.

(i.e., as a platted street, Park Area, Beach Trust Property, and a "common") Her use and occupation was by right and not adverse or hostile

B Possession Not Exclusive

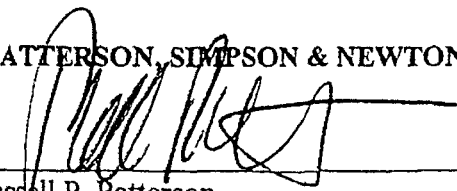
As the testimony at trial will show, except in the last several years when the unlawful improvements were constructed that triggered this litigation in 2004, the various lot owners in the subdivision regularly exercised their easement and ownership rights to access the beach over and across the Disputed Properties. At no point was anyone ever denied access across said property.

For these reasons, and others to be brought out during trial, Bair's counterclaim for adverse possession should be denied.

D CONCLUSION

This Court has an opportunity to address a carefully designed sham perpetrated on the Court in 1998 and to fully protect beach access to lot owners in Hilton Head Subdivision No. 1. Bair and her husband have attempted to secretly claim title to property clearly intended to be conveyed to the property owners by the original developer and protected with multiple layers of covenants and recorded plats designed to protect and keep open said properties forever. As Judge Duffy concluded under these same facts, the 1998 QTA was nothing more than an ill-advised scheme that should be dismantled. Just as President Reagan demanded of the Soviets, this Court should tell the Defendant: "Ms. Bair, tear down that wall!"

JONES, PATTERSON, SIMPSON & NEWTON, P.A.



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Hilton Head Island, South Carolina
October 9, 2008

EXHIBITS TO
PLAINTIFFS' AMENDED PRE-TRIAL BRIEF

- A Plat Book 9/4 (Trial Ex 10)
- B Diagram of Areas in Dispute
- C Photographs of Avocet Street Extension (Trial Ex 77-1st page only)
- D Order of Judge Patrick Michael Duffy (4/26/07)- Trial Ex 66(d)
- E Order of Judge Kemmerlin, Petersburg v Sokol, et al 1/30/01- Trial Ex 63-1(a)

EX. 77



1A



1 B



R-122

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Investors Title Insurance Company,	)	
	)	
Plaintiff,	)	
	)	C A No 9 05 1434-PMD
v	)	
	)	
Carolyn S Bair a/k/a Carolyn Songer	)	FINDINGS OF FACT AND
Austin,	)	CONCLUSIONS OF LAW
	)	
Defendant	)	

This matter was tried without a jury on March 8, 2007. The court - having considered the admissions in the pleadings, the public records of Beaufort County, South Carolina, a stipulation entered by the parties, the arguments and briefs of counsel, and the evidence offered at the trial enters a judgment in favor of Plaintiff Investors Title Insurance Company.

I BACKGROUND

1 In the 1950s the Hilton Head Company developed five residential subdivisions in the North Forest Beach area of Hilton Head Island, South Carolina. These were known as Hilton Head Beach Subdivisions No. 1, 1-A, 2-A and 3. Each of the five subdivisions was separately platted, and in each case the subdivision plats showed residential lots and roads.

2 As a part of that development, a plat of Hilton Head Beach Subdivision No. 1 was recorded in Beaufort County Plat Book 9 Page 4 (the "Subdivision Plat"). This plat shows Dune Lane running parallel with the beach and a number of streets (named "A Street," "B Street," "C Street," and so forth) running from Baynard Drive (on the far side of Dune Lane from the beach) to the beach. Baynard Drive is now known as N Forest Beach Drive, and A Street is now known as

Exhibit "A" - Petrol Boat
(Trial Ex. 66(b))
R-123

Avocet Street

3 Lot 5 (also known by the street address of 1 Dune Lane) is on the southwestern edge of the subdivision. It is shown as 65' 28" on the northerly (Dune Lane) side, 65' 74" on the southerly (beach) side, and 100' on the eastern and western sides.

4 The Subdivision Plat shows A Street running along the western side of Lot 5. The Subdivision Plat does not show whether the portion of A Street next to Lot 5 is paved, dirt, landscaped, or otherwise different from the other streets in the subdivision. The Subdivision Plat shows four lots (Lots 1, 2, 3, and 4) directly behind Lot 5, all of which abut A Street.

5 The name of Hilton Head Subdivision was later changed to North Forest Beach Subdivision.

6 Forest Beach Association was formed in 1974 as a non-profit corporation in South Carolina. Pl. Ex. 2.

7 Defendant, Carolyn Bair (hereinafter referred to as "Mrs. Austin"), is a licensed South Carolina real estate broker. She bought Lot 5 in Hilton Head Beach Subdivision No. 1 in 1984. As owner of Lot 5, she, with all other owners in the subdivision, had an easement to use all of Avocet Street. Mrs. Austin also owns Lot 23 in Hilton Head Beach Subdivision No. 2.

8 - In 1987 the Hilton Head Co. filed bankruptcy, and two years later Property Research Holdings, Inc. bought some of the assets of the estate. Specifically, it bought the common properties of Forest Beach Subdivision No. 1 and took an assignment of the developer's rights under the covenants applicable to the common properties. Pl. Ex. 4. The common properties included what the parties call the Strand Block and the Beach Access Lots. Property Research Holdings later made a non-exclusive assignment of its rights to enforce the declarant's rights under the covenants.

applicable to the Forest Beach subdivisions to Forest Beach Association Pl Ex 5

9 Sometime thereafter, Mrs Austin spoke to the principal of Property Research Holdings, Frank Guscio, about buying the Strand Block and Beach Access Lots from Property Research Holdings

10 On January 31, 1995, the Beaufort County Master-in-Equity entered an order declaring that the Strand Properties and Beach Access Lots in Hilton Head Subdivision 1, 1-A, 2, 2-A, and 3 shall be forever held in trust for the use and benefit of all present and future owners of lots within the subdivisions described in the covenants and enjoining inconsistent uses Pl Ex 11 The court would, later that year, however, vacate its order on the grounds that the plaintiff did not have standing to bring that suit

11 Mrs Austin was not a named party to this 1995 action, nonetheless, Mr Austin admitted to being aware of the holding in this case, although he could not be sure when he first read it

12 In 1996, Property Research Holdings conveyed streets between Dune Lane and the beach to Forest Beach Association

13 In 1998 Mrs Austin, then Carolyn S Bair became reacquainted with an old friend, Robert E Austin, Jr , Esq , and the two became engaged to be married that fall Mr Austin is an attorney licensed in Florida He is astute, experienced and knowledgeable in the matters of real estate law During their courtship Mr Austin began learning about the title issues related to the Beach Access Lots He derived his knowledge from discussions with locals, discussions with Guscio, and extensive reviews of courthouse records

14 On November 18, 1998, Guscio sent Mr Austin a draft of a plat showing the Strand

Block and the Beach Access Lots, together with a proposed quit claim deed for the Strand Block

15 Two days later, Mrs Austin, employing the assistance of Mr Austin, brought a lawsuit against Property Research Holdings to quiet title in her to the end of Avocet Street (the part of Avocet Street immediately to the west of her lot) She also named as additional defendants “unknown persons” who might claim an interest in the real property For reasons she never explained, she did not name as defendants Beaufort County, the Town of Hilton Head, the State of South Carolina, Forest Beach Association, or any of the owners of the four lots behind her house Her suit was based on adverse possession for ten years (going back at least to 1988)

16 Mrs Austin and her husband acted as a team in the prosecution of the quiet title action Mr Austin admitted to knowing more about the problems with the title in Hilton Head Beach Subdivision No 1 than anyone with the exception of Mr Guscio He had researched the town ordinances and compared them with the restrictions on record, and he talked to residents of the area and learned the local “lore” relating to the title issues He testified that it was common knowledge that there were title issues in the Forest Beach area of Hilton Head Island

17 Mrs Austin effected service of process on Property Research Holdings personally, but she served the allegedly unknown persons by publication in the Beaufort Gazette She did not explain why she chose a Beaufort newspaper over the Island Packet, the newspaper serving Hilton Head Island She admitted however that she wanted to keep the quiet title lawsuit “quiet”

18 Mrs Austin obtained a judgment by default against Property Research Holdings and later against the supposedly unknown persons This judgment had the apparent effect of quieting title to the end of Avocet Street in Mrs Austin

19 Shortly thereafter, Forest Beach Association lost its corporate charter Pl Ex 2

20 Mrs Austin thereafter sought the services of Attorney James O Hale regarding a quit claim deed and additional title work Following discussions she received a proposed fee agreement from him The parties stipulated that a letter was written by Attorney Hale and sent to Mrs Austin and received by her on or about March 8, 2000 The letter is a proposal by Attorney Hale to prepare a quit claim deed for Property Research Holdings and to review the title background He goes on to state "After a conversation I had with Frank Guscio, I am concerned that the Town of Hilton Head Island, the Forest Beach Association and possibly the State of South Carolina should have been named in the Quiet Title Action in order to clear title in a manner sufficient to insure it This is based on the understanding that there may be a claim that the property constitutes a portion of the access-ways within the Forest Beach Community " The letter is not signed, but the very next day, Mrs Austin received a quit claim deed from Property Research Holdings covering the end of Avocet Street Mrs Austin did not explain why Property Research Holdings would have given her such a quit claim deed, and it appears to be the fruit of her collusive relationship with Mr Guscio Attorney Hale's office recorded the deed and had it returned to Attorney Hale's office

21 Mrs Austin had her newly expanded Lot 5 re-surveyed in August 2002 Based on this new survey, Terry G Hatchell, RLS prepared an individual plat dated April 24, 1997, last revised August 29, 2002 ("Hatchell Plat') In March, Mrs Austin refinanced her mortgage As a part of that transaction, she asked the closing attorney to sell her an owner's policy of title insurance In the process of closing the loan and obtaining the title insurance policy, she never disclosed to the closing attorney (who served as the title agent) that she had obtained title to the end of Avocet Street by adverse possession, a quiet title suit that left out important parties, and by a quit claim deed And she never disclosed her dealings with Mr Guscio or her possession of the many documents she and

her husband had that were not part of the public record

22 Investors Title issued the Policy (Policy No OR-A 052147) on March 18, 2003. The Policy insures many aspects of the title to Lot 5 of Hilton Head Beach Subdivision No. 1, subject to various exclusions, exceptions, and conditions. Lot 5 is described as

ALL that certain piece, parcel or lot of land, with improvements thereon, situate, lying and being on Hilton Head Island, Beaufort County, South Carolina shown and designated as Lot 5 of Hilton Head Beach Subdivision No. 1 on a plat recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 9 at Page 4 [Subdivision Plat"] For a more complete description of said property, reference may be had to an individual plat prepared by Terry G. Hatchell, RLS dated April 24, 1997, last revised August 29, 2002 [“Hatchell Plat”]

Policy, Schedule C (Complaint ¶ 7, Am. Ans. ¶ 7)

The Policy specifically takes exception from coverage for loss, costs, attorney’s fees and expenses resulting from 3 Easements and/or rights of way as shown on plat recorded in Plat Book 9 at Page 4, on plat for Bair for Hatchell and as referenced in restrictions below

And the policy contains the following two exclusions

You are not insured against loss, costs, attorney’s fees, and expenses resulting from 3 Title Risks

- that are created, allowed, or agreed to by you
- that are known to you, but not to us, on the Policy Date – unless they appeared in the public records

23 Just two months after the closing, Mrs. Austin, represented by Mr. Austin, filed a brief in a lawsuit wherein she argued that the streets of Subdivision No. 2 are easements. Pl. Ex. 35

24 On November 9, 2004, Forest Beach Owners Association, claiming to own property in Forest Beach Subdivision No. 1, sued Mrs. Austin for access to the beach across the end of Avocet Street (the “underlying suit”). Mrs. Austin forwarded the lawsuit to Investors Title for a defense. Investors denied the claim and brought this declaratory judgment lawsuit seeking a

declaration that the Policy does not provide coverage for the loss, costs, attorney's fees, or expenses resulting from the underlying lawsuit. Mrs. Austin counterclaimed for breach of the insurance policy and for bad faith, but has since agreed to dismiss her bad-faith claims and her claims for attorney's fees in this declaratory judgment action.

25 The court has already considered and ruled upon several of the issues in this declaratory judgment action pursuant to three separate motions for summary judgment. On September 6, 2006, the court issued an Order finding that because the Policy incorporates two inconsistent plats - the Subdivision Plat depicts the contested portion of land as an easement extending to the ocean front and the Hatchell Plat depicts the contested portion of land as part of Lot 5 - the scope of the Policy is ambiguous as a matter of law. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and against the insurer, therefore, the court found that the Policy covers the larger section of land described as "Revised Lot 5" in the Hatchell Plat, not the smaller lot shown and designated as Lot 5 in the Book 9 Plat. Because the portion of the Lot which is the subject of the underlying lawsuit is included in Lot 5 as described by the Hatchell Plat, the court found that title risks relating to this portion are covered by the Policy. As such, Investors is required to defend Defendant's title to this property in the underlying lawsuit, unless a Policy exception or exclusion applies.

II. BENCH TRIAL

On March 8, 2007, the court conducted a bench trial in which the only outstanding issue was whether a Policy exclusion applies to release Investors from its obligation to defend Mrs. Austin's title in the underlying lawsuit. The court now makes the following Findings of Fact and Conclusions of Law in accordance therewith.

Actions Tried Without a Jury

26 Rule 52(a) of the Federal Rules of Civil Procedure sets forth the standard of review of actions tried without a jury. Rule 52(a) provides that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

27 “It surely does not stretch the language of Rule [52(a)] to characterize an inquiry into what a person knew at a given point in time as a question of ‘fact.’” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498, 104 S.Ct. 1949, 1958 (1984) (holding that district court’s determination regarding a party’s actual knowledge of the falsity of a published statement constituted a determination of fact entitled to Rule 52(a) deference), *Herbert v. Lando*, 441 U.S. 153, 170, 99 S.Ct. 1635, 1645, 60 L.Ed.2d 115 (1979) (referring in passing to actual malice as “ultimate fact”).

28 In a bench trial, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony. *J.S.K. Realty Co. v. New Plan Realty Trust*, 9 Fed.Appx. 89 (4th Cir. 2001). The trial court, sitting as a trier of fact, has both the right and the duty to weigh the evidence and to draw reasonable inferences and deductions. *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987) (finding that where jury trial is waived, judge weighs the evidence, determines the credibility of the witnesses, and finds the facts).

29 If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse the district court’s decision even though convinced that it would have weighed the evidence differently. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). “Where there are two permissible views of the evidence, the factfinder’s

choice between them cannot be clearly erroneous ” *Id* (citations omitted) The reviewing court must give due regard to the opportunity of the district court to judge the credibility of the witnesses ’ *Multi Channel TV Cable Co v Charlottesville Quality Cable* 65 F 3d 1113, 1122 (4th Cir 1995) As the Supreme Court has reasoned, a trial on the merits ‘ should be the main event rather than a tryout on the road ’ *Anderson* 470 U S at 575 (citations omitted)

Legal Standard for Construction of Insurance Policies

30 Insurance policies are subject to the general rules of contract construction so courts must enforce (and not write) contracts of insurance, and the language of policies must be given its plain meaning *Botany Bay Marina Inc v Great American Ins Co* , 760 F Supp 88 (D S C 1991), see also *Diamond State Ins Co v Homestead Industries Inc* , 318 S C 231, 456 S E 2d 912 (1995) (holding that insurance policies are subject to the general rules of contract construction), *Sloan Construction Co v Central Nat Ins Co of Omaha*, 269 S C 183, 236 S E 2d 818 (1977) Similarly, an insurer’s obligation under a policy of insurance is defined by the terms of the policy itself, and the obligation cannot be enlarged by judicial construction *South Carolina Farm Bur Mut Ins Co v Wilson*, 344 S C 525, 544 S E 2d 848 (Ct App 2001) (cert den)

31 If the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties *Kay v State Farm Mut Auto Ins Co* , 349 S C 446, 562 S E 2d 676 (Ct App 2002) (cert den)

32 Courts are not authorized to pervert policy language or to exercise inventive powers in order to create an ambiguity where none exists *Stewart v State Farm Mut Auto Ins Co* , 341 S C 143, 533 S E 2d 597 (Ct App 2000)

Applicability of Policy Exclusions

33 As discussed above, the Policy provides by general exclusion that the insured is not insured against loss, costs, attorneys fees, and expenses resulting from [t]itle risks that are created, allowed or agreed to by [the insured], or that are known to [the insured], but not to [Investors], on the Policy Date – unless they appeared in the public records ’

34 “Title risks” is a defined term under the Policy that includes “someone else[s] own[ing] an interest in your title” or ‘ someone else[’s] ha[ving] an easement on your land,” if that situation affected the title on the Policy date (Policy at 1) A title risk will be said to have been known by an insured when the owner of the title insurance policy knew of facts not in the public record before the issuance of the policy that would have put a reasonable person on notice that there was a likelihood that somebody would come along later and challenge his title to the property See Joyce D Palomar, *Title Insurance Law* §§ 6 14, 6 15 (West Group 2004) Because the language of an exclusion will be resolved in favor of the insured and coverage, the court finds that the Policy exclusion applies only when an insured has *actual* knowledge of the facts that would have put a reasonable person on notice of the title risk which is the subject of the underlying lawsuit See *New York Underwriters Ins Co v Cent Union Bank of South Carolina*, 65 F 2d 738 (4th Cir 1933) (holding that, under a fire insurance policy, an exclusion for when mortgagee has knowledge of change in occupancy is interpreted to require actual knowledge of the change), *Owners Ins Co v Clayton*, 364 S C 555, 560, 614 S E 2d 611, 614 (2005) (holding that the insurance company bears the burden of establishing the exclusion’s applicability)

35 Mrs Austin testified that she did not have ‘actual knowledge’ that members of the Forest Beach Community retained an easement across the contested portion of Lot 5 which was

formerly Avocet Street, in spite of the 1999 judgment purporting to quiet title in her. However, considering her familiarity with the law of easements (as evidenced by the lawsuits filed by her in 1998 and 2003), the letter she received from Attorney Hale warning her that the Forest Beach Community may retain such an interest, and her husband's admission that he had 'superior knowledge' of Hilton Head's title issues, including the 1995 Order by the Beaufort County Master-in-Equity, the court finds this testimony is not credible. When the testimony of a witness is not credible, the trier of fact may simply disregard it. *Bose Corp.*, 466 U.S. at 512, 104 S.Ct. at 1966.

36 In this case, the evidence presented at trial shows that shortly after acquiring the Policy, Mrs. Austin, through Mr. Austin, filed a brief in an unrelated lawsuit in which she acknowledged that the streets of Hilton Head Subdivision No. 2 are easements for the use and benefit of all present and future lot owners. Based on this evidence, the court finds Mrs. Austin had actual knowledge that all lot owners in the Hilton Head Subdivisions owned an easement interest in the streets of their respective Subdivisions, including Avocet Street in Subdivision No. 1.

37 Mrs. Austin admitted that she took the land formerly known as Avocet Street by adverse possession, then filed a declaratory judgment action related to it in which she failed to name members of the Forest Beach Community as defendants, and then obtained, for no consideration at all, a quit claim deed to the land from the businessman with whom she had arranged to obtain the judgment. As such, although Mrs. Austin knew that all Subdivision No. 1 lot owners owned an easement across Avocet Street, she and her husband took possession of the beach access property by hostile and adverse means and then brought an adverse possession lawsuit in which she failed to name parties that she knew had an interest in the property in dispute. See *Pinckney v. Atkins*, 317 S.C. 340, 454 S.E.2d 339 (Ct. App. 1995), 59 Am. Jur. 2d *Parties* § 130 (2006).

38 The court is convinced that Mr Austin expertly orchestrated the quiet title suit in the way a good patent attorney lawyer would prepare a suit for a client who attempted to reverse engineer a competitor's invention. While he was very skillful, he would not and could not have undertaken it without the knowledge and consent of his wife, an experienced realtor and experienced litigator. It is therefore inescapable that following the quiet title action that resulted in the May 27, 1999 judgment, both Mr and Mrs Austin knew of the title risk at issue in the underlying lawsuit. The fact that both knew the risk involved in the quiet title suit is amply demonstrated by the omission of necessary parties from the quiet title action, by the limited scope of notice to these necessary parties by publication in a neighboring town's paper, and, most tellingly, by the fact that Mr and Mrs Austin filed legal briefs only two months later in a different suit contradicting their actions.

39 In assessing the applicability of the Policy exclusion for "title risks known to the insured," Mrs Austin's knowledge of the title risk is the relevant issue. It is not relevant whether or not she knew the name of the person who would ultimately sue her. See J Bushnell Nielsen *Title & Escrow Claims Guide* 320 (Woodridge Legal Publishers 1996).

40 The Policy defines "public records" to mean "title records that give constructive notice of matters affecting [the insured's] title according to the state statutes where your land is located" (Policy at 2). In other words, the title risk inherent in the 1999 judgment is excluded from the scope of the Policy unless this risk is recorded in those South Carolina records established to put purchasers of real property on constructive notice of matters relating to the title of real property. See *Haw River Land & Timber Co v Lawyers Title Ins Corp*, 152 F 3d 275 (4th Cir 1998). Stated

otherwise, the risk transferred to Investors by the Policy is the risk of not conducting an adequate title search among the records established by the state for searching titles to real property

41 South Carolina Code section 30-7-10 requires ‘generally all instruments in writing conveying an interest in real estate’ are valid so as to affect the rights of purchasers for valuable consideration without notice if they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated

42 The closing attorney for Investors, Henri Ann Logan, testified that she conducted a title search of the grantor-grantee index in the Beaufort County Office of the Register of Deeds prior to issuing the Policy to Mrs. Austin. In the course of this search, Ms. Logan found and did not take exception to the 1999 judgment purporting to quiet title of the contested portion of Avocet Street in Mrs. Austin “free and clear of all encumbrances, claims, options, and interests.” The court finds Ms. Logan properly limited her search to matters of public record and did not consider local ordinances, the pleadings from the quiet-title action, or other papers not recorded in the Office of the Register of Deeds which may have impugned the legal effectiveness of the 1999 judgment. As such, the title risk inherent in the 1999 judgment did not appear in the public record when it was examined by Ms. Logan. Mrs. Austin admitted that she did not disclose the circumstances surrounding the quiet title action regarding Avocet Street to her closing attorney. Had she done so, she would have ruined a carefully crafted plan designed and executed by her attorney/husband.

43 As to matters that are outside the public record and not normally discoverable via standard title examination – e.g., wild or stray deeds, instruments filed outside the chain of title, frauds, forgeries, conveyances made under undue influence or by minors or incompetents – the title insurance policy normally provides coverage, but will not if an insured has knowledge of these

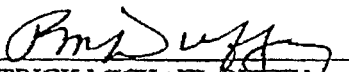
matters outside the public record See Joyce D Palomar, *Title Insurance Law*, § 6 17 (2004) J Bushnell Nielsen, *Title & Escrow Claims Guide* 170 (Woodridge Legal Publishers, Supp 2005)

44 Because Mrs Austin knew of title risks which did not appear in the public records and which Investors Title knew nothing of, coverage for litigation relating to the ownership of Avocet Street is excluded under the exclusion that the insured is "not insured against loss, costs attorneys' fees and expenses resulting from [t]itle risks that are created, allowed, or agreed to by you, that are known to you, but not to [Investors], on the Policy Date – unless they appeared in the public records "

CONCLUSION

It is therefore **DECLARED**, for the foregoing reasons, that the Policy does not provide coverage for the loss, costs attorney's fees, or expenses resulting from the underlying lawsuit and that Investors Title has no duty to defend or indemnify Mrs Austin under the Policy for loss, costs, attorney's fees, or expenses resulting from the underlying lawsuit

AND IT IS SO ORDERED


PATRICK MICHAEL DUFFY
United States District Judge

Charleston, South Carolina
April 26, 2007

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO 99-CP-07-427
BRIAN J PETERSBURG,)
Plaintiff,)
v) ORDER
DAVID M AND MARY E)
SOKOL, HENRY A AND ADIRA)
THOMPSON,¹ AND HILTON)
HEAD BEACH SUBDIVISION)
ASSETS HOLDING)
CORPORATION,)
Defendants)

11/3/01

Pursuant to an Order of Reference which referred this case to me with finality, any appeal to be directly to the appropriate appellate court, I held references, took the testimony and other evidence offered and I now make the following Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1 Because this case concerns rights in real property, it will be easier to understand if the reader will first look at the plat attached to this opinion as Exhibit "A"

2 This is a dispute over beach access rights and covenant enforcement in the Hilton Head Beach No 2 Subdivision, such subdivision being shown on the plat above referred to

¹ This is an amended caption made as the result of the substitution of parties after the suit was brought

EX. E
1 11/1/01 Pre-Trial Brief

3 The Plaintiff Brian J Petersburg ("Petersburg") owns Lot 37 as shown on the Subdivision Plat which is a "second row" property, the Defendants David and Mary E Sokol own Lot 36 and the Defendants Henry A and Aaira Thompson own Lot 45, both of these being ocean front lots

4 The Defendant Hilton Head Beach Subdivision Assets Holding Corporation owns all the roads including "L Street" and the "strand blocks"² as shown on the Subdivision Plat (Exhibit "A") L Street and the strand blocks were conveyed to the Defendant Hilton Head Beach Subdivision Assets Holding Corporation by deed recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Deed Book 606 at Page 539

5 As shown on the Subdivision Plat, L Street's eastern terminus is approximately 100 feet from the intersection of Dune Lane and L Street Dune Lane, is an unpaved 36' right of way which runs roughly parallel to the mean high water mark of the Atlantic Ocean and separates the first and second row ocean lots According to the Subdivision Plat, the easternmost 100 feet of L Street is located between the Sokols' and the Thompsons' lots and terminates approximately 200 feet from what

² The "strand blocks" consist of the area between the platted lots and the mean high water line as shown on Exhibit "A" It is referred to as the beach trust property - although it in fact is not trust property

was - at the time of the plat (1953) - the mean high water mark of the Atlantic Ocean

6 The Subdivision Plat was originally recorded by the Hilton Head Company in 1953 as part of an overall scheme of development and all property shown thereon is subject to that certain Declaration of Rights, Restrictions, Conditions, Etc , which is recorded in the Office of the RMC for Beaufort County, South Carolina in Deed Book 78 at Page 306

7 In addition to the aforementioned covenants, and as part of its overall development scheme, the Hilton Head Company recorded additional sets of covenants which are recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Deed Book 74 at Page 20, Deed Book 73 at Page 305, Deed Book 77 at page 181, and Deed Book 78 at Page 73 Among other things, these Covenants restricted lots to residential use, and established building setbacks

8 The aforementioned covenants make specific reference to the park area at the end of "L" Street and the strand block in two ways In Deed Book 74 at Page 305, Deed Book 77 at Page 181 and Deed Book 77 at Page 180, The Hilton Head Company provided that it and its successors and assigns would forever hold the "beach strand blocks" adjacent to the three oceanfront subdivisions (No 1, 2, and 3) "in Trust for the use and benefit of all present and future property owners of any lot or

lots [in the subdivisions] " And in Deed Book 78 at Page 306, 310, the covenants refer to what are described as "Park Areas" - that portion of the lands of the Hilton Head Company shown as the open areas between groups of lots in any subdivision or between subdivisions, which constitute means of access to the beach for rear lots and any other areas designated by the Hilton Head Company, its successors and assigns. It is provided that such areas shall be set aside as park areas to be allowed to stand free of buildings, billboards, etc., or to be landscaped and maintained, for the beautification of the Island and the enjoyment of its residents and visitors.

9 After Hurricane David took much of the dunes which had built up seaward of the lot lines, the ocean advanced inland to become dangerously close to the front beach lots, so a rock revetment - a form of seawall - was built the length of the part of the beach we are here concerned with, between the lot lines and the highwater mark as shown on Exhibit "A". The front beach owners then frequently filled in the land behind the revetments and began to treat the part of the beach trust property filled as a part of their front yards, in some instances building swimming pools and gazebos within what is the beach trust property.

10 I am asked to have all "improvements" removed

from the 36 foot wide projection of L Street which crosses that part of the beach trust property behind the rock revetment in order to reach the beach trust property seaward of the rock revetment³

11 The eastern most 100' of L Street was intended to be and is "Park Area" as defined in the covenants and therefore is reserved for the purpose of providing access to the beach, and in accordance with the covenants, is to stand free of buildings, billboards, etc

12 On or about July 10, 1991, Property Research Holding, Inc , as then owner of L Street and Richard M Hussett and Cynthia Hussett, the Sokols' predecessor in interest to the title of Lot 36 entered into a certain Encroachment Easement Agreement, recorded on July 22, 1991 in Book 574, page 1920 which purported to grant to the Sokols' predecessor in interest the right to keep certain encroachments in the Easement Area, all as defined therein

13 In addition to obstructing the right of way with the encroachments, the residents and prior owners of Lot 36 from time to time parked their cars in the area allowed by the Encroachment Agreement, and the owner of Lot 36 constructed a gazebo in the 36 foot wide projected extension of L Street

³ Which is worth getting to, because beach renourishment (a euphemism for fighting God with sand) has temporarily brought back a wide beach to walk and play upon

across that portion of the beach trust property landward of the rock revetment seawall

14 The combined effect of encroachments and parking has resulted in the Easement Area becoming impassable⁴ for the Plaintiff and violates the covenants which require that the Easement Area remain a "Park Area" It is the claim of the Plaintiff that the construction of improvements in the strand area adjacent to Lot 36 violates the covenants

15 The Defendant Hilton Head Beach Assets Holding Corporation has or intends to attempt to convey portions of the strand blocks to adjoining oceanfront land owners which would purport to create exclusive rights in those persons and the Plaintiff alleges that such conveyances are null, void and of no legal effect as they are in direct violation of the covenants which encumber the strand blocks

16 Based upon the facts set forth above, the Plaintiff asserts five causes of action, denominated by the Plaintiff as

- A) Trespass - suit for monetary damage for asserted trespass against the Defendants Sokol and Thompson for

⁴ Obviously, from the photographs, one can without a machete pick his way through to the beach - which is all he is entitled to - according to the Defendants

allegedly constructing improvements within the Easement Area ⁵

- B) Declaratory Judgment to have the Court to declare that the Plaintiff has a permanent non-exclusive 36' easement for ingress and egress over the easternmost 100 feet of L Street, said easement being for beach access
- C) Declaratory Judgment to have the Court to declare that "To the extent the Encroachment Agreement allows for parking and construction within the Easement Area and construction in the strand area adjacent to Lot 36, this directly violates the covenant, said Encroachment Agreement is [therefore] invalid and has no legal force or effect "
- D) Declaratory Judgment and injunction declaring that the strand blocks "... are to be held in trust for the use and benefit of all present and future lot owners, and that any attempt to plat, sell, convey, or to grant easements, licenses or permits in the strand block or other common property to any lot owner to the exclusion of other lot owners is null and void and of no legal effect "

⁵ Actually the First Amended and Restated Complaint alleges the trespass against predecessors of the Sokols and Thompsons, but a motion to substitute the presently named Defendants was made and allowed

E) Injunctive relief requiring (1) removal of encroachments in the Easement Area, (2) that the Defendants cease parking in the Easement Area, (3) the Defendants not to obstruct the Easement Area in any way, (4) the Defendants to return the Easement Area to its natural state as a Park Area for beach access, (5) the removal of improvements in the strand area adjacent to all lots within Hilton Head Beach Subdivision Number 2, (6) no use of the strand blocks which is inconsistent with any applicable covenants, and (7) any other further relief to which the Plaintiff may be entitled

17 I find that nothing done or undone by any Defendant entitles the Plaintiff to punitive damages

18 I find that the Plaintiff has proved the trespass of all Defendants but that he has put no evidence upon which I can grant any monetary damages, so I award the Plaintiff \$1 nominal damages against the Defendants

19 I find that nothing in the covenants and restrictions of record gives to the prevailing party any attorney's fees, so I find the Plaintiff is not entitled to attorney's fees

20 Reference to the plat referred to in numbered finding

of fact one (1) should be made Between the front lot lines and the mean high water mark is what is called the beach trust land or the beach strand land

21 The Plaintiff seeks a declaratory judgment concerning his rights to common properties consisting of roads, park areas, beach accesses and beach strand blocks, within his subdivision The Plaintiff seeks to establish that by virtue of plats and restrictive covenants placed upon the common properties by The Hilton Head Company, the original developer of the subdivisions, and by subsequent usage by the public, the roads within the subdivision are dedicated to public use, and the park areas, beach accesses, and strand blocks are set aside as open space for the use and enjoyment of himself as the owner of a lot within the subdivision A justifiable controversy exists because the Defendants claim the right to exclude lot owners such as the Plaintiff from portions of the common properties and to construct and maintain private improvements for their exclusive use and benefit

22 The rights which the Plaintiff seeks are, I find, rights obtained by easements for a limited group of the public, namely lot holders in the subdivision, by virtue of such lot holders having bought their property in reliance upon deed and plat references

23 The Hilton Head Company developed five residential

subdivisions known as Hilton Head Beach Subdivisions during the early to mid 1950's. Each of the five separate subdivisions was separately platted, and in each case the subdivision plats showed residential lots and roads. The plat for Subdivision No 2, with which we are now concerned, a subdivision bounding on the Atlantic Ocean, depicts an area between the mean high water mark of the Atlantic Ocean and the oceanfront lots that has come to be commonly known as the beach strand blocks or "trust property." The plats for Subdivisions No 1, 1-A, 2, 2-A, and 3 can be found in the Beaufort County RMC Office in Plat Book 9 at Page 4, Plat Book 9 at Page 69, Plat Book 9 at Page 20, Plat Book 11 at Page 19, and Plat Book 9 at Page 31, respectively.

24 As part of its subdivision plans, The Hilton Head Company also recorded several sets of restrictive covenants running with the land. These covenants can be found in the Beaufort County RMC Office in Deed Book 74 at Page 20, Deed Book 74 at Page 305, Deed Book 77 at Page 181, Deed Book 78 at Page 73, and Deed Book 78 at Page 306. Among other things, these covenants restricted lots to residential use, established building setbacks, and prohibited the subdivision of lots, or the changing of lot boundary lines except by the written consent of The Hilton Head Company, its successors or assigns. The covenants make specific reference to the common properties that are the subject of this action, in two ways. In Deed Book 74 at

Page 305, Deed Book 77 at Page 181, and Deed Book 77 at Page 180, The Hilton Head Company provided that it, and its successors and assigns, would forever hold the "beach strand blocks" adjacent to the three oceanfront subdivisions (No 1, 2, and 3) "in Trust _ for the use and benefit of all present and future property owners of any lot or lots [in the subdivisions] " And in Deed Book 78 at Page 306, 310, the covenants refer to what is described as "PARK AREAS" as

That portion of the lands of The Hilton Head Company shown as the open areas between groups of lots in any subdivision or between subdivisions, which constitute means of access to the beach for rear lots, and any other areas designated by The Hilton Head Company, its successors or assigns, shall be set aside as park areas to be allowed to stand free of buildings, billboards, etc , or to be landscaped and maintained, for the beautification of the Island and the enjoyment of its residents and visitors

25 Until its bankruptcy in 1987, The Hilton Head Company continued to administer the covenants It maintained the integrity of the roads, park areas, beach accesses and beach strand blocks

26 In January 1989, The Hilton Head Company and its successors, by their Bankruptcy Trustee, quit-claimed the common properties and assigned their rights under the covenants applicable to the common properties to Property Research Holdings

27 In August, 1992, Property Research Holdings conveyed

the common properties in Hilton Head Beach Subdivision No 2 to the Defendant Hilton Head Beach Subdivision Assets Holding Corporation, a corporation whose principals are all owners of oceanfront lots in Hilton Head Beach Subdivision No 2. Thereafter, Hilton Head Beach Subdivision Assets Holding Corporation entered into a series of "Lease With Purchase Option Agreements" purporting to convey portions of the beach accesses and beach strand blocks in No 2 Subdivision to adjacent oceanfront owners. While never going so far as to claim the right to completely deny beach access to the owners of the remaining lots in the Forest Beach subdivisions, the Defendants now claim that they, and those to whom they have or would convey portions of the strands and beach accesses, have the right to otherwise incorporate these properties into their own oceanfront lots, improve them for their own private use, and restrict or prohibit use and access by the other owners in the subdivisions. The Plaintiff contends that these activities violate the rights granted to the remaining lot owners by the recorded plats, covenants, and restrictions put in place by The Hilton Head Company. Thus, the controversy centers around the use of the beach strand blocks and the portions of the roads that lie between oceanfront lots. Together, these portions of the common properties constitute the means by which owners of lots within

the subdivisions access the beach and move laterally along the beach at mean high tide

28 The roads, including the portions thereof that lie between oceanfront lots, are clearly depicted on the recorded subdivision plats. Moreover, the recorded plats and covenants clearly express an intention that the owners of lots in the subdivisions are to have beach access. The covenants recorded in Deed Book 78 at Page 306 explicitly state that the "lands .. shown between groups of lots in any subdivision or between subdivisions, which constitute means of access to the beach for rear lots, .. shall be set aside as park areas to be allowed to stand free of buildings, billboards, etc "

29 If one buys a lot in a subdivision in reliance on a recorded plat which shows roads and alleys and parks and accesses, he has a right to rely upon the open spaces shown on a plat as remaining open forever for his benefit and the benefit of other lot holders

30 The recorded plats also show the areas that have come to be known as the beach strand blocks or the beach trust property. These areas appear as the land located between the mean high water mark of the Atlantic Ocean and the seaward boundaries of the oceanfront lots. These boundaries of the strand blocks are also set out in recorded covenants, separately recorded for each of the three oceanfront subdivisions and

specifically intended to set the strand blocks aside for the use and enjoyment of the lot owners. The common scheme is that The Hilton Head Company, its successors and assigns, shall forever hold the strand areas in trust for the use and benefit of all present and future property owners of any lot in the respective subdivision.

31 Those who would like to annex portions of the strand to their own private lots for their own exclusive use and benefit, or sell such rights, argue that any trust established by the covenants is a dry or naked trust, that is, that it imposes no active duties on the trustee, so that the use has been executed by the statute of uses with the result that ownership of the lands is vested in the lot owners. If the trust was a bare naked trust, which I find and conclude to be true, then, since at that point when the attempted creation of the trust occurred the Hilton Head Company owned the lots, the statute of uses put title to the strand property back into the Hilton Head Company and the successors of the Hilton Head Company became owners of the strand property, but see Frierson v. Porter Academy, 217 SC 168, 50 SE2d 82 (1950). Even if this is so, while it may affect title to the property, it does not defeat the Plaintiff's claim that the plats and covenants restrict the use of the property to beach access and park space for the benefit of all the owners in the subdivision. Where the

use is transformed from an equitable to a legal estate, the same qualities, conditions, and limitations that were applicable to it as a use follows it in its new condition as a legal estate Erleron v. Porter Academy supra Thus, regardless of who holds title to the strand properties, the strand properties remain dedicated to the use and benefit of all of the owners in the subdivision To hold otherwise would totally frustrate the unmistakable intention of the Hilton Head Company by, among other things, enabling the defendants to block beach access This is so because it is not possible to get to the beach from the rear lots in the subdivisions without crossing over the strand property

32 From the beginning of the subdivisions, the deeds to lot owners were sold with references to recorded plats, so that one could see what streets or alleys would be open for him to use in connection with his property and, in particular, the purchasers of property on the rows behind the oceanfront row relied upon the roads or paths platted down to the beach through the front row lots to give them access Now the Defendant Hilton Head Beach Subdivision Assets Holding Corporation is granting to individual lot owners rights in the streets reserved to be open because they are so shown on the plat, and this interferes with the back lot owners' access to the beach which they bought when they bought their lots, because the plats were

recorded when they bought, and nothing in their deeds negated their use, that is, their right to an easement to use the platted streets and alleys ⁶

33 Now the roads or alleys to the beach are being blocked by "improvements" by adjoining front beach landowners

34 The property between the beach front owners' lots and the mean high water mark known as the beach strand block or "trust property" was to be held "in trust ... for the use and benefit of all present and future property owners of any lot or lots [in the subdivisions] ..." This language is under our law like the law of the Medes and the Persians⁷, that is immutable. The Seller of the beach strand property could not change it without the consent of every person who had been sold a lot with knowledge of the trust clause, regardless of whether it created a trust or not. After Hilton Head Beach Subdivision Property Research Holdings obtained from the Bankruptcy Court the residuary rights of the Hilton Head Company, including the beach trust property, it conveyed certain rights to Assets Holding Corporation. And it still holds - unless it has attempted alienation - the beach trust property. Therefore, no attempt to

⁶ It is true that some of these street ends are shown as beach access parks, but "a rose by any name," i.e., they are there to provide access to the beach.

⁷ See the Book of Daniel where it appears that once the King of Media and Persia made a law, not even the king could change it, hence the expression, "Thus was it in the days of the Medes and the Persians and thus shall it always be."

plat and sell to adjoining landowners, or any other use of the beach trust property which would not benefit all lot holders in the affected subdivisions can be made

35 Likewise, no conveyance, easement, license, or permit can be made, or if made, cannot be used, except as provided in such covenants, i e , no right can be given to one lot holder to the exclusion of any other

36 Some years ago, in an effort to prevent further beach erosion a rock revetment was built on the beach strand property. Over the years many of the front beach owners filled in dirt between their lot lines and the revetment and put improvements, gazebos, swimming pools, lawns, etc on the fill dirt. The Plaintiff and/or his predecessors in title stood by and made no effort to protect themselves from those "improvements." The Plaintiff saw those improvements in place (or a reasonable inspection would have shown them to have been in place) when he bought his lot, so he cannot now challenge and insist upon the removal of improvements on the beach trust land already present,⁸ except as it affects him and as is hereafter provided. I make this finding not because of any Encroachment Agreement a front beach lot holder may have entered with the Defendant Hilton Head Beach Subdivision Assets Holding Corporation, because I find

⁸ Obviously the persons who have invaded the beach strand property would have to be given a chance to be heard, i e , would have to be joined as parties to a suit

such Encroachment Agreements to be void, but because the rights were lost by non-action when the Plaintiff's predecessors in title had an opportunity to stop "improvements" in the beach strand area and failed to do so. It is not my intention to make any ruling in this case which would take away the rights of any person who is not a party to this suit.

37 But here the Defendants Sokol seek to put in a swimming pool on the property between their lot line and the revetment line. Can the Plaintiff who here complains of such proposed use and seeks to enjoin it, fail because the Defendants seek only to do what others have done?

38 I think the answer must be no. There is a difference in the Defendants' proposed addition and the addition made by others. Here the Plaintiff has objected before the Defendants have gone forward with the project. I must enforce the Plaintiff's right in this particular.

39 I must enforce it because I must think of, among other things, the future. As a result of beach nourishment, we again have a beach which one can walk on - a beach east of the revetment. But, a hurricane or a lack of beach nourishment - which is expensive⁹ - could result in the revetment and the area between it and the lot lines of the front beach being washed

⁹ And is perhaps paid for in part by taxes on poor people, so that the rich front lot owners can cavort on the beach.

away Could it then be said that the Plaintiff could not walk on what would then be the beach because I by my decision have said that the front beach lot holders own or have equivalent dominion over the property then on the beach below their platted lot lines? I think not

40 Then, what about the 36 foot wide street ends reserved as access to the beach and/or parks? As long as the Defendant Hilton Head Beach Subdivision Assets Holding Corporation holds such street ends, I do not question that it¹⁰ could, so long as it provided reasonable access to the beach, put parks in, that is, landscape within the street ends But it cannot under the guise of putting in parks convey the right to adjoining landowners to increase their landscaping¹¹ and hence their holdings The covenants do not allow Hilton Head Beach Subdivision Assets Holding Corporation to convey any title or easement or license to adjoining landowners with the idea that such adjoining landowner will put in a park, nor can there be any parking made in the street ends or street ends called "parks"

41 All improvements made in the 36 foot wide street end

¹⁰ Or later someone to whom it sold its rights could

¹¹ The natural beauty of the beach makes every 36 foot street opening a natural park, the right to look down the 36 foot wide vistas at waves breaking on the beach is such "paradise enow" as to make the open vistas natural parks

of L Street should be removed within 90 days of the receipt of this Order by the Defendants' attorneys ⁻¹ And all improvements within the projected 36 foot wide street and to the rock revetment shall likewise be within that time removed by the Defendants

42 Under the ruling just made, obviously I refuse to consider the counterclaim for damages claimed to arise as the result of a swimming pool not being allowed and a claimed resulting rental income loss

43 I previously entered a temporary restraining order in this case A temporary injunction was then refused, but I now grant a permanent injunction

44 The Defendants have asserted that the Plaintiff has failed to name parties necessary for a just adjudication I take it that the Defense is that under Rules 12(b)(7), 12(h)(2) and 19(a) SCRCF, indispensable parties have not been joined Rule 12(b)(7) provides that the defense of "failure to join a party under Rule 19 may be raised by a responsive pleading or by motion, Rule 12(h)(2) provides as it here applies, that "a defense of failure to join a party indispensable under Rule 19" may be made by a pleading or "by a motion for judgment on the pleadings " Rule 19(a) provides as follows

(a) Persons to be Joined if Feasible A person who is

⁻¹ This Order is directed at the Thompsons as well as the Sokols because they or their predecessors also cluttered the 36 foot vista

subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

As I read Rule 19, it requires me to undertake a two-part analysis to determine whether all parties needed for a just adjudication are before the Court. First, I identify all necessary parties by applying the test set out in 19(a). If, after application of the rule 19(a) test, I determine that additional persons should be joined, and such persons cannot be made parties, I must determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. Rule 19(b) provides the practical factors for me to consider in reaching its determination. Only if pragmatic considerations strongly indicate that it would be preferable to dismiss the action rather than proceed with the parties before it, should I conclude that the absent party is truly "indispensable". The number of cases in which there is truly an

"indispensable party" in whose absence the Court should not proceed are very rare. Lightsey, CODE PLEADING, pp 109-110. If the party is not necessary under Rule 19(a), then the considerations listed in Rule 19(b) are never reached. Stewart v. State Crop Pest Comm., 307 SC 133, 414 SE2d 121 (1992). Parties are not necessary to a complete determination of a controversy unless they have rights which must be ascertained and settled before the rights of the parties present in the suit can be determined. J. J. Lawter Plumbing v. Wen Chow Intern. Trade and Inv., Inc., 286 SC 49, 331 SE2d 789 (SC App 1985). General considerations of efficiency or convenience are not sufficient to require joinder. SCDHEC v. Fed-Serv Industries, Inc., 294 SC 33, 362 SE2d 311 (SC App 1987). Where a complete determination of the controversy can be had without bringing in additional parties, those sought to be brought in are not necessary parties. Marshall v. Winter, 250 SC 308, 157 SE2d 595 (1967). The Defense is based on the fact that there are numerous other persons who could bring the same action brought by the Plaintiff. Therefore, it is argued, failure to join them here could subject the Defendants to multiple suits or inconsistent obligations. There are hundreds of lot owners in Forest Beach who are beneficiaries of the covenants at issue here. To require the Plaintiff to join them all as a prerequisite to asserting his rights would, as a practical

matter, deny Plaintiff access to the Court. None of the other potential plaintiffs have rights which must be ascertained and determined before this case can be adjudicated between the parties before the Court, nor does the absence of any party preclude or prevent the complete adjudication of the claims between the parties who are present. If the Defendants are concerned that others may bring claims identical to the Plaintiff's, they could and should have brought those other parties into this action themselves. This Defense now fails.

45 The Defense of Adverse Possession is raised. This claim is without merit because the Deeds and chain of title of the Defendants Sokol and Thompson are subject to the covenants and restrictions of record. They are estopped by their deeds from claiming adverse possession. See Peoples Fed S&L v Myrtle Beach Golf Club, 310 SC 132, 425 SE2d 765 (1992) ¹³. There was never a claim made of exclusive use of the easement claimed by the Plaintiff. Even now the Defendants Sokol and Thompson admit that the Plaintiff has a right to use the easement. Without an exclusive claim to the entire 36 feet, which admittedly the Defendants Sokol and Thompson do not have, who is to set the limits on the Plaintiff's right - two feet, ten feet? Sideways perhaps Mr. Petersburg could make it down a one foot

¹³ Same case, Certificate improvidently granted. 443 SE2d 807

corridor, but that would be unfair to a lot holder who like me has no sideways. The Plaintiff and the Defendants Sokol and Thompson have (apart from any adverse possession claim) equal rights to use the easement. To say that an adverse use can deprive the Plaintiff is akin to allowing one tenant in common to claim adversely to another without an ouster. At 25 AM Jur 2d. 690, "Easements and Licenses," Section 199 appears the following

... use of an easement of ingress and egress created by grant will not be considered as adverse to the owner of the dominant estate [Plaintiff] until the owner of the dominant estate demands its use and is denied such use

Here no use was demanded of the servient estate until this suit was commenced

46 Not only are the Defendants Sokol and Thompson not entitled to any improvements, really encroachments, within the 36 foot street end of L Street, but they cannot maintain any improvements or encroachments within the projection of this 36 foot wide vista through the strand block. I am not unaware that I have elsewhere allowed improvements in the strand area because the Plaintiff's predecessors in title sat by and allowed these to be built and the Plaintiff was aware of these encroachments when he purchased his lot. The same acquiescence occurred as to encroachments in the projected 36 foot vista into the strand or beach trust property, but these encroachments are just as if

built within the platted street ends, because when the Defendants Sokol and Thompson claimed the right to put improvements in the strand property, for example a gazebo, in the path of the 36 foot vista, they could not do so. Their actions in attempting to claim the beach strand area could not bar beach access. Again adverse possession is not a good Defense.

CONCLUSIONS OF LAW

1 Any finding of fact which in fact is a conclusion of law is here so adopted.

2 I grant a permanent injunction as provided above.

3 I declare - as stated in detail above - in my findings of fact that any rights the Defendants Sokol and Thompson have in so far as this law suit is concerned come not from any grant to them by the Defendant Hilton Head Beach Subdivision Assets Holding Corporation.

4 I declare that the Defendants Sokol and Thompson are not entitled to maintain any improvements within the 36 foot street end of L Street or within its projection through the strand block property, and in fact, they are to remove the improvements.

5 I find damages as set forth in my findings of fact.

which I here incorporate, so that I award the Plaintiff \$1 00 nominal damages, to prove the point that there can be no wrong without a remedy

6 Each party shall bear its own attorney's fees, legal costs as provided by law to be paid by the Defendants

7 The Encroachment Agreement referred to herein is invalid

8 I declare that in accordance with the covenants, the strand blocks and all road ends or parks for beach access located within Hilton Head Beach Subdivision #2 are to be held for the use and benefit of all present and future lot owners and any attempt to plat, sell, convey, or to grant easements, licenses or permits in the strand blocks or road ends or parks for beach access to any lot holder to the exclusion of any other lot holder is void and of no legal effect

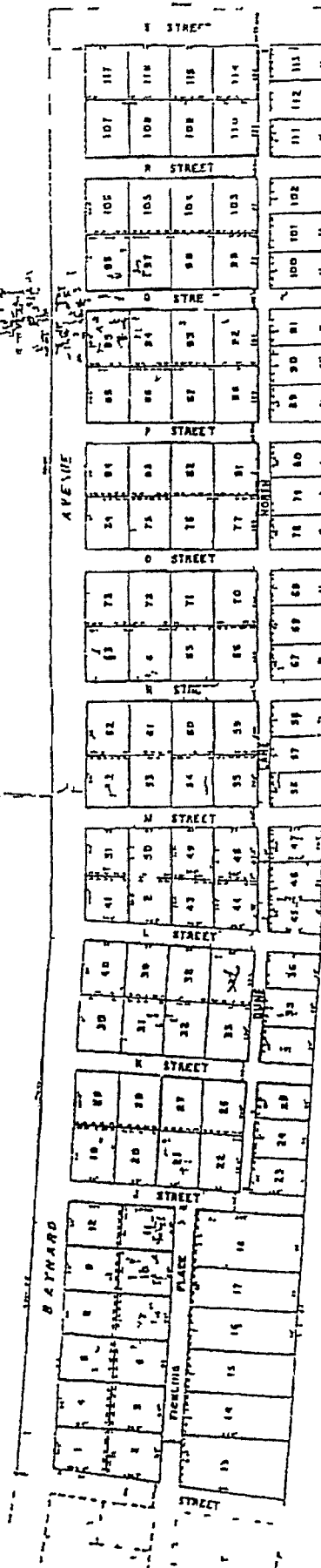
AND IT IS SO ORDERED


Thomas Kemmerlin, Jr , Master in
Equity and Special Circuit Judge
for the Court of Common Pleas of
Beaufort County

Beaufort, South Carolina

This 30th day of January, 2001

EXHIBIT A



B E I A C H

HILTON HEAD BEACH
SUBDIVISION NO. 2
PROPERTY OF
THE HILTON HEAD COMPANY
HILTON HEAD, S. C.



End of Sheet

BEACH 1955 MAP A 1013
NORWAY ST 10 FT 1574 FEET

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Thomas Kemmerlin, Jr
Special Referee

Case No 2004-CP-07-2036

Forest Beach Owner's Association,, Inc ,
and Trevor Howard,

Respondents,

v

Carolyn S Austin, formerly known as
Carolyn S Bair,

Appellant

RECORD ON APPEAL
Volume II

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1 JOHN SNODGRASS, called as a witness,
2 having been first duly sworn, was examined and
3 testified as follows

4 DIRECT EXAMINATION

5 BY MR PATTERSON

6 Q Mr Snodgrass, would you give us your full
7 name, please

8 A John David Snodgrass

9 Q And where do you live?

10 A 2 Sandpiper Street, Hilton Head Island

11 Q And is that in North Forest Beach?

12 A Yes

13 Q And which subdivision - I know they're
14 numbered - which subdivision do you live in?

15 A 2A

16 Q All right And what do you do for a living?

17 A I am general manager of North Ridge Cinemas
18 I'm also the executive director of the Forest Beach
19 Owners' Association

20 Q Which is the Plaintiff in this case?

21 A Yes

22 Q All right How long have you been associated
23 with the Forest Beach Association, or the Forest Beach
24 Owners' Association?

25 A Since 1995

1 Q All right And just briefly, what roles have
2 you had with those subdivisions?

3 A I've held positions as director, president,
4 and executive director

5 Q Okay And you also have lived, as you've
6 mentioned, in Hilton Head 2A since 1994

7 A Yes

8 Q And you've owned property there?

9 A Yes

10 Q All right Looking at Exhibit 35A, and I
11 think it's under tab 35 -- excuse me, or 35A, are these
12 the forfeit records for an entity called Forest Beach
13 Association, Inc ?

14 A Yes

15 Q And when was the Forest Beach Association
16 formed?

17 A The original association, with the name
18 Forest Beach Association, Inc , was formed in 1974

19 Q All right And did it dissolve at some
20 point?

21 A Yes It did

22 Q And when did it dissolve?

23 A I believe it was around 2000

24 Q Does the document state September 22nd, 2000?

25 A Yes It does

1 Q All right And that's Exhibit 35A?

2 A Uh-huh

3 Q And why did the Forest Beach Association
4 dissolve?

5 A There was an administrative error on the part
6 of the then treasurer, in a failure to file a payroll
7 tax return timely, and ultimately the Secretary of State
8 proceeded with an administrative dissolution

9 Q All right And did the association continue
10 to operate?

11 A Yes It never ceased operation

12 Q All right And when that -- when the
13 association became aware of that, did it try to
14 reinstate the name -- it's charter as Forest Beach
15 Association?

16 A Yes It did

17 Q And was it successful?

18 A No Prior to our becoming aware of the
19 dissolution, in an attempt to reestablish, the name had
20 been reestablished by Mr Guscio

21 Q Mr Guscio with Property Research Holdings
22 that's --

23 A Yes

24 Q -- here today?

25 A Correct

1 Q And so what did the association do?

2 A The association formed a new entity under the
3 title, Forest Beach Owners' Association

4 Q And is Exhibit 35B the corporate records for
5 Forest Beach Owners' Association?

6 A Yes It is

7 Q And was that formed effective October 6th,
8 2000?

9 A Yes It was

10 Q And looking at Exhibit 22, did the, that I'll
11 call the owners' association, Forest Beach Association,
12 transfer and assign all of its rights to the new
13 association by an absolute assignment?

14 A Yes It did

15 Q And if you'll just read for me the first
16 "whereas" on Exhibit 22

17 A "WHEREAS the Assignor was
18 formed as a not for profit
19 mutual benefit corporation to
20 protect and preserve the rights
21 of property owners throughout
22 those certain subdivisions
23 located on Hilton Head Island,
24 South Carolina known as Forest
25 Beach and since its

1 incorporation has obtained the
2 right to enforce certain
3 covenants and restrictions
4 which were recorded by the
5 original developer, has
6 instituted litigation to
7 enforce such covenants, has
8 obtained real property, and has
9 entered into certain agreements
10 to facilitate the enforcement
11 said covenants and
12 restrictions The rights,
13 holdings, property, real and
14 personal, of the Assignor are
15 more particularly described on
16 Exhibit "A" a copy of which is
17 attached hereto and
18 incorporated herein by
19 reference "

20 Q Okay Did the association continue just as
21 it had before, under its new name, Forest Beach Owners'
22 Association, which is the Plaintiff in this case?

23 A Yes There was no change in operations

24 Q All right In what subdivisions is the
25 Plaintiff, Forest Beach Owners' Association, involved

1 with, as far as covenant enforcement and other dealings
2 of the association?

3 A In South Forest Beach, Pond Forest, and
4 Lawton Beach, the Central Forest Beach Business
5 District North Forest Beach includes Hilton Head Beach
6 Subdivisions 1, 1A, and 2A, and 3 And we assist people
7 in Hilton Head Beach Subdivision number 2

8 Q Okay And all those different subdivisions
9 were developed and formed by the Hilton Head Company?

10 A Yes

11 Q Okay And I believe there are seven
12 different plats showing all of those subdivisions that
13 the association is involved with?

14 A I believe there are eight plats

15 Q Okay Well, are seven of them for -- shown
16 as Exhibit 10, and 79 through 84, in this case?

17 A You said Exhibit 10?

18 Q Exhibit 10 is which subdivision?

19 A That is a plat of subdivision number 1

20 Q All right And that plat shows that property
21 that we are here today for as lot 5 Avocet?

22 A Yes It does

23 Q Okay And tell me what the other plats I've
24 identified, 79 through 84, are for

25 A Exhibit 79 is Hilton Head Beach subdivision

1 number 2 Exhibit 80 is Hilton Head Beach subdivision
2 number 3 Exhibit 81 is --
3 Q Is that Lawton Beach subdivision?
4 A Yes
5 Q All right
6 A Subdivision number 1, South Forest Beach,
7 also known as Lawton Beach Exhibit 82 is Palm -- no
8 It is Hilton Head Beach subdivision 1A, North Forest
9 Beach Exhibit 83 is Hilton Head Beach subdivision
10 number 2A, North Forest Beach And Exhibit 84 is
11 Central Forest Beach subdivision
12 Q Okay Let me, while you're up there at
13 Exhibit 84, one of the pieces of property that are
14 subject to this litigation is what's called the strand
15 block, or Beach Trust property, in front of Avocet
16 Street, and seaward of Mr Bair's lot 5?
17 A Correct
18 Q On Exhibit 84 is there a designation of that
19 property on that plat?
20 A Yes There is There is a wording, "Strand
21 of Hilton Head Beach, Subdivision Number 1, Trust
22 Property," indicated on this plat
23 Q Okay All right I want to talk about what
24 property or land the association owns
25 Plaintiff -- look at Exhibit 19, is that some

1 property that is owned in Hilton Head Beach subdivision
2 number 1 by the association?

3 A Yes It is It's referred to commonly as
4 parcel C We also call it the pump house location

5 Q All right And that was acquired by the
6 association in December of 1999?

7 A Yes It was

8 Q All right In looking at Exhibit 24, is that
9 another deed for real estate owned by the association?

10 A Yes It is

11 Q And was that acquired by the association in
12 May of 2001?

13 A Yes It was

14 Q And looking at that deed and the plat that is
15 showed on Exhibit 25, are that -- is that combined of
16 all the street-- what are called the street extensions,
17 or street ends, in Hilton Head number 1?

18 MR STEPP I'm going to object I
19 think that calls for a legal conclusion, but I
20 wouldn't object to what his understanding of it
21 was

22 JUDGE KEMMERLIN Okay

23 MR PATTERSON Okay

24 BY MR PATTERSON

25 Q Is it your understanding that Exhibit 24

1 conveys what are marked parcels A through I, which are
2 the -- what are commonly called the street ends, or the
3 seaward end, of all the plated streets in Hilton Head
4 number 1?

5 A Among others, yes

6 Q Does it also purport to convey the land
7 seaward of the street extensions, a portion of what's
8 been called the trust property?

9 A Yes It does

10 Q All right For all of Hilton Head number 1?

11 A Correct

12 Q Okay And looking at Exhibit 33, has the
13 association been paying real estate taxes on all three
14 of those different types of properties?

15 A Yes We have Since at least 2004, and I
16 believe even earlier than that

17 Q Okay And in fact, looking at Exhibit 33,
18 the association has actually been paying taxes on the
19 property that is claimed by Ms Bair in this case

20 A Yes

21 Q And they've been paying taxes on that
22 property since 2004?

23 A At least 2004

24 Q Okay All right I want to talk now about
25 the beach accesses, how people get to the beach in

1 Hilton Head number 1

2 If you'll look at Exhibit 10, which is the
3 subdivision plat

4 A (Witness complied)

5 Q How do the interior lot owners in Hilton Head
6 Beach subdivision number 1 access the beach,
7 historically?

8 MR STEPP Your Honor, I'm going to
9 object I don't know that this witness has a
10 foundation to answer that question

11 MR PATTERSON I can provide a
12 foundation if you want me to

13 JUDGE KEMMERLIN All right Go ahead
14 then

15 BY MR PATTERSON

16 Q How long have you lived in North Forest
17 Beach?

18 A At this point, approximately, 17 years

19 Q All right And you've been associated with
20 the association in one way or another since 1994?

21 A Correct

22 Q Okay In part of your duties do you
23 regulate, visit, and inspect all of the properties the
24 association is involved with, including Hilton Head
25 Beach number 1?

1 A Yes On numerous occasions I drive through
2 the subdivisions As the beach accesses are one of the
3 most important concerns of the community, we regularly
4 monitor the beach accesses, and inspect them

5 Q And do you personally actually use the beach
6 accesses?

7 A Yes I do

8 Q Because you live --

9 A I live on Sandpiper, in North Forest Beach,
10 and I frequent Coligny Plaza, and so I have occasion to
11 use the beach accesses on the south end as well

12 Q And have you used, say for example, the
13 Avocet, or A Street, beach access shown on plat book --
14 on Exhibit 10?

15 A Yes I have

16 Q Okay All right With that understanding,
17 how do the interior lot owners in Hilton Head Beach
18 number 1, shown on Exhibit 10, access the beach?

19 MR STEPP Same objection, Your Honor
20 The foundation would only be for what he could have
21 observed or done personally It can't be that
22 general

23 JUDGE KEMMERLIN Well, I'll take it
24 subject to the objection If they can't get there
25 that way, there ain't but one way they can get

1 there, and that's by rowboat

2 MS BAIR No That's --

3 MR STEPP Well, no We'll show you
4 another way

5 JUDGE KEMMERLIN Okay

6 BY MR PATTERSON

7 Q How have they historically gained access to
8 the beach?

9 A There are multiple means of access to the
10 beach, all of which are the ends of the streets that run
11 perpendicular to the beach So A Street, as identified
12 by this plat, B Street, C, and so on up though I Street,
13 all end at the beach and provide a means of access

14 Q All right And are all of those, A Street
15 and B Street, are all of those open, or prior to Ms --
16 prior to the action Ms Bair took in this case -- how --

17 Historically all of those beach accesses have been
18 open to provide access to the beach?

19 A Yes They have

20 Q Every single one of them on Exhibit 10?

21 A Yes

22 Q And how about on the other ocean front
23 subdivisions, Hilton Head number 2 and 3, shown by
24 Exhibit 79 and 80, are the beach accesses in those
25 subdivisions set up the same as is Exhibit 10?

1 A Yes They are They're the ends of the
2 streets that run perpendicular to the beach, and they
3 all provide a means of access to the interior lot
4 owners

5 Q And prior to the actions that we're here
6 today about, Ms Bair and A Street, were every single
7 one of those beach accesses for Hilton Head Beach number
8 1, 2, and 3, shown by Exhibits 10, 79, and 80, always
9 open to the beach, and are open today?

10 A Yes

11 Q Is there any other way that property owners,
12 in all of these subdivisions that the association's
13 involved with, can access the beach, other than going
14 down these street extensions?

15 A No

16 Q Have you ever used the Avocet Street
17 extension to gain access to the beach?

18 A Yes I have

19 Q Okay And I want you to look at the
20 photograph which is Exhibit 76

21 A (Witness complied)

22 Q All right

23 JUDGE KEMMERLIN What exhibit's that?

24 MR PATTERSON Exhibit 76 Why don't
25 you turn that around so the Judge can see it You

1 all can use the same one

2 JUDGE KEMMERLIN I see it Okay

3 BY MR PATTERSON

4 Q Tell me what that photograph is?

5 A That's a photo from, approximately, September
6 of 1991 of the Avocet Street extension going toward the
7 ocean

8 Q Okay And how would you -- people access the
9 beach in 1991 down the Avocet street extension that
10 we're --

11 A You could walk from the intersection of
12 Avocet and Dune toward the ocean on either side of the
13 planter depicted in the picture You could follow a
14 beaten foot path to the right, or there was another
15 means off to the left

16 Q Okay And so, in 1991 at least, shown by
17 Exhibit 76, the street extension and the beach access
18 was wide open and accessible?

19 A Yes

20 MR STEPP Object to the form of the
21 question as leading

22 MR PATTERSON All right

23 JUDGE KEMMERLIN Okay

24 BY MR PATTERSON

25 Q Was there any obstructions, as far as beach

1 access, in 1991?

2 A No significant obstructions

3 Q Okay And I notice a car in this photograph

4 Would cars ever use the beach extension?

5 A Yes

6 Q And tell me on what occasion?

7 A On numerous occasions people would pull up to

8 drop people off to go the beach Some adjoining lot

9 owners on ocean front might use it as a means of access

10 to their garage or parking areas

11 Q And in fact the owner of lot 5, did they ever

12 use the street end for vehicles?

13 A Yes They used it regularly for parking

14 Q And in fact there's no other place to park a

15 car for Ms Bair's house, other than parking it

16 approximately where this red car is on Exhibit 76?

17 A That is correct

18 Q I want you to look at Exhibit 72 If you'll

19 keep it that way then maybe both you and the Judge can

20 look at the same exhibit, since these are pretty bulky

21 Turn to Exhibit 72

22 A (Witness complied)

23 Q All right

24 A All right

25 Q The -- I will represent to you that that is

1 an as-built survey, dated April 24th, 1997

2 A Correct

3 Q Does that show Avocet Street in that survey?

4 A Yes It does

5 Q All right And does it show an existing path
6 to the beach?

7 MR STEPP Object to the form of the
8 question as leading It shows a path

9 JUDGE KEMMERLIN I'm sorry I didn't
10 hear you

11 MR STEPP It shows a path, but the
12 witness should say where the path goes

13 BY MR PATTERSON

14 Q All right Does that show any indication of
15 the existence of a path?

16 A There is a path indicated that is marked
17 "Existing Beach Access Path," which begins on Avocet
18 Street adjacent to lot 5, meanders, or cuts across, what
19 is listed on this as-built as "Sea Crest Motel
20 Property," and then into the strand area, and then back
21 into the strand area in front of the Avocet Street

22 Q Is that, generally, the location of the foot
23 path that you -- one of the paths to the beach that you
24 described earlier when you were looking at the
25 photograph?

1 A Yes That -- that mirrors the path of the
2 path that was depicted in the earlier photograph that
3 led to the right

4 Q Okay And how long was that path in use for
5 before something changed? If you'll look at Exhibit 55

6 MR PATTERSON If that notebook's
7 messing up we can use this one

8 WITNESS Yeah It's got a defective
9 ring in it

10 MR PATTERSON Here let's switch
11 Looking at --

12 JUDGE KEMMERLIN You might as well use
13 this one, because you're going to need that one
14 I've been watching his anyway

15 MR PATTERSON Okay

16 JUDGE KEMMERLIN If I can't I'll
17 holler

18 MR PATTERSON Those notebooks cost
19 \$50 00 apiece, you'd think they'd work for a week

20 WITNESS Okay

21 BY MR PATTERSON

22 Q In looking under "New Business," this is
23 Board Minutes of March of 2004

24 A Yes March 8th, 2004

25 Q All right Did something change with the

1 beach access about this time frame?

2 A Yes It was noted that the access at Avocet
3 Street had been completely blocked at that point in time
4 by construction of iron gates, and that cut across the
5 Avocet Street as it -- on the ocean side of Dune Lane --

6 Q All right

7 A -- blocking Avocet Street from there to the
8 beach

9 Q And just to speed things along, the
10 subsequent board minutes, which are Exhibits 56 though
11 60, reference other board action relative to -- in 2004,
12 to the construction of the iron gates

13 A Yes Exhibit 56 references a request and
14 some action by the town to look at the height of the
15 fence adjacent to the gate, and the blockage of the
16 access

17 Q One of the responses of the association was
18 to contact the town?

19 A Yes We contacted the town I met with the
20 code enforcement officer, at that time Barbara Barrett,
21 and Jeff Buckaloo from the engineering department

22 Q All right Did the town, to your knowledge,
23 take any action?

24 A The town, to my knowledge, took no action

25 Q All right How about Exhibit 57?

1 A Okay This indicates that in June of '04 we
2 had received a letter advising us that a title search
3 would be performed by our attorney, which was yourself,
4 to determine the ownership of the access, and at that --
5 at that point was our first step in opening up the
6 access

7 Q Okay At some point you authorized this
8 lawsuit to be filed

9 A Yes

10 Q And it was filed in 2004?

11 A Yes

12 Q All right I want to look at what was here
13 today Look at the photograph, Exhibit -- starting at
14 77

15 A (Witness complied)

16 Q Tell me what Exhibit 77 is

17 A Exhibit 77 is a series of photographs looking
18 toward the ocean from Avocet Street to the Avocet Street
19 extension, with lot 5 being to the left in the
20 photographs

21 Q And in these photos --

22 A The first two photos

23 Q These photos were taken around November of
24 2005?

25 A Yes

1 Q And does the -- is the improvements, there on
2 Avocet Street access, generally look like that today?

3 A Yes

4 Q All right I see somebody out in photo 1B on
5 Exhibit 77 walking next to that wall Where is that
6 lady coming from, if you know?

7 A They are coming from a pathway built by the
8 Sea Crest Motel on their property

9 Q Okay And does that pathway lead to the
10 beach?

11 A Yes It does

12 Q All right And is that on the Avocet Street
13 extension, or any property owned or controlled by the
14 association?

15 A No That is private property owned by the
16 Sea Crest Motel

17 Q Is there any agreements between the
18 association, the property owners in Hilton Head number
19 1, to be able to use the beach path on the Sea Crest
20 Motel property?

21 A There is no agreement with the association
22 for any of its members to utilize that property

23 The only agreement I am aware of would be for a
24 property owned by the same owner as the Sea Crest Motel,
25 for their residence and guests to use it

1 Q Looking at Exhibit -- photograph 1C at 77, is
2 there a wall to the right?

3 A Yes

4 Q All right And is that wall -- who
5 constructed that wall, if you know?

6 A I do not know who actually constructed the
7 wall

8 Q All right And is it now possible, after
9 these improvements were put in, to access the beach from
10 the Avocet Street extension?

11 A Not without going off of the extension on to
12 lot 5's property to the left

13 Q Okay Turning to the next page of Exhibit
14 77, tell me what these photos are This is photos 2A
15 through 2C

16 A Okay

17 Q Just take those out of that Take them all
18 out

19 A Okay 2A through 2C Okay

20 Q What is 2A? What are these photos showing?
21 If you'll just describe them briefly

22 A 2A shows a set of steps leading up to a path
23 that goes out through the beach through the end of the
24 Avocet Street extension

25 Q All right And 2B is what?

1 A 2B is a rock path leading from the top of
2 those steps out toward the beach

3 Q And 2C?

4 A 2C is a photograph of the rear of the house
5 on lot 5, the Avocet Street extension being to the left

6 Q All right The next page, 3A through 3C, are
7 those additional photographs of the landscaping?

8 A Yes

9 Q And that landscaping is located where?

10 A In the strand area and street extension

11 Q All right And Exhibits -- photo's 4A
12 through 4C, what are those photos?

13 A Those are photographs of the end of Avocet
14 Street, just prior to its terminus with the strand
15 property, looking toward the ocean

16 4C is a reverse photo looking back down Avocet
17 Street toward Dune Lane, Dune Lane being just the other
18 side of the fence to the right

19 Q All right And that shows the gate closed
20 Have you ever seen the gate completely closed like that?

21 A Yes

22 Q All right And what is -- how often was the
23 gate completely closed?

24 A Difficult to say, but at least once a week

25 Q All right And normally what does it look

1 like? Or the times both gates aren't closed, what's it
2 look like?

3 A It looks like photograph 4A, except with the
4 gates across So if you can envision 4C from the other
5 direction

6 Q All right Turn back to Exhibit -- photo 1A,
7 the first photo we looked at

8 A (Witness complied) All right It looks
9 like photo 1A most of the time

10 Q With one gate closed?

11 A One gate closed

12 Q Have you ever seen it with both gates open?

13 A Rare occasion I have seen it

14 Q All right Continue with Exhibit 77, 5A,
15 what is that photo?

16 A This again is a photograph from the strand
17 area looking toward the house on lot 5, which is to the
18 right, and the pathway from what would be the street
19 extension of Avocet just to the left, near the
20 landscaping

21 Q All right 6A, the next photograph?

22 A (Witness complied) 6A, this is looking from
23 the beach toward Avocet Street, North Forest Beach
24 Drive, of the private pathway to the beach on the Sea
25 Crest property

1 Q All right And this is where this -- the
2 lady in Exhibit -- photo 1B was exiting out of -- this
3 is the walkway showing --

4 A In this photograph, yes That's where she
5 was coming out of

6 Q And is 6B the end of that same walkway on the
7 Sea Crest property?

8 A Yes It's the path right adjacent to the
9 pool deck on the left, in this photograph

10 Q And finally the last photograph, 7A of
11 Exhibit 77?

12 A Same pathway from the opposite direction,
13 looking toward the ocean

14 Q All right What problems or objections does
15 the association have with what is currently at the end
16 of Avocet Street extension?

17 A It appears that it is private property
18 blocking the use from the interior lot owners to access
19 the beach down Avocet Street

20 Q And how long had that use been in existence,
21 to your knowledge?

22 A Well, to my direct knowledge, at least 15
23 years, and certainly given the age of the subdivision
24 and its original design, I would envision that it was --

25 MR STEPP Object to speculation

1 there

2 MR PATTERSON Okay

3 BY MR PATTERSON

4 Q All right Let's move to another issue in
5 this case involving architectural review approval

6 Is there a requirement for architectural review
7 approval before the construction of improvements in
8 Hilton Head number 1?

9 A Yes

10 Q And as to Ms Bair's property, would the ARB
11 requirements be found in the covenants that we've marked
12 -- and deeds, as Exhibit 11, 12, and 13? You don't have
13 to turn to them if you --

14 A Yeah The covenants for Forest Beach
15 stipulate the ARB requirements

16 Q Okay And that -- they, basically, provide
17 in the covenants, which are fairly old, that the Hilton
18 Head Company must approve any improvements?

19 A Correct

20 Q All right And is it your understanding that
21 Property Research Holdings, through the bankruptcy,
22 acquired the Hilton Head Company's rights under those
23 covenants?

24 A Yes They did

25 Q And under Exhibits 16 and 17, did Property

1 Research Holdings, Mr Guscio's company, under Exhibits
2 16 and 17, assign those to the association?

3 A Yes They did

4 MR STEPP What Exhibit was that on?

5 MR PATTERSON That was Exhibit 16 and
6 17

7 BY MR PATTERSON

8 Q And I believe they were originally assigned
9 to the original homeowners' association, Forest Beach
10 Association

11 A Forest Beach Association, Inc Yes

12 Q And then Forest Beach Association, Inc , as
13 we already talked about under Exhibit 22, assigned those
14 to the new association, Forest Beach Owners'
15 Association

16 A That is correct

17 Q All right Looking at Exhibit 53 and 54

18 A (Witness complied)

19 Q Tell me what those documents are

20 A Exhibit 53 is the fee schedule and compliance
21 deposit schedule for the association, the Forest Beach
22 Owners' Association, as revised on April 1st 2004

23 Q And what is 54?

24 A Exhibit 54 is the permit application,
25 approximately three pages I believe, and that was

1 revised effective May 4th, 2004

2 Q And since you've been involved with the
3 association since 1994, have they, basically, had an
4 architectural review committee, and --

5 A Yes

6 Q And had these forms, and fees, and
7 procedures?

8 A There's always been a fee schedule and an
9 application form as long as I've been involved with the
10 association

11 Q And have you reviewed certain historical
12 documents as to what happened before you all were there?

13 A Yes

14 Q And what was going on as far as architectural
15 review approval, even as far as the Hilton Head Company
16 was concerned?

17 A Everything that was constructed in the
18 subdivisions was required to be submitted for review,
19 and it was reviewed by the ARB committee, and written
20 approval were given to the applicants

21 Q All right Did Ms Bair, the Defendant, ever
22 request or obtain ARB approval for the large metal gates
23 that she constructed?

24 A No She did not

25 Q How about the -- did she -- I know you don't

1 know who built the large concrete wall, but did anybody
2 submit any approvals for the large concrete wall?

3 A We have no records of any submissions for a
4 wall

5 Q How about the additional palm trees and
6 landscaping that was added?

7 A No submissions for any landscaping
8 improvements

9 Q Looking at Exhibit 78 for a second

10 A (Witness complied)

11 Q Exhibit 78?

12 A Uh-huh

13 Q Did -- on your site inspection in November of
14 2005, did you notice any other improvements that had not
15 been approved by the Forest Beach Association ARB?

16 A Yes We noticed, to the northerly direction,
17 between the house on lot 5 and the adjoining property,
18 that there had been constructed what appeared to be some
19 storage areas that ran between the house and the fence

20 Q Does photo 78-7C show, actually, both of
21 those storage sheds?

22 A I believe there may be three, but it
23 definitely shows two in this photograph

24 Q All right And tell me what's on the next
25 page, photos 8A and 8B of 78?

1 A Photo 8A shows one of the storage units, and
2 8B shows one near the front of the property

3 Q And in the past you'd referred to Exhibit 74,
4 which is an as-built survey you looked at before Does
5 that survey also indicate the location of at least one
6 of the storage rooms?

7 A I believe it does It's marked on here,
8 "Storage Area with AC unit " And then there's another
9 one marked, "Storage room by lot 5 projects into lot 6 "

10 JUDGE KEMMERLIN But that's not

11 Avocet

12 MR PATTERSON Excuse me, Your Honor?

13 JUDGE KEMMERLIN But that's not

14 Avocet, is it?

15 MR PATTERSON Yes, sir I'm talking
16 about certain improvements that she's done that are
17 not on the street extension

18 JUDGE KEMMERLIN That's all right

19 BY MR PATTERSON

20 Q And in fact it shows the location of the
21 storage room, and labels it, "Storage Room," that you
22 have photographed, is that correct?

23 A Yes It does

24 Q And were either one of those storage rooms --
25 any application approvals obtained for those two storage

1 sheds?

2 A No applications and no approvals

3 Q Would they have been approved?

4 A No They would not have been

5 Q And why not?

6 A Under the covenants you may not build closer
7 than five feet to the property line on the side of the
8 property The structure itself is built at the five
9 foot setback, and these storage rooms extend right up to
10 the property line

11 Q In fact, per Exhibit 74, one of them goes
12 over the property line, according to the survey?

13 A According the surveyor it does

14 Q Okay And the five foot setbacks, and I know
15 the court can read it, would they be in the covenants
16 that are Exhibits 11, 12, and 13?

17 A Yes

18 Q And -- I'll show you my Exhibit If you look
19 at Exhibit 9 Hold on and I'll get it Is Exhibit 9
20 the deed for Mr Bair's property?

21 A Yes It is

22 Q And in fact those covenants that I just
23 referenced as Exhibits 11, 12, and 13 are specifically
24 referenced in her deed?

25 A Yes It specifically states that the

1 property is subject to covenants, restrictions, and
2 conditions, and recorded in the office of the clerk of
3 the court, Beaufort County, South Carolina, Book 77,
4 page 11, 74 page 20, and 78 at 306

5 Q Okay What does the association want the
6 Court to do as far as all of the improvements that have
7 -- that we've just discussed that were not built with
8 ARB approval?

9 A Since none of these could have been approved
10 under the covenants, the association wishes that they be
11 removed

12 Q How about the big iron gates, and the
13 concrete wall, and the landscaping that blocks access?

14 A We would like to see all obstructions to the
15 Avocet Street beach access removed

16 Q Okay I want to talk briefly about the
17 property rights that are claimed by the association in
18 the disputed properties, which is the street extension
19 and the trust property

20 Looking at Exhibit 24, and I need you turn to that

21 A (Witness complied)

22 Q Is Exhibit 24 the May 2001 deed from Property
23 Research Holdings into the Forest Beach Association?

24 A Yes It is

25 Q All right And that is the deed where the

1 association claims actual title to the street extension,
2 and to the strand portion, and -- seaward of the street
3 extension?

4 A Yes

5 Q And those parcels in that deed are labeled A
6 and AA?

7 A Yes They are

8 Q And they're shown graphically, if you'll turn
9 to the next exhibit, Exhibit 25

10 A Yes

11 Q Point out to me where that property is that
12 we've received by deed

13 A "A" is the extension of Avocet Street from
14 its intersection at Dune Lane up to the end of the
15 subdivision boundary, and "AA" represents the beach
16 trust property oceanward of that parcel at the end of
17 Avocet Street

18 Q All right Now I need you to turn to what I
19 call Beach Trust Covenants If you'll look at Exhibits
20 85 -- 84, 85, and 86

21 A (Witness complied)

22 Q Does the association claim title to, or
23 certain rights to, the beach trust property?

24 A Yes

25 Q All right Is one of the bases the plat,

1 Exhibit 84?

2 A Yes

3 Q And would you highlight in yellow the
4 designation of that property as -- that we've talked
5 about before?

6 A (Witness complied)

7 Q All right And does that, where you've
8 marked in yellow, does that include the property
9 immediately seaward of the Avocet Street extension, and
10 Ms Bair's lot, lot 5?

11 A Yes It does

12 Q All right And then turning to Exhibit 85
13 Excuse me Yeah 85

14 A (Witness complied)

15 Q Is that what I've called the Beach Trust
16 Covenants?

17 A Yes

18 MR PATTERSON I know that Exhibit is
19 a little hard to read Is it all right that I have
20 him read from something that's typed up, and you
21 can check to make sure he's --

22 MR STEPP Sure

23 BY MR PATTERSON

24 Q If you'll look on Exhibit 85, those are
25 covenants that were recorded by the Hilton Head Company

1 in 1953

2 A I believe so

3 Q Okay

4 A Yes

5 Q If you'll read the first part of 74 at 305
6 starting with, "That The Hilton Head Company "

7 A "That the Hilton Head
8 Company, its successors and
9 assigns, shall forever hold in
10 Trust the following described
11 lands for the use and benefit
12 of all present and future
13 property owners of any lot or
14 lots in Hilton Head Beach
15 Subdivision No 1, said land is
16 more particularly described as
17 follows, to-wit "

18 Q Okay And then there is a legal description?

19 A Yes There is

20 Q A metes and bounds description?

21 A Yes

22 Q All right And just read that description to
23 me please

24 A "All that certain piece,
25 parcel or lot of land situate,

1 lying and being on Hilton Head
2 Island, Beaufort County, South
3 Carolina, being that land
4 located between the high water
5 mark of the Atlantic Ocean and
6 the front lot line of the lots
7 in the Subdivision known as
8 Hilton Head Beach Subdivision
9 #1, and described as beginning
10 at the Southeastern corner of A
11 Street as shown on a Plat of
12 said Subdivision thence
13 northeasterly along the front
14 lot lines of the lots fronting
15 on the ocean in said
16 Subdivision #1 500 feet, thence
17 in a southeasterly direction to
18 the mean high water mark of the
19 Atlantic Ocean, thence along
20 the mean high water mark of the
21 Atlantic Ocean approximately
22 500 feet to a point South 6 08'
23 East of the point of beginning,
24 thence North 6 08' West to the
25 point of beginning "

1 Q Okay And the next Exhibit, Exhibit 86, is
2 that another set of covenants recorded by the Hilton
3 Head Company for subdivision number 1, in March 24th,
4 1953?

5 A Yes It is

6 Q And if you'll read for me starting with, "Be
7 it resolved," from that exhibit

8 MR STEPP Can you just show me where
9 -- what part -- where in the Exhibit it is to
10 authenticate?

11 MR PATTERSON Sure I quit trying to
12 read that thing It was taking forever to try to
13 figure that out Wait a second, I have to get a
14 magnifying glass "Be it resolved," right after
15 "1953," third line You see where we're starting?

16 MR STEPP Yeah I'm with you

17 BY MR PATTERSON

18 Q Go ahead and start This is about the third
19 line in the first paragraph of --

20 A "Be it resolved that the
21 President of The Hilton Head
22 Company and the Secretary of
23 The Hilton Head Company be and
24 they are authorized and
25 directed to execute any

1 instrument or instruments --

2 Then there's an unknown portion

3 Q Well, it's three dots

4 A Three dots

5 Q Okay

6 A " declaring that certain

7 area of land lying between the

8 front lot lines of Hilton Head

9 Beach Subdivision No 1 and the

10 mean high water mark of the

11 Atlantic Ocean from the

12 southern end of said

13 subdivision to the northern end

14 of said subdivision as shown on

15 a plat recorded in the Office

16 of the Clerk of Court for

17 Beaufort County, South Carolina

18 and northward from said

19 subdivision for a distance of

20 one thousand (1,000) feet

21 Said area to be declared a

22 common for the use and benefit

23 of all present and all future

24 owners of property located in

25 Hilton Head Beach Subdivision

1 No 1 and extension thereof and
2 the said Hilton Head Company
3 hereby authorizes and ratifies
4 any instrument which the said
5 officers may exercise to carry
6 out the terms, conditions and
7 purposes hereof "

8 Q In reading that exhibit, does that cover the
9 strand property seaward of the Avocet Street extension
10 and in front of Ms Bair's property?

11 MR STEPP That's his understanding?

12 BY MR PATTERSON

13 Q That's your understanding?

14 A That's my understanding That it covers --
15 the 74 at 306 covers the strand property in front of
16 both the street extension and lot 5

17 Q And certainly it's your understanding that
18 the plat that we looked at, Exhibit 84, designates that
19 property as number 1 trust property that you highlighted
20 in yellow?

21 A Yes

22 Q All right Just briefly and we'll wrap this
23 up As far as any easement rights the association
24 claims, based upon the subdivision plat - and I don't
25 need you to turn all the way back, but I'll just show

1 you the subdivision plat we've been talking about, which
2 is Exhibit 10 - does that subdivision plat show Avocet
3 Street as -- Avocet as a street designated "A" Street?

4 A Yes "A" Street is indicated running from
5 Baynard Avenue, which is now known as North Forest Beach
6 Drive, past Dune Lane, to the terminus of the
7 subdivision boundary

8 Q And I hate to ask you, but if you'll turn to
9 Exhibit 1 Sorry about that

10 A (Witness complied)

11 Q All right I represent to you Exhibit 1 is
12 the first deed and the chain of title to Ms Bair's lot,
13 which is the first conveyance by the Hilton Head Company
14 out

15 A Okay

16 Q And if you'll look at the metes and bounds
17 property description

18 A (Witness complied)

19 Q If you'll read, "Said lot is more
20 particularly described "

21 A "Said lot is more
22 particularly described as being
23 bounded northeasterly by Lot
24 No 6 of said subdivision,
25 southeasterly by lands of

1 Grantor known as Hilton Head
2 Beach, southeasterly --
3 MR STEPP Southwesterly
4 MR PATTERSON Southwesterly
5 WITNESS " southwesterly by A
6 Street and northwesterly by
7 Dune Lane, and being
8 quadrangular in shape fronting
9 68 74 feet on Hilton Head
10 Beach, 100 feet on A Street,
11 68 28 feet on Dune Lane --

12 MR PATTERSON You can stop there

13 BY MR PATTERSON

14 Q Can you highlight where it says that it is
15 southwesterly by A Street?

16 A (Witness complied)

17 Q Again continuing along with discussion of any
18 easement rights the association claims, would you look
19 at Exhibit 13, which are the covenants recorded at 78 at
20 306

21 A (Witness complied) And if you would turn to
22 section 5 of those covenants on the last page

23 A (Witness complied) Section 5

24 Q All right If you will read for me the area
25 marked "Park Areas "

1 A Okay

2 "Park Areas - that portion
3 of the lands of The Hilton Head
4 Company shown as the open areas
5 between groups of lots in any
6 subdivision or between
7 subdivisions, which constitute
8 means of access to the beach
9 for rear lots, and any other
10 areas designated by The Hilton
11 Head Company, its successors or
12 assigns, shall be set aside as
13 park areas to be allowed to
14 stand free of building,
15 billboards, etc , or to be
16 landscaped and maintained, for
17 the beautification of the
18 Island and the enjoyment of its
19 residents and visitors "

20 Q Okay

21 MR STEPP I'm sorry I'm lost

22 Section 5 did you say?

23 MR PATTERSON It's at the end

24 MP SNODGRASS Roman numeral V

25 MR STEPP Okay Thank you

1 BY MR PATTERSON

2 Q How have the actions of Ms Bair that you've
3 described interfered with the ownership and easements
4 rights asserted by the association and the property
5 owners in Hilton Head number 1?

6 A It precludes the use of Avocet Street for the
7 benefit of rear lot owners as a means of access to the
8 beach

9 Q All right And prior to the gates going up
10 in 2004, how often was the Avocet Street beach path
11 used?

12 A Avocet Street is one of the busiest access
13 points for the area, because of the number of rear
14 property owners and time share developments that utilize
15 that, as opposed to the northern street accesses

16 Q Okay

17 A It was used daily

18 Q To your knowledge has anyone, including
19 yourself, ever been told by Ms Bair to get off her
20 property, or not use the Avocet Street extension?

21 A I have never been personally told to not use
22 it, and I've used it on several occasions, and I am
23 unaware of anyone who's been told not to use it

24 Q Have you ever seen any no trespassing signs,
25 or a sign that says "Property of Ms Bair," of any kind?

1 A No

2 Q And I think you've already testified that the
3 association --

4 MR PATTERSON You want to take a
5 break (toward Judge)?

6 MR KEMMERLIN Excuse me Excuse me
7 just one minute

8 (WHEREUPON, a brief break was taken off
9 the record)

10 BY MR PATTERSON

11 Q As I mentioned, the property that is subject
12 to this dispute, the Avocet Street extension and the
13 trust property in front of that, the association's been
14 paying taxes on since 2004?

15 A Yes

16 Q There's discussions about a quiet title
17 action that Ms Bair filed, which is in Exhibits 38
18 through 52, that was filed in November 1998 When was
19 the first time that the association became aware that
20 that quiet title action had been filed?

21 A We became aware during the title search in
22 2004, at the onset of this suit

23 Q And what was the reaction of the association?

24 A We were all startled, "we" meaning the board-
25 of-directors No one had been aware of it

1 Q Okay Based upon -- does the association
2 keep track of the property owners from the tax records
3 in Hilton Head Beach subdivision number 1?

4 A Yes

5 Q Based upon your understanding of those
6 records, did the Hilton Head Company own any lots in
7 Hilton Head number 1 at the time of its bankruptcy
8 filing?

9 MR STEPP Your Honor, I object I
10 think that would have to be hearsay

11 JUDGE KEMMERLIN Well, it's a matter
12 of public record, I guess Isn't it?

13 MR PATTERSON Yes, sir

14 JUDGE KEMMERLIN I don't know if
15 anybody searched the records, but he may know from
16 a standpoint of -- insofar as they are aware, you
17 can ask him that, I guess

18 BY MR PATTERSON

19 Q Are you aware if they owned any lots at the
20 time that the Hilton Head Company filed for bankruptcy
21 in November of 1987?

22 A I am not aware of them owning any lots in the
23 subdivision

24 Q Okay

25 MR PATTERSON I don't have any other

1 questions You can answer any that --

2 JUDGE KEMMERLIN I think you all might
3 want to swap places I don't know --

4 MR STEPP I'm all right, if nobody
5 objects All right Mr Snodgrass, I'm just going
6 to sit right here I'll try not to loom over you,
7 but if you think I'm making you uncomfortable, just
8 let me know

9 CROSS EXAMINATION

10 BY MR STEPP

11 Q Look back, if you would, at Plaintiff's
12 Exhibit 35

13 A 35A?

14 Q Yeah I want to make sure I've got his
15 chronology of events right

16 Forest Beach Association was, I believe you said,
17 formed in -- sometime in the 70s, is that right?

18 A Yes

19 Q Now Forest Beach Association was a voluntary
20 association of owners of lots in all three Forest Beach
21 subdivisions -- or all four Forest Beach subdivisions,
22 correct?

23 A Well, eight subdivisions But, yeah,
24 membership in the association was voluntary

25 Q It was not an association created in any of

1 the covenants or restrictions that the Hilton Head
2 Company recorded?

3 A No

4 Q And you could own property in any of those
5 eight subdivisions without being a member, is that also
6 right?

7 A Yes

8 Q Okay Now that association was dissolved, I
9 think we established, on 9/22/2000 See that in 35A?

10 A Correct

11 Q And the current Plaintiff in this case,
12 Forest Beach Owners Association, Inc , was formed in
13 October -- on October 6th, 2000, is that right?

14 A That is correct

15 Q Okay Now when -- look at Plaintiff's
16 Exhibit 46 Well, let me check that Plaintiff's
17 Exhibit 38 I'm sorry

18 A (Witness complied)

19 Q That -- that is -- Plaintiff's Exhibit 38 is
20 a copy of the summons and complaint in the quiet title
21 action that Ms Bair brought in 1998, is that right?

22 A I believe so Yes

23 Q And the date of the summons there on
24 Plaintiff's Exhibit Number 38 is November the 20th, 1998,
25 correct?

1 A Correct

2 Q So on November 20th, 1998 was Forest Beach
3 Owners' Association, Inc , the Plaintiff in this case,
4 in existence?

5 A No

6 Q Forest Beach Association was in existence,
7 and continued in existence for about another two years,
8 is that right?

9 A Correct

10 Q All right Now look at Exhibit 22 I hate
11 to bounce you around, but I'm following Russell's
12 chronology

13 MR PATTERSON I guess I can't object

14 WITNESS (Witness complied)

15 BY MR STEPP

16 Q Now Exhibit 22 you testified was an
17 assignment from Forest Beach Association, the entity
18 that got dissolved in 2000, to Forest Beach Owners'
19 Association, the entity that is the Plaintiff in this
20 case, is that right?

21 A Correct

22 Q And it is by this instrument that Forest
23 Beach Owners' Association claims its rights that predate
24 the date of its formation, is that right?

25 A Correct

1 Q Okay And that date of this assignment on
2 the third page is October 17th, 2000, is that right?

3 A That is correct

4 Q And would you agree with me that we just
5 looked at Exhibit 22 -- I'm sorry, Exhibit 35, that on
6 October the 17th, 2000 Forest Beach Association had
7 already been dissolved, is that right? It was dissolved
8 on September 22nd, 2000

9 A Yes

10 Q Okay Now look at Exhibit 10, which is this
11 Plat (indicating)

12 A (Witness complied)

13 Q Does Forest Beach Owners' Association own any
14 of the lots shown on Plaintiff's Exhibit 10?

15 A We own land We own no residential lots

16 Q Okay And do you -- does Forest Beach
17 Owners' Association own any land that is shown on
18 Plaintiff's Exhibit 10?

19 A Yes

20 Q All right And where is that land?

21 A They are the portions of the streets
22 oceanward of Dune Lane, Avocet being contested, but
23 uncontested, B Street though I Street

24 Q And that was by virtue of a deed from
25 Property Research Holdings in May of 2001, right?

1 A Correct

2 Q I asked a bad question, but thank you for
3 your answer

4 All right Prior to that did Forest Beach Owners'
5 Association own any land shown on Plaintiff's Exhibit
6 10?

7 A Not to my knowledge

8 Q Okay All right Let's look for a minute --
9 well, no We'll come back to that
10 Now, Mr Snodgrass, I want to ask you --

11 JUDGE KEMMERLIN Let me -- it has
12 always been my feeling that the so called Beach
13 Trust of yours is not a trust, because it was not
14 executed in the sense that it failed to have used -
15 - to file a statue of uses It's a bare naked
16 trust

17 Therefore, upon its formation, and upon
18 the filing of that plat, every land owner himself
19 had a right to whatever was shown on that plat, and
20 that has always existed, regardless of whatever
21 other people want to say otherwise, because that
22 was created by Lawton, and those people way up
23 here, they have a right, if that shows an access,
24 they have a right to that access Now that's
25 always been my position

1 Now how do you get around the land
2 trust not being a trust, and the statute of uses
3 being executed?

4 MR STEPP Well, if that's a question
5 to me, I'll be glad to answer it

6 JUDGE KEMMERLIN Yeah

7 MR STEPP Two answers First, and I
8 will show you -- I'll make a proffer of this now,
9 and then I'll try to do it with the witness But I
10 think we can show, Your Honor, that the beach
11 strand property doesn't cover the property
12 immediately at the end of Avocet Street We'll
13 look at that description in a minute and I'll show
14 it to you It may cover the property in front of
15 lot 5, but it doesn't cover the property seaward of
16 the street extension of Avocet Street

17 So whatever rights may have existed
18 northeast of there don't exist right there So
19 that anybody that does have a right on Avocet
20 Street doesn't have a right to continue over that
21 property that's not a part of the strand block

22 Number two --

23 JUDGE KEMMERLIN So you say that
24 Property Research Holdings bought that?

25 MR STEPP And sold it to -- and

1 deeded it to Ms Austin, title to which I don't
2 really think can be in dispute The use of it may
3 be in dispute, but title to which I don't think is
4 in dispute

5 And secondly, the covenants at 74 at
6 306 --

7 Well, there are two sets of covenants
8 that talk about use of the street ends The one
9 that talks about interior lot owners, we read that
10 to mean the owners just adjacent to lot A

11 JUDGE KEMMERLIN What gives you the
12 right to read it that way?

13 MR STEPP Well, because I think
14 that's what it says And I'll find it and read it
15 to you at the right moment And I may not be able
16 to put my hands on that - there are so many
17 covenants - but I'll cite that to you, Your Honor

18 JUDGE KEMMERLIN Okay

19 MR STEPP So we don't think there is
20 any -- there was any unrestricted right of access

21 But then, most importantly, our
22 position is that A Street extension, whatever it
23 may used to have been, has long been abandoned for
24 any of those purposes

25 And there's also been some discussion

1 in these cases about whether it's a park or not
2 It doesn't qualify as a park under the 74 at 306
3 covenants we just looked at because it is not an
4 area between lots, and it is not an area between
5 subdivisions, either one So by the express terms
6 of those covenants, it's not a park

7 So I don't know about the statute of
8 uses, and the execution of the statute of uses for
9 all of what does constitute the beach strand, but
10 that property doesn't cover up the foot of Avocet
11 Street, in our view

12 JUDGE KEMMERLIN Okay

13 MR STEPP So let' see if we can --
14 does that at least address your question, Your
15 Honor? If not --

16 JUDGE KEMMERLIN Yeah Yeah Yeah
17 Partially But I was thinking that the Beach Trust
18 says in there something about it being an open --
19 creating for -- a right -- or some trust does

20 Doesn't it create a right for the
21 people to use these -- the road endways?

22 MR STEPP I'm not aware of anything
23 that specifically refers to them I mean, I might
24 be wrong, but --

25 JUDGE KEMMERLIN It's says, "all

1 Lots " Doesn't it?

2 MR STEPP Yeah There's something
3 about --

4 JUDGE KEMMERLIN It's hard to read I
5 realize that I may be anticipating it all, but I
6 want to have it straight in my head

7 MR STEPP Well, we're going to cut to
8 the chase That's fine

9 JUDGE KEMMERLIN Can you find the
10 magnifying glass? And doesn't it say where --

11 MR PATTERSON Yes, sir I typed them
12 up I've got some comments about --

13 JUDGE KEMMERLIN You want to see it
14 before he gives it to me then (toward Mr Stepp)?

15 MR STEPP Well, is it the same thing
16 that John was just looking at (toward Mr
17 Patterson)?

18 MR PATTERSON Yeah

19 MR STEPP Yeah I mean, that's fine
20 But that's really what I want to refer to as well

21 JUDGE KEMMERLIN Okay I understand

22 MR PATTERSON Your Honor, before I
23 give you that, I've got some of my comments on that
24 sheet that I probably shouldn't let you see

25 JUDGE KEMMERLIN All right Sure

1 Sure

2 MR PATTERSON Does he have a copier?

3 Because I can copy the --

4 JUDGE KEMMERLIN Yeah But I don't

5 know how to work it

6 MR PATTERSON Hold on a minute I'll

7 cut my section off with my comments and give you a

8 clean copy Won't take just a second

9 MR PATTERSON Is that all right if I

10 hand him that (indicating)?

11 MR STEPP Yeah That's fine In

12 fact, if you don't mind, let me just come around

13 there?

14 MR PATTERSON And Your Honor, if you

15 want to mark on that, that is Exhibit 85

16 JUDGE KEMMERLIN Let me just read it

17 first

18 MR PATTERSON Yes, sir

19 JUDGE KEMMERLIN I see the point

20 you're making, but -- all right All right

21 MR STEPP See, if you look there's

22 the --

23 JUDGE KEMMERLIN You don't have to

24 read it to me I understand it

25 MR STEPP Okay

1 JUDGE KEMMERLIN I want to also though
2 read what it says -- those original covenants say
3 about the lots

4 MR STEPP Well, let's see if I can
5 find that

6 MR PATTERSON Here is 86, the other
7 covenants

8 JUDGE KEMMERLIN Okay

9 MR PATTERSON There are two sets
10 There they have the plat that designates it
11 (indicating)

12 JUDGE KEMMERLIN Let me see Just a
13 minute Well, that's still dealing with the same
14 thing Okay Declared for common use But it
15 does say -- wait just a minute Let me read it
16 again Okay All right Okay?

17 MR PATTERSON Yeah

18 JUDGE KEMMERLIN Go ahead

19 BY MR STEPP

20 Q All right Mr Snodgrass, let me -- do you
21 still have the piece of paper that Mr Patterson gave
22 you that had the --

23 A Yeah It's those two sheets (indicating)

24 Q All right And look at Exhibit 10, if you
25 would?

1 MR PATTERSON Can we go ahead and
2 mark those, and put --

3 MR STEPP Yeah Let's go ahead

4 MR PATTERSON -- those into evidence?
5 Why don't we just call them -- well, we could call
6 them 85A and 86A, if you want

7 MR STEPP Whatever

8 JUDGE KEMMERLIN Okay Okay He's
9 going to mark it now Okay

10 (WHEREUPON, documents were marked as
11 Plaintiff's Exhibit Numbers 85A and 86A for
12 identification into the case of Forest Beach
13 Owners' Association, Inc and Trevor G Howard vs
14 Carolyn S Bair)

15 MR BARNES And are they just blowups
16 of --

17 MR PATTERSON Yes

18 BY MR STEPP

19 Q All right Mr Snodgrass, I call your
20 attention to 85A and this property description Do you
21 see that?

22 A Yes

23 Q Okay And it says,

24 " the front lot line of
25 the lots in the Subdivision

1 known as Hilton Head Beach
2 Subdivision #1, and described
3 as beginning at the
4 Southeastern corner of A Street
5 as shown on a Plat "

6 And I'm showing you Exhibit 10, which is plat book
7 9 at page 4 Do you see that?

8 A Yes

9 Q And would you take this pen and mark the
10 southeastern corner of A Street on Exhibit 10

11 A Southeastern corner of A Street

12 Q Here's your north (indicating)

13 A It'd be right there (indicating)

14 Q Okay Just put a circle around that if you
15 would, sir

16 A (Witness complied)

17 Q Thank you All right Now you don't really
18 know how many people have been down A Street to the
19 beach, do you?

20 A I've never taken a personal inventory, no

21 Q Okay And you would never have seen a
22 vehicle drive all the way down the A Street extension so
23 that the vehicle could get to the beach, have you?

24 A I've never seen a vehicle drive to the beach
25 on any street extension

1 Q Right And that wouldn't be possible, would
2 it, on any of them?

3 A No There's a rock revetment that prevents
4 vehicle from getting to the beach

5 Q And on the A Street extension there's a
6 basketball goal and landscaping that's been there -- at
7 least some landscaping has been there forever, right?

8 A Yes

9 Q So it wouldn't be -- it never has been
10 possible, since you've lived in Forest Beach, to drive a
11 vehicle across the street extension to the beach on A
12 Street, correct?

13 A That is correct

14 Q Now you -- I'm sorry Let me look back
15 You -- you moved to Forest Beach subdivision in
16 1994, correct?

17 A I believe I moved there in 1991

18 Q Okay

19 A '91 or '92 I don't remember exactly

20 Q And you moved to subdivision 2A, is that
21 correct?

22 A Yes

23 Q Okay So you have not lived down here --
24 That 2A is north of subdivision 1, correct?

25 A Yes

1 Q You have not lived down in the area of
2 subdivision 1, correct?

3 A No I have not lived there

4 Q Okay And you've not ever lived in lots 1,
5 2, 3, 4, 8, 9, 10, or 11, correct?

6 A That is correct

7 Q Okay But in your inspections and driving
8 around, are you aware that there has always been --
9 there have always been obstructions in the Avocet
10 extension, in the form of a basketball goal, shrubbery,
11 or landscaping?

12 A I'm familiar with the existence of the
13 basketball goal and landscaping, which exists in all
14 street extension, to one degree or another, but not of
15 any other significant obstructions

16 Q Now let's look at the plat that shows the
17 path, that's Exhibit 72, I think

18 A (Witness complied)

19 Q All right Now if I understood your
20 testimony Mr Snodgrass, what you said was that the path
21 that is depicted on Exhibit 72 is consistent with the
22 actual location of a path on the ground, is that right?

23 A Yes It is

24 Q And this path on the ground goes from the
25 Avocet Street extension on to property of the Sea Crest

1 Motel, correct?

2 A Yes It cuts across what would be the
3 southeastern corner of the Sea Crest Motel property

4 JUDGE KEMMERLIN Let me ask you a
5 question Lawyers, maybe it's come out Is that
6 path just developed, or is it deeded to an easement
7 granted by the motel?

8 MR STEPP Well, that's what I'm
9 coming to

10 MR PATTERSON There's no easement,
11 but that's historical use

12 JUDGE KEMMERLIN Okay That's what --

13 MR PATTERSON I'll concede that

14 MR STEPP

15 Q Well, Mr Snodgrass, what you said when we
16 were looking at the photographs that show this nice
17 paved sidewalk from the Sea Crest property right down to
18 the beach, you said you were not aware of any agreements
19 between the owners, or owner, of the Sea Crest property
20 and owners in Forest Beach that gives the Forest Beach
21 owners the right to use that sidewalk, correct?

22 A Correct

23 Q And you're similarly not aware of any prior
24 agreement that permitted owners in Forest Beach to cut
25 across the Sea Crest property if they followed this

1 path, correct?

2 A Correct

3 Q And as far as you are aware this could have
4 been blocked by the Sea Crest at any time, correct?

5 A Theoretically, yes

6 Q Okay

7 JUDGE KEMMERLIN Okay I hope I'm not
8 rude, but when something worries me I try to stop
9 it right then and there and get it, kind of,
10 straight

11 I -- you're saying that, admittedly,
12 the Sea -- the sea part of it is held for anybody
13 All right And admittedly then, the accesses are
14 held by anybody But there's a strip that you say,
15 in between All right

16 MR STEPP Now what I'm saying right
17 now Judge is that this path, to the extent that --

18 JUDGE KEMMERLIN Oh, I'm not talking
19 about that path I'm --

20 MR STEPP Oh, I'm sorry

21 JUDGE KEMMERLIN I'm jumping

22 MR STEPP All right

23 JUDGE KEMMERLIN All right Here's
24 the high water mark, and here is the Beach Trust
25 property (indicating), right?

1 MR STEPP Uh-huh

2 JUDGE KEMMERLIN All right The lot

3 lines are back here, right?

4 MR STEPP Yeah There's a --

5 JUDGE KEMMERLIN All right And the

6 driveway, whatever you want to call them, are down

7 like this to this lot line

8 MR STEPP Right

9 JUDGE KEMMERLIN All right So why do

10 you say this part was always held --

11 And I guess this is what Mr Guscio and

12 those claim they bought, right?

13 MR STEPP Right

14 JUDGE KEMMERLIN But apart from there

15 use from him, they've got -- weren't they using it

16 all these years without anybody mentioning it?

17 MR STEPP Well, that's in dispute,

18 Your Honor

19 JUDGE KEMMERLIN Well, wait a minute

20 I mean, how do people get to the beach then?

21 MR PATTERSON Well, that's the

22 problem with his whole argument The way he's

23 interpreting things, nobody would have a way to get

24 to the beach

25 JUDGE KEMMERLIN Well, now wait

1 MR STEPP Well, if you allow me to
2 answer that question -- I'd like to answer it

3 JUDGE KEMMERLIN Okay

4 MR STEPP They'd use B Street They
5 use the Sea Crest There are a gazillion ways to
6 get to the beach that don't require going over
7 Avocet Street extension

8 JUDGE KEMMERLIN All right I'm
9 talking about Avocet I'm talking about just in
10 general

11 MR STEPP Yeah And I want to make
12 it clear --

13 JUDGE KEMMERLIN Okay Wait just a
14 minute Okay? If they all used it over the years
15 with no protest, all of these things, going, then
16 why don't they have a negative reciprocal easement
17 to do it?

18 MR STEPP Well, because they -- if
19 they ever did, they abandoned it, is our theory, on
20 A Street

21 Now that's my point We're not saying
22 that this is true for every street end You know,
23 for example, there's going to be evidence, I'm
24 sure, about, you know, some litigation in number 2,
25 about Jacana Street

1 JUDGE KEMMERLIN Okay

2 MR STEPP Well, you know, which way -
3 - Jacana Street was continued to be used as a
4 street "A" Street was not continued to be used as
5 a street, and that's the difference

6 JUDGE KEMMERLIN Now don't jump to any
7 conclusions by my questions, because I ask some
8 awfully stupid ones sometimes So don't -- that
9 I'm going to rule with you, or against you, either
10 side It's just that I think out loud sometimes,
11 and sometimes perhaps I shouldn't But if you
12 don't know what I'm thinking you don't know what --
13 okay?

14 MR STEPP I appreciate it I bruise
15 too easily to jump to conclusions

16 BY MR STEPP

17 Q Let's see Where was I? Okay The path to
18 -- yeah Let's see Let's just leave those on the
19 table (indicating), because they'll get lost in those
20 notebooks Okay

21 All right Let's look at Exhibit 77, those
22 photographs And if you don't mind I'm going to look at
23 the colored versions with you

24 A (Witness complied)

25 Q Let's go back to page 1

1 A All right

2 Q All right And here's this -- on 1B, here's
3 this woman, and she's coming up this sidewalk that the
4 Sea Crest put in, is that correct?

5 JUDGE KEMMERLIN I understand all
6 that

7 BY MR STEPP

8 Q All right And here, somewhere back in here
9 I thought there was a picture of a sign right next to
10 that Do you remember that?

11 A No Not that --

12 Q All right Let's look --

13 JUDGE KEMMERLIN When I cavalierly
14 say, "I understand that," you've got to make a
15 record I'm aware of that So --

16 BY MR STEPP

17 Q Okay Well, let me ask you - I think that
18 must have been another set of photographs - are you
19 aware of any sign restricting access to the use of this
20 sidewalk? Does it say, "Private property Keep out,"
21 or anything like that?

22 A No I'm not aware of any signs placed by Sea
23 Crest for that access

24 Q Okay And is there -- is there ever any
25 security guard or anybody asking for identification of

1 people who walk down that?

2 A Not that I've ever observed

3 Q Okay And then how -- and -- and does this
4 sidewalk that we see coming out here (indicating), it
5 extends all the way up Avocet Street, is that right?

6 A I believe there's a photograph that depicts
7 that It might not be in this group I saw one

8 There is a sidewalk on Avocet Street in the right
9 of way, I believe, that abuts the Sea Crest property,
10 and then right here (indicating), this is Dune Lane

11 Q Right

12 A This is Avocet Street

13 Q We're looking at 1B

14 A This is a driveway into the Sea Crest
15 property right here

16 Q Right But you can -- if you're -- if you're
17 walking down Avocet toward the ocean, you can walk on a
18 sidewalk the whole length of Avocet Street all the way
19 down to the beach, is that right?

20 A From Dune Lane, yes

21 Q From Dune Lane Okay

22 It doesn't go out to Forest Beach Drive? I'm
23 talking about the area from here (indicating)?

24 A Yeah

25 Q This is Dune Lane right here (indicating)

1 A Yeah On the southern side of Avocet from
2 North Forest Beach Drive to the driveway entrance here,
3 of the Sea Crest, there is a concrete sidewalk

4 Q Okay Great And was any permit obtained
5 from the Forest Beach Owners' Association to do the
6 sidewalk construction?

7 A I do not know, specifically, of the sidewalk
8 construction I know that the Sea Crest Motel was
9 permitted, but I do not know, specifically, whether or
10 not the sidewalk was in the submission

11 Q Okay You mentioned in Exhibit 78 -- sorry
12 All right Maybe I didn't understand I thought
13 you said you were not aware of any application for
14 permit or permit for that sidewalk, is that right, or
15 did I misunderstand you?

16 A What I was trying to say is that the Sea
17 Crest development adjacent to lot 5 submitted plans that
18 were approved by the association I am unaware if those
19 plans specifically included the sidewalk

20 Q Okay All right Look at Exhibit 78 now,
21 which would be the next batch

22 A (Witness complied)

23 Q And here are 77C This is one of the storage
24 sheds that you are talking about?

25 A Yes It is

1 Q And do you know when that was constructed?

2 A I do not know the exact date, no

3 Q Okay Look at Exhibit 74

4 A 74?

5 Q Yeah Which is the as-built survey

6 A (Witness complied)

7 Q And what is the date of this survey, it's,
8 kind of, upside down?

9 A It looks to be 2000 -- no '97, revised
10 The original survey is 4/24/97, revised again May 21st,
11 '02, August 8th, '02, and August 29th, '02 So I would
12 interpret this to be the most recent iteration, August
13 9th -- August 29th, '02

14 Q Okay Do you know whether any of the
15 iterations of this survey were recorded?

16 A I do not know if any of these were recorded

17 Q Was the assignment from Forest Beach
18 Association to Forest Beach Owners' Association - I
19 think it's Exhibit 22 - was that ever recorded?

20 A Yes I believe it was

21 Q Let's look at that now Okay 51 at 790,
22 page 720 Is that it?

23 MR PATTERSON 1345 at 720

24 MR STEPP 1345 at 720 Okay Great

25 ////

\\\\\\

1 BY MR STEPP

2 Q Let's look at Exhibit 24 It shows that's
3 the deed from Property Research Holdings from --

4 Mr Snodgrass, this deed -- and I'll give you a
5 minute to get there

6 A (Witness complied) Okay

7 Q All right You with me?

8 A Yeah

9 Q All right This deed from Property Research
10 Holdings to Forest Beach Owners' Association was part of
11 a three party agreement - right? - between the Town of
12 Hilton Head, Forest Beach Owners' Association, and
13 Property Research Holdings, Inc , is that correct?

14 A Yes

15 Q And that settled a bunch of litigation, is
16 that right?

17 A Yes

18 Q All right Were you -- what role did you
19 play in the negotiation and agreement to that
20 settlement?

21 A I represented the board of directors in my
22 capacity, at that time, as president

23 Q All right In May of 2001, when this deed
24 was executed by Mr Guscio, were you aware that Property
25 Research Holdings, Inc had already deeded what's shown

1 -- or executed and delivered a quitclaim deed for what's
2 shown as parcels A and AA to Ms Austin?

3 A The only recollection that I have is that Mr
4 Guscio, during a meeting, said, "I may have transferred
5 some of these properties I don't know "

6 Q Okay And was that meeting before the deed
7 was executed?

8 A Yes

9 Q And did the Forest Beach Owners' Association
10 do any title search to see whether Property Research
11 Holdings had in fact conveyed out any interest in that
12 property?

13 A Not to my recollection

14 Q Okay All right Let's look at Plaintiff's
15 Exhibit 13

16 A (Witness complied)

17 Q And over on roman numeral five

18 MR STEPP I guess I'll just publish
19 this Judge, because I think it responds to one of
20 your earlier questions It says

21 "That portion of the lands
22 of The Hilton Head Company
23 shown as the open areas between
24 groups of lots in any
25 subdivision or between

1 subdivisions, which constitute
2 means of access to the beach
3 for rear lots, and any other
4 areas designated by The Hilton
5 Head Company, its successors or
6 assigns, shall be set aside as
7 park areas to be allowed to
8 stand free of building,
9 billboards, etc , or to be
10 landscaped and maintained, for
11 the beautification of the
12 Island and the enjoyment of its
13 residents and visitors "

14 So that's what I was referring to that
15 talked about rear lots

16 JUDGE KEMMERLIN Okay

17 BY MR STEPP

18 Q I'm sorry Before you leave, were you still
19 on 24?

20 A No

21 Q That's all right

22 MR STEPP All right Your Honor, if
23 you can give me a little break to confer with
24 counsel I think we might be getting close here

25 JUDGE KEMMERLIN Sure Sure You all

1 want to take a few moments

2 (WHEREUPON, a brief break was taken off
3 the record)

4 MR STEPP I don't have any further
5 questions

6 REDIRECT EXAMINATION

7 BY MR PATTERSON

8 Q Let me -- just one question Mr Snodgrass,
9 you were asked about the property description for the
10 first, what I call the beach strand covenants, which was
11 Exhibit 85

12 I want you to look at the property descriptions for
13 the second one, which is 86 And I handed you 86A, and
14 I'm also handing you Exhibit 10 If you'll -- is it
15 your understanding that the property description on 86A
16 covers the entire area starting at the western point of
17 Avocet Street all the way down to I Street, on Exhibit
18 10?

19 A Yes My understanding is that Exhibit 86A,
20 which is 74 at 306, indicates that the trust property,
21 or the beach strand, runs the entire length of the
22 subdivision from the southwest corner of Avocet Street
23 all the way to the northeast corner

24 Q All right And if I could look at Exhibit
25 86A If I highlight the area -- that language that I've

1 highlighted (indicating), as to why you say that --

2 A " lot lines of Hilton
3 Head Beach Subdivision No 1
4 and the mean high water mark of
5 the Atlantic Ocean from the
6 southern end of said
7 subdivision to the northern end
8 of said subdivision "

9 Q Looking at Exhibit 10 What is the southern
10 end of the subdivision?

11 A Southern end would be the southern end of
12 Avocet Street

13 Q Okay And the other reason, as I understand
14 it -- or the associations' understanding why the entire
15 property in front of Ms Bair's property and the street
16 end --

17 I'll show you, without you having to pull it up,
18 another copy of Exhibit 84

19 JUDGE KEMMERLIN Just one second

20 What -- okay

21 BY MR PATTERSON

22 Q And the other reason --

23 JUDGE KEMMERLIN Wait a minute Let
24 me ask the witness a question, and he, maybe, can
25 answer it If this is true, what you were saying -

1 - but as I understand you were saying, in effect,
2 this lot goes to here (indicating) Because it
3 says from the southern lot line This is the
4 southern lot line (indicating), right?

5 WITNESS Yes

6 -JUDGE KEMMERLIN All right And
7 what's it bounded by?

8 MR PATTERSON It says the southern
9 end of the subdivision It doesn't say the
10 southern lot line It says

11 "Southern end of the
12 subdivision "

13 JUDGE KEMMERLIN I see it Okay

14 MR PATTERSON " to the northern end
15 of the subdivision," plus a
16 thousand feet

17 JUDGE KEMMERLIN Okay Read it again

18 MR PATTERSON All right It says
19 " declaring that certain
20 area of land lying between the
21 front lot lines of Hilton Head
22 Beach Subdivision No 1 --

23 JUDGE KEMMERLIN Right

24 WITNESS Which would be this line

25 (indicating)

1 MR PATTERSON " and the mean high
2 water mark of the Atlantic
3 Ocean --
4 JUDGE KEMMERLIN Okay
5 WITNESS Out here (indicating)
6 MR PATTERSON " from the southern
7 end of said subdivision --
8 JUDGE KEMMERLIN Right
9 WITNESS Here (indicating)
10 MR PATTERSON " to the northern end
11 of said subdivision "
12 JUDGE KEMMERLIN Well, if that's true
13 then is there a little area between?
14 MR PATTERSON Well, that's what our
15 position is, Your Honor
16 JUDGE KEMMERLIN Well, then why did
17 you all pay Guscio for it? Because that was always
18 my feeling --
19 MR PATTERSON Well, Your Honor they
20 bought a bunch of -- they didn't buy the -- they
21 bought the street extensions They bought a bunch
22 of property from Guscio
23 JUDGE KEMMERLIN They didn't bring --
24 they got this piece between here and here
25 (indicating) from him?

1 MR PATTERSON The only piece of
2 property they claimed -- in the deed we don't claim
3 the beach trust property in front of the lots, we
4 do claim it in front of the street extension

5 JUDGE KEMMERLIN I understand it now
6 Thanks

7 MR PATTERSON Can I make one other --
8 Bobby, with your permission, the last
9 part of that property description is cut out Can
10 I go ahead and add that?

11 MR STEPP Sure

12 JUDGE KEMMERLIN I'm sorry I
13 interrupted you

14 MR PATTERSON No That's fine,
15 Judge

16 BY MR PATTERSON

17 Q And then notwithstanding the property
18 descriptions, the other basis that you believe, or the
19 association believes, the trust property included all of
20 the property in front of Avocet is plat book 12 at 89,
21 which is Exhibit 84?

22 A Correct

23 Q All right And that property, as you've
24 described and highlighted in yellow, designates what for
25 the property in front of the Avocet Street extension?

1 A It indicates that the property in front of
2 Avocet Street is the strand of Hilton Head Beach
3 subdivision number 1 trust property

4 MR PATTERSON I don't have any other
5 questions

6 MR STEPP Just a couple on re-cross,
7 if I may?

8 JUDGE KEMMERLIN Sure

9 RE-CROSS EXAMINATION

10 BY MR STEPP

11 Q Looking at that plat book 12 page 89, this
12 right here (indicating) This designation down here,
13 "Strand lot," that was put on there by the surveyor, is
14 that right?

15 A I can't say that that was the surveyor that
16 put it on, or who actually drew the plat

17 Q Well, it would be Fred C Hack, wouldn't it?

18 A That is who has stamped it, yes

19 Q Okay Do you have any understanding whether
20 Mr Hack was authorized to dedicate property as a strand
21 lot, or to restrict its usage?

22 A I believe he was an officer of the Hilton
23 Head Company What his authority was, I am uncertain

24 Q Okay Now, look back at 86, the one he just
25 stapled I'm sorry, 86A We sort of have always

1 skipped over the first part of this, but do you agree
2 with me it says

3 "Be it resolved that the
4 President of The Hilton Head
5 Company and the Secretary of
6 The Hilton Head Company be and
7 they are authorized and
8 directed to execute any
9 instrument or instruments '
10 declaring that certain area of
11 land lying between the front
12 lot lines as a common "

13 And then it concludes over here

14 "The Hilton Head Company
15 hereby authorizes and ratifies
16 any instrument which the said
17 officers may exercise to carry
18 out the terms, conditions, and
19 purposes hereof "

20 You see that?

21 A Yes

22 Q Do you know whether in fact those officers of
23 the Hilton Head Company in fact ever acted pursuant to
24 this resolution?

25 A I do not know what they did pursuant to that

1 Q All right Thank you

2 MR STEPP I don't have any other
3 questions

4 MR PATTERSON No other questions,
5 Your Honor

6 MR STEPP All right Thank you Mr
7 Snodgrass

8 JUDGE KEMMERLIN All right Thank you
9 very much

10 WITNESS You're welcome

11 MR PATTERSON We call --
12 Is it all right for us to proceed, Your Honor?

13 JUDGE KEMMERLIN Yes

14 MR PATTERSON Mr Trevor Howard If you will
15 take the hot seat over there

16 JUDGE KEMMERLIN Come around here, if you will

17 TREVOR HOWARD, called as a witness,
18 having been first duly sworn, was examined and
19 testified as follows

20 DIRECT EXAMINATION

21 BY MR PATTERSON

22 Q Mr Howard, could you give us your full name

23 A Trevor Garth Howard

24 Q And where are you from, because it doesn't
25 sound like you're from Frogmore?

1 A From England, originally

2 Q All right And when did you come to the

3 United States?

4 A 1986

5 Q All right And what citizenship do you have?

6 A English citizenship

7 Q Okay On October 31st, 1994 did you purchase

8 a lot in Hilton Head subdivision number 1?

9 A We did

10 Q And is Exhibit 69A a copy of your deed for

11 lot 33?

12 A Which one?

13 Q 69A Is that a copy of your deed?

14 A Yes It is

15 Q All right And looking at Exhibit 10, which

16 we have an extra copy of, can you highlight just in

17 yellow for the Judge where lot 33 is, so he'll have some

18 idea where you live

19 A (Witness complied)

20 Q All right Why did you purchase that

21 property?

22 A Well, because of the ambiance of the area,

23 and our children wanted to be down close to the beach

24 Q And after 1994 you moved there with your

25 family?

1 A Yes

2 Q And how many -- who all's in your family?

3 A Three children, my wife, and I - five

4 Q And what's the ages, approximately, of your

5 children when you moved there?

6 A There were in their teens

7 Q Okay And did you previously live in Spanish

8 Wells?

9 A Yes We did

10 Q Why did you move out of there?

11 A For that reason, because we wanted to be

12 close to the beach

13 Q Okay And your deed refers to -- 69A refers

14 to plat book 9 at 4, which is Exhibit 10, that you have

15 right there?

16 A Yes

17 Q Okay Have you ever used the properties that

18 are in dispute on this case, which is the Avocet Street

19 extension and the beach trust property immediately

20 seaward of that?

21 A Yes

22 Q Tell me about your use since 1994?

23 A It was our common access when we'd go on a

24 beach walk, Tiki Hut, our favorite watering hole on the

25 beach, and if it was windy we wouldn't go down Dove

1 Street, which is the end of our street, we'd walk along
2 on Dune and cut down through Avocet and --

3 Q All right Go ahead

4 A And there are lots of activities There was
5 volleyball, and et cetera, around the Holiday Inn, and
6 when we'd finish we'd walk back -- back down along
7 Avocet, and back down Dune, and on to Dove, or if it was
8 a pleasant day we'd just come along the beach and come
9 off on the Dove Street access

10 Q And how often would you use the Avocet Street
11 extension?

12 A Probably weekly or so, usually on the weekend
13 when we were at the beach

14 Q All right And if you'll look at Exhibit 76

15 A (Witness complied) Yes

16 Q Go ahead and turn that

17 A Uh-huh

18 Q Does that accurately represent what the beach
19 access looked like in 1994 when you bought your
20 property?

21 A Yes It does

22 Q All right And looking at that Exhibit,
23 where -- how would you access the beach?

24 A Well, the car's sort of in the way, but we
25 would go beyond the car and straight down to the beach

1 This was an open area here (indicating)

2 Q Okay And how long did you continue to
3 access the beach down Avocet Street, in the way you've
4 described, with your family to go to the Tiki Hut and
5 the Holiday Inn?

6 A Well, until it was obstructed with the gate
7 and we couldn't get through there anymore

8 Q Okay And do you remember about when the
9 gates went up that were obstructed?

10 A Not long after we'd been there So '95 or
11 '96

12 Q Well, are the gates you're talking about
13 shown on Exhibit 77?

14 A Yes They are

15 Q Are these the gates that were recently
16 constructed sometime in 2004?

17 MR STEPP Objection He's leading,
18 Your Honor

19 JUDGE KEMMERLIN Yeah You are
20 leading

21 BY MR PATTERSON

22 Q Do you know when Ms Bair constructed the
23 gates that are shown on Exhibit 77?

24 MR STEPP Objection Asked and
25 answered

1 WITNESS I don't exactly know We
2 bought some property up in North Carolina and we
3 weren't there so much, but they suddenly appeared

4 BY MR PATTERSON

5 Q All right To, kind of, put some time frame
6 on it, was it recently, or --

7 A Well, fairly recently Yes

8 Q Okay Did you ever use any of the other
9 beach accesses that are shown on Exhibit 10, which is
10 plat book 9 at 4?

11 A Well, we've used many of them when we've
12 walked through Living there that was just a walkabout
13 area

14 Q And are all the other street ends accessible?
15 You can access the beach on those?

16 A Yes You can

17 Q All right And has that always been the
18 case?

19 A Always been the case

20 Q Is that the case today, except for Avocet?

21 A It's just the same

22 Q All right What is your understanding, if
23 you have any, of your right to use the Avocet Street to
24 use -- extension to access the beach?

25 A Well, it's always been my understanding that

1 you could access the beach from any road end

2 Q Okay The path that you used prior to the
3 gates being constructed, could you describe it in a
4 little more detail as to what it looked like?

5 And you can maybe turn back to photo Exhibit 76
6 I'm not sure what happened to it Maybe I didn't go far
7 enough back

8 Tell me what that path looked like in a little more
9 detail

10 A Well, the original access you're talking
11 about, or the current path now?

12 Q The original --

13 A The original

14 Q -- path

15 A Well, it was just an open dune area that you
16 could walk through to the beach on, just like all of the
17 other beach accesses

18 Q And was it -- did it have a sidewalk, or what
19 was the condition of the path?

20 A No There was no sidewalk, just amble
21 through There were palmettos growing there

22 Q Okay And would you typically see a car on
23 the street end, as shown on Exhibit 76?

24 A Well, in fact when we lived in Spanish Wells
25 we would often park there to offload the children to go

1 down to the beach that way

2 Q All right And that's after you purchased
3 your lot?

4 A Prior to -- when we were at Spanish Wells --

5 Q Okay

6 A -- living, and we'd come down to there to the
7 beach

8 Q How about after you purchased your lot --
9 your house in Spanish -- in North Forest Beach, did you
10 ever use your car to pick up or drop off anything to --

11 A No We had no need to do that

12 Q Did you ever see anybody, any other people --

13 A Quite common

14 Q -- use --

15 A Yes

16 Q Okay All right Looking at -- going back
17 to Exhibit 77 This Exhibit (indicating)

18 A (Witness complied)

19 Q Is that generally what it looks like today?

20 A Yes

21 Q All right Is there any signs there that are
22 not shown in that photograph?

23 A On the left gate there's a, "Beware of the
24 dog," sign

25 Q How long has that, "Beware of the dog," sign

1 been there?

2 A That's very recent

3 Q All right How do you happen to know what's
4 going on on this piece of property?

5 A Well, I was on the board for a period of
6 time And --

7 Q Well, how do you access the -- did they
8 change the streets in your neighborhood? Some of them
9 are one-way

10 A They did

11 Q All right

12 A So we -- to go to Dove Street we come in on
13 Avocet, which is one-way in, and Dove Street is one-way
14 out So we head along Dune Lane and come out to our
15 house

16 Q All right So now to get to your house you
17 have to go by Avocet everyday to get to your house?

18 A Yes

19 Q Okay Is there currently today anywhere --
20 any way to access the beach down Avocet Street
21 extension?

22 A No

23 Q How do people, you included, access the beach
24 in this area now?

25 A Well, if we wanted to go down that way we'd

1 have to go down the sidewalk on the Sea Crest property

2 Q Okay And if you look at Exhibit 77, photo
3 1B, you see a female walking down that sidewalk you're
4 describing?

5 A Yes That's --

6 Q All right And to your knowledge is that
7 sidewalk on the property of the -- of Hilton Head -- is
8 it in Hilton Head Beach subdivision number 1?

9 A Well, it's not in our subdivision, no

10 Q All right Do you have any rights to use
11 that?

12 A Not at all, it's not on our property

13 Q All right You mentioned you'd served on the
14 board, what -- approximately when to when were you on
15 the board of the association?

16 A Well, we bought the property in North
17 Carolina So I was not active So that was around
18 2004 John can probably be better on the dates than
19 that

20 But after that I didn't feel I was active So I
21 dropped off in about 2004

22 Q All right You got off about 2004 When did
23 you get on the board?

24 A '98

25 Q Okay So from 1998 to 2004 you were on the

1 board?

2 A Yes

3 Q Did you ever have any dealings with Ms Bair
4 during that time period?

5 A No

6 Q Were you or anyone on the board aware that in
7 1998 Ms Bair filed a quiet title action, which is shown
8 by Exhibit 38?

9 A No

10 Q All right As a family, when was the last
11 time that you tried to use the Avocet Street extension?

12 A Well, our daughter was married on Dove Street
13 October of last year We had a lot of our English
14 family over, and friends, and we went down Dune Lane to
15 go down to the Tiki Hut, and that's really the last time
16 I've been down there

17 But they just wanted to do the old round robin that
18 we used to do when we first came here, and we all filed
19 down the pathway off to the side, but we don't normally
20 use that access anymore

21 But October of last year was really the last time

22 Q All right Had there been, kind of, a family
23 tradition to go down Avocet Street?

24 A We'd always do that

25 Q All right And did you try to do that when

1 your daughter got married?

2 A Yes We did

3 Q And were you able to continue the tradition
4 in the same path?

5 A Not the same path

6 Q And why not?

7 A Because we were over on the Sea Crest
8 property The path had gone away

9 Q Okay And you're a property owner today?

10 A Yes

11 MR PATTERSON Give me one second

12 (WHEREUPON, a brief break was taken off
13 the record)

14 MR PATTERSON I don't have any other
15 questions

16 Mr Howard if you'll answer any that
17 Mr Stepp may have

18 MR STEPP Mr Barnes is actually
19 going to take this witness, Your Honor

20 JUDGE KEMMERLIN Okay

21 CROSS EXAMINATION

22 BY MR BARNES

23 Q Mr Howard, how are you?

24 A Very well Thank you

25 Q I'm Jack Barnes We met once before, I

1 believe it was your deposition

2 A Right

3 Q Nice to see you again Let me get you, if I
4 could, Mr Howard, to take a look at Plaintiff's Exhibit
5 Number 72, please sir?

6 A (Witness complied)

7 Q Do you see that Plaintiff's Exhibit Number
8 72, Mr Howard?

9 A Yeah

10 Q And you see on 72 the notation there, I guess
11 sort of to the south, "Existing beach access path - dirt
12 path"?

13 A Oh, yes Uh-huh

14 Q And is this the path -- when you were talking
15 about how you used to travel down the Avocet Street
16 extension to the beach to go to the Tiki Hut, is this
17 the path that you would take?

18 A Well, this was an open area I don't know
19 whether it was specifically on that path, but we would
20 just go down off the end of the street

21 Here's the street end (indicating) And we could
22 just amble all the way through the shrubbery, but that
23 is the path on the note, yes But it wasn't specific as
24 a path, it was a broader area than that

25 Q So you were not limited or confined to any

1 kind of path?

2 A Not particularly, because it was an open
3 area, so we just walked through the -- over the dunes to
4 the beach

5 Q And do you recall whether or not you knew, at
6 any point, whether you were on Avocet Street extension,
7 or the dune strand in front of Avocet Street extension,
8 or Sea Crest property?

9 A Well, Sea Crest wasn't built then when we
10 first were there, but we would just treat it like any
11 other beach access, we'd just amble over the top None
12 of them -- some of them have a walkway over the top, but
13 some of them are just an open dune to cross onto the
14 beach

15 Q So do you know specifically whether or not
16 you were on Avocet Street extension or whether you were
17 on Sea Crest property as you ambled across?

18 A No There was no delineation

19 Q Okay So you can't say for sure you were on
20 Avocet Street then?

21 A No I cannot

22 Q Okay Let me -- I believe you indicated that
23 you were on the board from '98 to, roughly, '04, is that
24 correct?

25 A Yes I'm not very good on dates, but that

1 was about the period of time that I think I was on the
2 board

3 Q Okay Now you were here earlier and you
4 heard Mr Snodgrass testify, correct?

5 A Yes

6 Q Okay And you heard him discuss that in, I
7 believe, 2001, when he was in negotiations with Mr
8 Guscio to buy the Property Research Holdings property
9 Do you recall hearing that testimony?

10 A I recall the testimony this morning, yes

11 Q And you were -- and you were on the board at
12 that time as well

13 A I was, yes

14 Q And did you participate in those
15 conversations as well?

16 A I didn't recall it, no

17 Q Okay Well, do you recall whether or not, in
18 2001, you were made aware that Mr Guscio had previously
19 deeded out some of the properties?

20 A I don't recall that, no

21 Q Okay When did you first learn that Ms
22 Austin had received a deed from Mr Guscio's company?

23 A I probably heard it on the board

24 Q And do you recall when?

25 A Not specifically, no

1 Q Tell me when your first recollection of
2 landscaping was on the Avocet Street extension?

3 A Well, it was certainly prior to the wall
4 going in, because I was a landscaper too, and I noticed
5 the additional plant material going in there It might
6 have been a year before the wall There again, I am not
7 good on specifics, but about that time

8 Q Okay In 1994, when you first moved there to
9 North Beach -- '94, that's correct?

10 A Yes

11 Q And you traveled down that path to the beach,
12 you don't recall any landscaping being there as early as
13 1994?

14 A There was some shrubbery, yes, on the
15 property line, not on the walkway Just some palmettos
16 and the normal vegetation, natural vegetation that you
17 find on those dune strands

18 Q Okay But you're referencing naturally
19 occurring vegetation, not anything that appeared to have
20 been planted by anyone?

21 A Well, when the house was built they probably
22 had put some landscaping around it I can't recall what
23 was there specifically It didn't make a dramatic
24 impression on me

25 Q Okay Now when do you -- do you recall there

1 being a basketball goal?

2 A Yes

3 Q Okay And when do you first recall there
4 being a basketball goal there?

5 A Been there a long time?

6 Q Was it there when you first moved there in
7 '94?

8 A I don't think I made a mental note of it, but
9 it always seemed to be around

10 Q Did you ever try to access the beach and see
11 anyone playing basketball there?

12 A I don't recall that, no

13 Q And you don't know who put that basketball
14 goal up, do you?

15 A No I don't

16 Q All right I think you indicated, Mr
17 Howard, that when you were living in Spanish Wells that
18 you had, on at least one occasion, parked your car on
19 the end of Avocet Street?

20 A Well, we unloaded the youngsters there I
21 wouldn't have left it there to park, because I -- I
22 would have taken it, probably, back to Coligny and left
23 the children at the beach

24 Q Okay And why didn't you leave your car
25 there to park?

1 A Because I was going somewhere else

2 Q Oh, so you weren't staying with them?

3 A No

4 Q All right Now did you ever -- did you ever
5 go to the beach while you were living at Spanish Wells
6 and access the beach that way while you were yourself
7 staying?

8 A When we were looking for property down there
9 we started to do that, yes But I -- I can't really --
10 just park -- sometimes we would park at Coligny and walk
11 through and study that end of the street Sometimes we
12 would park farther up and end up parking on the other
13 end of the street

14 I really can't be specific as to where I parked the
15 car

16 Q Okay You never parked it at the end of
17 Avocet Street though, did you?

18 A I might have done I don't know

19 Q So you don't recall?

20 A Well, we'd been in and out of there so many
21 times, and I know I parked on some street heads

22 Q Okay Did you -- do you -- I believe you
23 said you had seen cars parked at the end of Avocet
24 Street before

25 A Yes I have

1 Q And do you know whether or not those cars
2 belonged to folks who had parked there and gone to the
3 beach, or whether they belonged to folks who were at Ms
4 Austin's house, or the house that she currently lives in
5 that was owned previously by other folks?

6 A Well, I know people abuse any spot they can
7 stick a car Holiday makers come down with their
8 children, and if they can leave a car -- they even park
9 in our driveway

10 So no I wouldn't say it was a resident, or a
11 tourist I really didn't take that much notice

12 Q Okay But --

13 A But I've seen vehicles there, yes

14 Q You've seen vehicles there, but you don't
15 know whether or not they were -- belonged to folks who
16 were at the house at lot 5, or whether they belonged to
17 people who were at the beach, correct?

18 A Right

19 Q Anyone ever try to block your access
20 previously to the beach by way of Avocet Street?

21 A No

22 Q Anybody try to block your way to the beach by
23 way of the path that's currently there now?

24 A No

25 Q Mr Howard, there is a sidewalk from Forest

1 Beach Drive down the south side of Avocet Street, is
2 that correct?

3 A Yes

4 Q And then continuing down on -- across Dune on
5 down to the beach, right?

6 A Yes There is

7 Q Okay And do you know anything about
8 construction of that sidewalk?

9 A No

10 Q Mr Howard, you were not originally a
11 Plaintiff in this lawsuit, correct?

12 A No

13 Q And I believe you came in as a Plaintiff by
14 way of a second amended complaint, is that correct?

15 A Yes

16 Q And how is it that you became involved, or
17 came to be a Plaintiff here?

18 A I was asked to

19 Q By whom?

20 A By Mr Patterson

21 Q And why did Mr Patterson ask you to become a
22 Plaintiff?

23 A Because I lived in section 1, which has the
24 disputed area

25 Q And did you understand that there was already

1 a Plaintiff involved in the lawsuit?

2 A I was just asked to represent the North
3 Forest Beach Association, and I said yes And as far as
4 I know that was all I had to be involved with

5 Q So are you a Plaintiff in your individual
6 capacity, or as a member of Forest Beach Owners'
7 Association?

8 A As a member of the association

9 Q Okay So you were --

10 MR PATTERSON Your Honor, I would
11 object to the form of the question Would -- he's
12 a Plaintiff as set forth in the Complaint, and I'm
13 not sure it matters that --

14 JUDGE KEMMERLIN Is it improper for
15 him to be a party along with the other Plaintiff?

16 MR BARNES No, sir I don't think
17 it's improper, but I think the issue in question is
18 whether or not there's some standing on behalf of
19 the owners' association, and Mr Howard was
20 specifically recruited to remedy that problem

21 JUDGE KEMMERLIN Well, if --

22 MR BARNES So I think it would be
23 important to know whether -- I mean, if he's --

24 JUDGE KEMMERLIN Well, if he did
25 remedy it, what's the problem?

1 MR BARNES Well, I don't think he
2 remedied it if he's not here on his own individual
3 behalf

4 JUDGE KEMMERLIN Well, go ahead and
5 pursue it Okay?

6 BY MR BARNES

7 Q So Mr Howard, are you here as Trevor Howard,
8 property owner, or as Trevor Howard, representative of
9 the owners' association?

10 A Trevor Howard, property association -- or
11 Trevor Howard, as an individual, yes

12 Q Okay

13 MR BARNES I believe that's all I
14 have

15 JUDGE KEMMERLIN Okay

16 REDIRECT EXAMINATION

17 BY MR PATTERSON

18 Q Mr Howard, to follow up on that Why even
19 get involved with this whole thing? You're up on
20 vacation You drove back yesterday from a vacation up
21 in the mountains, with the leaves changing Why even be
22 spending your time fooling with this thing?

23 A Well, I think it's one's moral duty I think
24 if -- I think if there's an infringement on peoples'
25 rights who live in that community to do what they do, or

1 for what they are --

2 I don't know quite how to put this out But I
3 think sometimes we have to stand up and be accountable
4 for what we believe in, and that's what I'm doing

5 Q Well, why do you even care about it, you have
6 another way to get to the beach?

7 A Well, I just think you see so many -- you see
8 infringements in life, or whatever -- it may not just be
9 in a property situation, but when somebody steps out of
10 line, or does something wrong, or takes advantage of a
11 situation, I think if you have an opinion about it you
12 need to give it and say so

13 MR PATTERSON I don't have any other
14 questions

15 RE-CROSS EXAMINATION

16 BY MR BARNES

17 Q Mr Howard, do you have a fence around your
18 property?

19 A Yes I do

20 Q Did you put it up yourself?

21 A Yes I did

22 Q Did you get a permit to do it?

23 A Yes

24 Q Okay Who did you get a permit from?

25 A From the homeowners' association

1 Q Okay Was that the only requirement, that
2 you get it from the homeowners' association?

3 A We had an inspector I can't remember her
4 name, but she was specific of what I could do, and where
5 it had to go, and I had to make a drawing of the fence,
6 and they permitted it

7 Q Okay And what year was this, do you recall?

8 A It must have been '95 I think I did it
9 shortly after we bought the house

10 MR BARNES Okay Thank you That's
11 all I have

12 MR PATTERSON I don't have any other
13 questions for Mr Howard

14 JUDGE KEMMERLIN The last English witness I had
15 addressed me as My Lord It made it very difficult to
16 rule against him

17 WITNESS Thank you, My Lord

18 MR STEPP The next time I have a case I'm going
19 to make sure I have an English witness

20 WITNESS It should be milord

21 JUDGE KEMMERLIN I'm sure

22 (WHEREUPON, a brief break was taken off
23 the record)

24 JUDGE KEMMERLIN All right Come around Ms

25 Austin

1 ROBERT E AUSTIN, JR , called as a
2 witness, having been first duly sworn, was examined
3 and testified as follows

4 DIRECT EXAMINATION

5 BY MR PATTERSON

6 Q Mr Austin, can you give us your full name,
7 please?

8 A Robert E Austin, Jr

9 Q And you're a lawyer licensed in Florida?

10 A That is correct

11 Q How long have you been practicing law?

12 A 1965

13 Q And you first started dating Ms Bair in
14 April of '98

15 A No I started dating Ms Bair in, probably,
16 1958

17 Q All right Well, then there was -- you've
18 been married several times prior to that -- between that
19 and --

20 A That is irrelevant --

21 Q Okay

22 A -- to this case

23 Q Well, let me ask you -- I'm just trying to
24 get to the current time In 1998 did you start dating
25 Ms Bair again?

1 A Yes

2 Q All right And did that resumption of the
3 relationship start sometime in April of '98?

4 A That would be correct

5 Q And at that time you lived in Florida

6 A That's correct

7 Q And Ms Bair was living somewhere other than
8 Avocet Street on Hilton Head at that time

9 A I don't know that

10 Q Where was she living when you were starting
11 to date her in April of '98?

12 A Living is a term that I'm not prepared to
13 define

14 Q Well, I live in my house in Spanish Wells
15 Judge Kemmerlin lives in his house in Beaufort Where
16 did Ms Bair live when you were dating her in April of
17 '98?

18 A There's a difference between living,
19 residency What are you getting to Russell?

20 Q When it was time to go to sleep, where did
21 she put her head down?

22 A First guess, where her bed was that night

23 JUDGE KEMMERLIN Wait a minute now

24 Why is -- I don't understand I can't conceive of
25 the answer affecting me one way or the other, but

1 why be evasive about it

2 MS AUSTIN It's not -- Your Honor,
3 may I clear --

4 JUDGE KEMMERLIN No No I'm asking
5 the attorney, I guess, or the witness

6 WITNESS As far as I know, she had a
7 residence at 1 Dune Lane

8 MR PATTERSON Okay All right

9 BY MR PATTERSON

10 Q All right And she also had a residence at
11 57 Dune Lane, another ocean front house, did she not?

12 A That is correct

13 Q All right And isn't it fair to say that in
14 the summer of 1998 she was not living in 1 Dune Lane?

15 JUDGE KEMMERLIN Wait a minute Mr
16 Patterson I -- and I don't want to offend the
17 witness -- the Austin's either, but if you're
18 making any point that they may have lived together
19 before they were married --

20 MR PATTERSON No, sir I'm not --

21 JUDGE KEMMERLIN -- that certainly
22 doesn't affect me

23 MR PATTERSON No I --

24 JUDGE KEMMERLIN I live with a lady
25 that I'm not married to Now, actually, she's my

1 nurse, but nevertheless

2 MR PATTERSON Okay Well, I think --
3 my point has nothing to do with any of that

4 JUDGE KEMMERLIN Okay

5 MR PATTERSON I'm not going to open
6 up Pandora's Box for arrows to be shot at me

7 JUDGE KEMMERLIN Okay

8 BY MR PATTERSON

9 Q Well, let's move on You got married in
10 1998

11 A That is correct

12 Q And both of you moved down to Florida to
13 live

14 A We established a Florida -- she established a
15 Florida residency as her domicile in Florida in December
16 of 1998

17 Q And since that time the Avocet Street house
18 has, basically, been rented on a short term or a long
19 term basis, since December of 1998

20 A Off and on That would be correct

21 Q All right When you started dating Ms Bair
22 in April of 1998, you started to investigate the title
23 to the lands in North Forest Beach

24 A I became acquainted with the titles, yes

25 Q All right And you reviewed the town

1 ordinances

2 A I think I did

3 Q And you went to the courthouse and looked at
4 documents available at the courthouse regarding the
5 title to the properties at North Forest Beach

6 A I believe that I did

7 Q And you reviewed cases that were on file at
8 the courthouse involving North Forest Beach that had
9 been litigated

10 A Yes

11 Q And you met numerous times with Frank Guscio
12 about the history of the property, and titles, and
13 different issues

14 A That is correct

15 Q And you felt Frank Guscio was the most
16 knowledgeable person as to the title in North Forest
17 Beach

18 A Mr Patterson, that's exactly what I
19 testified to in the other case, and when I say that was
20 my opinion, that was what I understood

21 Q And Mr Guscio you felt was the number one
22 source of reliable information as far as any of the
23 title issues in North Forest Beach

24 A At that time he certainly appeared to be

25 Q All right And at that time you felt, after

1 your investigation, that very few people understood the
2 property rights at North Forest Beach, the literal
3 rights, the developer land, and the application of the
4 statute of uses, is that correct?

5 A I don't think it was quite that broad But
6 with that, I think there was some question about it
7 But I had read Judge Kemmerlin's opinions with regard to
8 that

9 Q Did you feel that very few people understood
10 the application of the statute of uses for that property
11 in North Forest Beach?

12 A That's probably a fair statement

13 Q And as a result of that investigation,
14 instead of -- you felt you became the second most
15 knowledgeable person in 1998 about property rights in
16 North Forest Beach

17 A As I said before, and that -- since you've
18 taken it from my transcript, that's what I said

19 Q And that's what you felt at that time?

20 A Well, since that time, Mr Patterson, I've
21 got to know you, and maybe you know more than I, and
22 know some -- more than some of the other people So I
23 would stand corrected as to -- as far as rankings of one
24 and two

25 Q Okay After you had discussions with Ms

1 Bair, you drafted the 1998 Bair Complaint, Exhibit 38?

2 A That is correct

3 Q Even though she filed it as a pro se
4 litigant, you're the one that actually drafted it and
5 came up with the idea to file it

6 A That is correct

7 Q Prior to filing the suit, which is Exhibit
8 38, you did not review Ms Bair's deed to her property,
9 is that correct?

10 A I think that's a fair statement

11 Q And you just relied on what Ms Bair told you
12 as to what she owned

13 A That, together with other assumptions and
14 conclusions I reached from talking to other people

15 Q And in fact you did not even check the title
16 to the property at the register of deeds before filing
17 the quiet title action, is that true?

18 A That is correct also

19 Q All right In looking at Exhibit 38 there is
20 only one named Defendant, Property Research Holdings, in
21 your Complaint, is that correct?

22 A That is correct

23 Q Why didn't you name the Forest Beach
24 Association, Inc as a party in November of 1998?

25 A For two reasons, first of all I didn't know

1 of any interest that they'd claimed, and secondly, I saw
2 no reason to adjoin them, since I knew of no claimed
3 interest in the property of Forest Beach Association

4 Q All right All right You would agree with
5 me that the Forest Beach Association -- the Owners'
6 Association would be the most likely entity to object to
7 you claiming title to the beach access and the trust
8 property?

9 A I would not agree with that

10 Q All right Do you recall the testimony in
11 the trial of Investors Title vs Carolyn Bair, which is
12 Exhibit 66C, where you testified on March 8th, 2007?

13 MR STEPP I think he's entitled to
14 see a copy of that

15 MR PATTERSON And that's Exhibit 66C
16 You may look at it

17 MR STEPP Can you give us a page
18 reference please?

19 MR PATTERSON Page 40

20 WITNESS What line, Mr Patterson?

21 MR PATTERSON All right I'm on page

22 -- line 23

23 BY MR PATTERSON

24 Q The question is

25 "The truth is If there

1 was anybody that was going to
2 put up a fight over this title
3 lawsuit, it was Forest Beach
4 Association, wasn't it?"

5 And your answer was?

6 A The answer on the next page is

7 "I imagine they would have
8 because they don't have any
9 interest in the property "

10 Q Okay And you're aware that Forest Beach
11 Association had historically strongly protected the
12 beach access and the strand blocks in that neighborhood,
13 in part of your investigation

14 A I think that's too broad I'm not certain
15 that I knew it quite like that

16 Q Well, you knew that they had filed litigation
17 over the street extensions and enforcements of covenants
18 numerous times in the past

19 A Up in subdivision number 2

20 Q All right And you're aware that actually
21 the Forest Beach Association had filed suit against Ms
22 Bair, the client you were working for, in June of 1994,
23 some four years prior to your quiet title action, for
24 Ms Bair building into the Jacana Street extension

25 A I was aware of that

1 Q All right And that's Exhibit 64A That was
2 actually -- that matter was heard by Judge Kemmerlin

3 A That's correct

4 Q All right And if you look at Exhibit 62
5 Judge Kemmerlin -- is a reference hearing that was held,
6 or a settlement was reached, Exhibit 62B, and actually
7 attached to that reference hearing is a diagram of the
8 Jacana Street improvements that were subject to that
9 litigation?

10 And I'll wait for you to get to it

11 A 62?

12 Q B

13 A All right Just a second

14 Q If you'll look at the last page of that
15 reference hearing

16 A All right

17 Q There's a diagram that was attached as a
18 court exhibit showing the improvements in the Jacana
19 Street extension that were the subject of that lawsuit

20 A That's what it appears to be

21 Q All right And you knew about this lawsuit
22 as part of your investigation into the matter, but prior
23 to bringing the 1988 [sic] quiet title action

24 A Yes

25 Q Okay All right And as shown by - in that

1 case where Ms Bair was sued by the association -
2 Exhibit 62A through E, on an identical street platted by
3 the Hilton Head Company, Ms Bair entered into a
4 settlement agreement where she made certain improvements
5 of Jacana Street and the Beach Strand block, and you
6 were aware of that -

7 A I was aware of what I knew at that time I
8 think that's probably a fair statement

9 Q Well, I didn't ask you if you were aware of
10 what you knew I asked if you were aware that the
11 association had sued Ms Bair for improvements on Jacana
12 Street, Exhibit 62A through 62E?

13 A Yes

14 Q And in fact on two different occasions the
15 association held -- or the Court held Ms Bair in
16 contempt of court for not abiding by the settlement
17 agreement, Exhibit 62D and 62E

18 A That's what I understand

19 Q Okay All right So you intentionally, in
20 your 1988 [sic] quiet title action, did not name the
21 association, even though they had previously sued Ms
22 Bair on an encroachment on another street extension only
23 four years earlier

24 A Yes I intentionally excluded them, because
25 they did not claim an interest in the property This

1 was a quiet title suit, not an -- a covenant enforcement
2 case

3 Q All right Well, the association, obviously,
4 claimed title to the street extension, and rights of the
5 street extension, because they sued Ms Bair, like, four
6 years earlier, in 62A, did they not?

7 A To enforce covenants

8 Q And enforce the fact that she was building on
9 property that wasn't hers

10 A There's a difference between title and
11 enforcement of covenants, Mr Patterson

12 Q Okay You also did not name any of the lot
13 owners behind Ms Bair's, lots 1, 2, 3, and 4, on
14 Exhibit 10

15 A That is correct also

16 Q And those people would have used Avocet
17 Street to gain access to the beach Is that fair to
18 say?

19 A I never knew that they ever tried to, and
20 they did not claim any interest to the property

21 Q Well, how do you know they didn't claim any
22 interest if you never gave them the chance to claim it,
23 because you didn't name them in the lawsuit?

24 A That question cannot be answered They were
25 not named as a party This was a quiet title suit, and

1 they never asserted any interest in coming down what was
2 called Avocet Street

3 Q In fact one of the lot owners behind, on
4 Exhibit 10, there was a house on that lot, was there
5 not?

6 A That's correct

7 Q All right

8 A And also, I might add, that the deeds were
9 constructed -- the gates were constructed by the owner
10 of lot 2

11 Q All right The complaint you drafted -- I
12 want you to look at Exhibit 38, if you would?

13 A All right

14 Q If you'd get there to Exhibit 38, please

15 A (Witness complied) All right

16 Q If you look at the Exhibit, the complaint you
17 drafted for the quiet title action, you actually
18 attached a copy of the survey, did you not?

19 A That's correct

20 Q All right And the survey that you attached
21 actually shows "Existing Beach Access Path," on the
22 complaint you drafted, does it not?

23 A Exactly what it says

24 Q All right Does that not indicate to you
25 that people were using the property that's the subject

1 of your quiet title action to access the beach?

2 A It does not indicate anything to me

3 Q All right

4 A It indicates there was a path there

5 Q When a surveyor that you use says, "Existing
6 Beach Access Path," and "Dirt Path," you're telling me
7 that that doesn't indicate to you that people are using
8 that property to access the beach?

9 A "People," being indefinable

10 Q And you were aware of the existence of the
11 beach path prior to filing the suit, weren't you?

12 A Quite frankly Mr Patterson, at the time this
13 suit was filed, in 1998, that path was not discernable

14 In 1998 the construction of the Sea Crest had
15 commenced, and at that time all of this area had changed
16 (indicating), and there was no -- there were no people
17 that were coming across Avocet Street to go there

18 The people attempting to access the beach along
19 Avocet Street went to the southerly area across the Sea
20 Crest property where there had been constructed a
21 sidewalk for the -- and a covered sidewalk for the
22 safety of the pedestrians There were no people
23 crossing Avocet Street at any time that I saw

24 This lawsuit was strictly one for the quiet title
25 to that property, and since Forest Beach Association had

1 not asserted any interest in it, they were not a proper

2 As a matter of fact, in the suits to which you
3 referred Forest Beach Association -- those suits were
4 dismissed by Judge Kemmerlin because he found that they
5 did not have a discernable interest in the property that
6 gave them standing to even enforce the covenants

7 And the suit to which you referred to, quite
8 frankly, was improperly brought, because at the time
9 that suit was brought Forest Beach Association did not
10 have an interest in the property, and in the subsequent
11 suit, which Judge Kemmerlin ruled it had to be dismissed
12 because they lacked standing

13 Q Well, thanks for that speech, but if you
14 could just answer my questions

15 The survey you attached to the complaint is dated
16 April 24th, 1997, is it not?

17 A That is correct

18 Q Just several months prior to the suit being
19 filed

20 A The suit was filed, I think, at the end of
21 '98

22 Q All right Within a year of the suit being
23 filed this as-built survey was completed, was it not?

24 A That would appear to be correct

25 Q All right And so the surveyor -- the beaten

1 -- the path must have been so evident that the surveyor
2 could actually see the path, at least as of April '97,
3 within a year of you filing the suit?

4 A I cannot say what the surveyor saw

5 Q Well, he showed it on the survey, so you'd
6 agree that he must have seen a path there

7 A I won't agree with that

8 Q Okay

9 A I would assume that he had some reason for
10 doing it As far as his basis for it, I certainly
11 cannot say

12 Q All right The reason that you didn't know
13 the property owners, the lot owners, 1 through 4, behind
14 there is that you didn't know who they were, is that
15 correct?

16 A I did not know who they were

17 Q And you made no effort to try to find out who
18 they were

19 A No I did not

20 Q And it would be very easy for you to find
21 out, at least, who owned the house by going up there and
22 knocking on their door, couldn't you?

23 A I might have

24 Q All right It's very easy to go down to the
25 courthouse - you're a lawyer - and within 15 minutes

1 find out who owns lot's 1 through 4, could you not?

2 A I assume I could have

3 Q And actually you could find out who the
4 owners of every one of the lots on Exhibit 10 is, could
5 you not?

6 A I presume I could

7 Q If you had bothered to look, is that correct?

8 A I would agree with that

9 Q All right Is Exhibit 47 a petition and
10 affidavit that you drafted for your wife to sign? If
11 you want to look at Exhibit 47

12 A (Witness complied) Uh-huh

13 Q Did you draft that petition for your wife?

14 A Yes I did

15 Q All right Would you read to me, in
16 paragraph -- this is a petition to publish for the
17 unknown defendants and to appoint a guardian ad litem?

18 A That's correct

19 Q Would you read for me paragraph 2, starting
20 on the second sentence, 'Because'? Read that out loud

21 A "This being an action to
22 quiet title, it is necessary to
23 join as parties defendant all
24 unknown persons who have or may
25 claim any right, title, estate,

1 interest in or lien upon the
2 subject real estate Because
3 such fictitiously designated
4 parties are presently unknown
5 to the undersigned or to the
6 plaintiff, it is impossible to
7 find such unknown parties
8 within Beaufort County and
9 South Carolina, nor are the
10 last addresses of said unknown
11 parties known to the
12 undersigned or to the
13 plaintiff Accordingly, it is
14 impossible with any amount of
15 diligence to effect service of
16 the summons and complaint upon
17 such unknown parties' exception
18 by publication "

19 Q And in fact, as we're sitting here today, Mr
20 Austin, that affidavit is a bald faced lie, isn't it?

21 A No It's not, Mr Patterson

22 Q You know -- you knew of the existence of
23 Forest Beach Association, and at least four other
24 property owners You knew how to identify them, and you
25 knew how to serve them And yet you prepared an

1 affidavit that said you didn't know who any of these
2 people were

3 A No Mr Patterson, that's not correct
4 You're jumping to a conclusion This is a suit to quiet
5 title, not to find anybody who in the -- might have a
6 claim somewhere There is no showing anywhere, nor has
7 there been anybody that's come forward, that's ever
8 said, "We claim an interest in that property or title "

9 Q What about this lawsuit today?

10 MR STEPP Well, let him finish his
11 answer Objection, Your Honor

12 JUDGE KEMMERLIN Let him finish his
13 answer

14 MR STEPP He's explaining his prior
15 answer He's entitled to do that

16 WITNESS This lawsuit today was
17 brought by a firm that was not even in existence at
18 the time of this lawsuit

19 The Forest Beach Association, in 1998,
20 was not -- had no interest in Avocet Street or lot

21 5

22 BY MR PATTERSON

23 Q Okay You also decided to name Jim
24 Richardson, a Columbia, South Carolina attorney, as the
25 guardian ad litem, not anybody local that would know

1 what is going on Is that fair to say?

2 A No That's not fair to say You know who
3 Mr Richardson is? He practiced law in Beaufort with
4 Mr Slavino [sic] for a number of years before he moved
5 to Columbia, he was a Beaufort lawyer

6 Q Okay You knew a lawyer up in Columbia would
7 have no idea, or even one in Beaufort, would have no
8 idea what's going on on the North Forest Beach property
9 Is that why you designated him --

10 A No It wasn't, Mr Patterson I knew Mr
11 Richardson because he was a capable lawyer from Beaufort
12 whom I trusted, and asked him to serve

13 Q All right

14 A As a matter of fact he had been opposite me
15 on a case on which he had brought an action against Ms
16 Bair in front of Judge Kemmerlin He practiced in
17 Beaufort with Mr Slavino

18 Q You also asked the Court to publish the
19 summons in the Beaufort Gazette, is that correct?

20 A That's correct

21 Q And you knew that no one in Hilton Head reads
22 the -- well, let me rephrase that

23 The reason you wanted it published in the Beaufort
24 Gazette was so that nobody in Hilton Head would know
25 anything about the action Is that fair to say?

1 JUDGE KEMMERLIN It may be fair to
2 say, but don't go opening that can of worms,
3 because half the suits I decided would fail --

4 MR PATTERSON I'm not saying -- Your
5 Honor, I'm not saying it's not in the -- in
6 compliance with the technical rules I'm saying
7 it's part of plan

8 MR STEPP I object It's irrelevant
9 It's conceded it's in compliance with the technical
10 rules, and I don't know that there's any other
11 inquiry needed

12 BY MR PATTERSON

13 Q Your affidavit says

14 "The Beaufort Gazette is the
15 paper most likely to give the
16 unknown defendants notice of the
17 action "

18 Is that correct?

19 JUDGE KEMMERLIN I can see that that's
20 what it says

21 BY MR PATTERSON

22 Q And you know that virtually no one on Hilton
23 Head reads the Beaufort Gazette, just like no one in
24 Beaufort reads the Island Packet

25 A I don't know that All I know is the

1 Beaufort Gazette is published in the county seat of this
2 county

3 Q All right

4 A And, quite frankly, and I did inquire about
5 that, and it was a very -- if the paper is in the
6 general jurisdiction -- or general circulation, rather

7 Q Let's turn to Exhibit 51

8 A All right (Witness complied) All right

9 Q And I think I'm on a different exhibit than
10 you are 51

11 MR STEPP That's 52, I think

12 WITNESS Oh, excuse me

13 BY MR PATTERSON

14 Q At some point you associated Mr Hunter
15 Limbaugh as counsel for your wife

16 A That is correct

17 Q All right And did -- on April 27th, 1999 did
18 Mr Limbaugh write a letter to Judge Beatty, the
19 Administrative Judge for Beaufort County?

20 A I do not know that Matter of fact, I had
21 never seen that letter before

22 Q All right Well, let me ask you to read the
23 second paragraph starting where it says he's asking for
24 an order without a hearing, and it says, "This case "

25 Read that out loud for me If you'll highlight it It

1 says, "This case " If you'll highlight that in yellow
2 for me

3 A (Witness complied) All right

4 "This case is completely
5 uncontested All proper steps
6 have been followed to be sure
7 that anyone with any possible
8 adverse position has been
9 notified It would be a great
10 favor if you would enter the
11 order without the necessity of
12 a hearing in Beaufort on
13 unopposed matters "

14 Q All right You can stop there In fact that
15 is also a bald faced lie, because, in fact, lots of
16 things have been done to make sure nobody knew about
17 this lawsuit Would you agree with that?

18 MR STEPP Judge, that's
19 argumentative

20 JUDGE KEMMERLIN Mr Patterson, it's
21 just a matter of -- we don't usually use -- I
22 realize people tell lies, and they are lies, but we
23 usually refer to it as mistakes, and
24 misrepresentations for the purpose of anything,
25 rather than the word

1 MR PATTERSON Yes, sir I apologize

2 BY MR PATTERSON

3 Q In hindsight, would you agree with me that --
4 that you should have named the association, you should
5 have named the four property owners, and you should have
6 got them served with the complaint so they would know
7 what was going on?

8 A No I would not agree

9 Q Okay

10 A You want to know why? Let's go ahead and
11 talk about it The Forest Beach Association never had,
12 nor claimed any interest in lot 5 or Avocet Street in
13 the chain of title Likewise, the four lot owners
14 behind there claimed no interest in the title

15 Q All right

16 A Nor did they ever make any claim, or attempt
17 to use that property in any manner

18 Q In fact the reason all of these steps were
19 done is it's your position that the quieter that you can
20 keep a quiet title action, the better for the Austin
21 family, as long as you felt you crossed the "T"s and
22 dotted your "I"s?

23 A Absolutely, Mr Patterson

24 Q And isn't --

25 A And I will tell you something, Mr Patterson

1 No one wants to be sued And as I told the Federal
2 Judge, quite frankly, I don't sue anybody unless there
3 is a reason to join them as a party, and that there is a
4 proper party

5 I respect Rule 11 I respect my duties very
6 carefully And as Mr Stepp just aptly stated, there
7 are technical requirements, and every one was met here

8 Q Okay But generally your philosophy of a
9 quiet title action is, the quieter the better?

10 A Absolutely

11 Q All right

12 A I've said that before It may be a pun, but
13 it's true You don't join people that have no interest
14 in a piece of property

15 Q All right And as part of your work for your
16 wife on the quiet title action, after the judgment's
17 obtained, did you tell your wife not to change anything
18 on the property for three years so that the statute of
19 limitations could pass?

20 A Absolutely

21 Q And only after three years had passed did she
22 start building any improvements, like the wall and the
23 gate

24 A Yes

25 Q And the wall was built some time in 2002 and

1 2003, is that --

2 A No That's not correct

3 Q All right

4 A The wall was not built until some time after
5 2003, I believe

6 Q Okay So the wall was built some time after
7 2003

8 A Uh-huh

9 Q All right Let's talk about Mr Guscio, who
10 was the only party you did name Prior to filing the
11 quiet title action in November '98, you had numerous
12 discussions with Mr Guscio with Property Research
13 Holdings

14 A That's correct

15 Q And two days prior to filing the suit Mr
16 Guscio sent you a seven page fax with a proposed deed,
17 which is Exhibit 72A

18 A All right

19 Q Did Mr Guscio send you this fax that is
20 marked 72A?

21 A Yes I'm reasonably confident he did I
22 think it came from our files

23 Q All right We are missing the last three
24 pages Do you know what was included in the last few
25 pages?

1 A I do not know I could not find it either,
2 Mr Patterson

3 Q All right Why did Mr Guscio send you
4 Exhibit 72A?

5 A I'm not really certain I don't recall I
6 had had discussions with him about the property, and --
7 but as far as actually getting that, I don't know

8 Q All right And then on the day that you had
9 held Mr Guscio's company in default by Exhibit 43, you
10 received, on January 25th, '99, another fax, which has
11 been marked 72B

12 A That is correct

13 Q Tell me about this fax What was this fax
14 about?

15 A My recollection is, after Mr Guscio was
16 served I had no comments or contacts with Mr Guscio
17 until receiving this And I assumed that he would
18 either get counsel, or not get counsel, and I didn't
19 know

20 Q All right Well, apparently you had a
21 discussion about buying some property, did you not? It
22 says, "Here is a copy as we just discussed "

23 A There had been some discussions prior to
24 that, but I don't recall what they were

25 Q All right In fact you had discussions, and

1 your wife had discussions, with Mr Guscio about buying
2 this very property that was subject to the quiet title
3 action, did you -- had there not been?

4 A I believe she had had discussions on that

5 Q Right And she was offered -- there was
6 discussions about buying it for \$7,000 00

7 A I think there was

8 Q All right And is this Exhibit 72B about
9 entering a contract to buy that property?

10 A It might have been I can't tell you
11 precisely

12 Q And where is the contract that -- the other
13 documents that went with this fax?

14 A I do not know

15 Q Where is the contract for sale that he said
16 he would send you later?

17 A I do not know

18 Q One of the documents that Ms Bair is relying
19 on is a deed from Mr Guscio, Exhibit 73A, from Mr
20 Guscio's company

21 A That's correct

22 Q March the 8th, 2000

23 A That's correct

24 Q And this was given after the quiet title
25 action was completed

1 A That's correct

2 Q Do you know why Mr Guscio gave -- or why his
3 company gave Ms Bair deed 73A?

4 A I do not know that The deed came as a
5 surprise

6 Q Did you pay -- did you or your wife pay him
7 for that deed?

8 A I did not

9 Q But you hired Mr Hale on March 7th, the day
10 before the deed was signed, to prepare the deed, did you
11 not?

12 A I did not do that

13 Q Look at Exhibit 66C -- 66B, please

14 A (Witness complied) All right

15 Q The second page of that is a letter to you,
16 March 7th, 2000

17 A That's correct

18 Q All right And did you have discussions with
19 Mr Hale about performing a quitclaim deed for Property
20 Research -- from Property Research Holding, and a review
21 of title background?

22 A I did not I discussed with him title
23 background, but never the preparation of a quitclaim
24 deed

25 Q Did you receive the letter which is marked as

1 part of Exhibit 66B?

2 A I did

3 Q All right And you would agree with me that
4 in the reference part of the letter, the very first
5 thing says, "Preparation of Quit-Claim Deed"?

6 A That is there That's correct

7 Q So Mr Hale thought he was preparing a
8 quitclaim deed for you, because that's what he put in
9 his retainer letter, did he not?

10 A I'm not exactly certain that's what he said
11 He says

12 "You have requested --

13 And this is a letter addressed to Carolyn

14 " that Hale and Hale
15 represent you relative to the
16 above-referenced matter --

17 Q All right Let me stop you there What is
18 the above referenced matter?

19 A "Preparation of Quit-Claim
20 Deed for Property Research
21 Holdings "

22 Q All right So Mr Hale thought he was being
23 hired to prepare the quitclaim deed, did he not?

24 A I don't know what Mr Hale was thinking
25 about

1 Q And in fact Mr Hale did prepare the
2 quitclaim deed

3 A That is correct also

4 Q And he did that on your behalf, did he not?

5 A I don't know on who's behalf he prepared it,
6 because I didn't know about the quitclaim deed until we
7 received it

8 Q Well, you did receive Exhibit 66B, did you
9 not? You just said you did

10 A I agree with that

11 Q Well, it references the quitclaim deed

12 A I agree with that, Mr Patterson

13 Q So you knew about a quitclaim deed being
14 prepared by Mr Hale before you got the deed?

15 A Well, I don't know when I knew about it
16 Because, as I said, the letter came, it was mailed to
17 us, and the quitclaim deed was March 8th, was it not?

18 Q The very next day from this letter

19 A I cannot tell you what the sequence was I
20 do not recall And it -- I didn't even know the
21 quitclaim deed was coming

22 Q Okay In looking at the quitclaim deed,
23 Exhibit 73A, the first "whereas" provision, basically,
24 refers to the quiet title action you completed?

25 A That is correct

1 Q Okay And that was the basis for giving the
2 quitclaim deed, because you didn't pay him any money for
3 that, I believe you said?

4 A That's correct A 60 --

5 Q 73A

6 A 73A All right

7 Q All right And looking at -- going back, I'm
8 sorry, to 66B, you do recall having discussions with Mr
9 Hale about writing title insurance for this property, do
10 you not?

11 A I do recall that

12 Q And if you look at the last paragraph of 66B,
13 he, basically, says that he does not want to write title
14 insurance because of the manner in which the quiet title
15 action was complete The last paragraph of 66C

16 MR STEPP C or B?

17 MR PATTERSON I'm sorry B

18 WITNESS That was after, "

19 conversation with Frank Guscio"?

20 BY MR PATTERSON

21 Q Yeah If you go ahead and read that out
22 loud, so I --

23 A All right

24 "After a conversation I

25 had with Frank Guscio, I am

1 concerned that the Town of
2 Hilton Head Island, the Forest
3 Beach Association and possibly
4 the State of South Carolina
5 should have been named in the
6 Quiet Title Action in order to
7 clear a title in a manner
8 sufficient to insure it This
9 is based on the understanding
10 that there may be a claim that
11 the property constitutes a
12 portion of the access-ways
13 within the Forest Beach
14 Community "

15 Q Okay So a Hilton Head lawyer who knew
16 something about it was concerned about your quiet title
17 action and refused to provide title insurance, is that
18 correct?

19 A Based on what he says there, that's correct

20 Q And then you and your wife went over to a
21 Beaufort lawyer, Henry Ann Logan, and did get her to
22 write title insurance on it, didn't you?

23 A No That's not exactly right either She
24 wrote a title insurance policy

25 Q Ms Logan didn't?

1 A Who?

2 Q Henry Ann Logan, the attorney in Beaufort?

3 A That's correct

4 Q Right And you all never told her about Mr
5 Hale's letter, or any of his concerns about missing
6 parties, when that title insurance was written, is that
7 correct?

8 A That is correct also

9 Q All right

10 A And that, basically, is one of the rulings by
11 Judge Wood --

12 MR STEPP Excuse me I'm going to
13 object to that, because that's what's on appeal

14 MR PATTERSON Right I understand
15 it's on appeal, so it's not binding on you But my
16 question was, that was one of the factual elements
17 by Judge Wood that's on appeal, his decision --

18 MR STEPP Judge Duff

19 MR PATTERSON Judge Duff I'm sorry

20 BY MR PATTERSON

21 Q That was one of the decisions that he ruled,
22 that you did not have title insurance

23 A Excuse me I'm not going to comment on that
24 judgment one way or the other

25 JUDGE KEMMERLIN What, is that the

1 case in Federal Court?

2 MR PATTERSON Yes, Your Honor And
3 it's an exhibit in this case

4 JUDGE KEMMERLIN Well, you -- I'm
5 taking it subject to your objection on that I
6 have not made up my mind on it Okay

7 MR STEPP Well, there's also -- let
8 me just supplement the record there My
9 understanding of the Rules of Professional Conduct,
10 we're not supposed to be criticizing judges, or
11 disagreeing with their decisions, except in the
12 normal course of business on appeal

13 So, you know, we're a little bit
14 handicapped, and I would think that the existence
15 of the appeal would suggest what our position is
16 vis-a-vis those findings

17 MR PATTERSON I understand you
18 vehemently disagree with the findings in that
19 decision, but that decision, which is 66D, that
20 Judge ruled in that case -- that was one of the
21 reasons that he denied any title insurance coverage
22 was because you did not disclose to Ms Logan the
23 information in Mr Hale's letter, is that correct?

24 WITNESS It is not correct, and I'm
25 not going to comment on it, because I would be

1 violating the rules I think that's an unfair
2 question It can't be answered without my taking
3 issue with the Judge's ruling, and I'm not going to
4 do that Mr Patterson

5 MR PATTERSON I'm not asking you to
6 agree or disagree, I'm just asking what the judge
7 ruled

8 WITNESS The judge ruled whatever he
9 ruled

10 JUDGE KEMMERLIN Well, I can read
11 that If I decide to consider it I can read it

12 BY MR PATTERSON

13 Q All right Have you had a chance to review
14 the actual metes and bounds property description for the
15 deed from Mr Guscio, which is Exhibit 73A?

16 A Yes

17 Q And is there an error in the property
18 description, in that it does not close?

19 A No

20 Q Okay All right Now you've represented
21 your wife in other lawsuits involving North Forest
22 Beach, including Austin vs W J Enterprises, which was
23 heard by Judge Kemmerlin

24 A That is correct

25 Q And that's Exhibit 64, and that suit was

1 filed by you in September 2002?

2 A That is correct

3 Q All right And just to refresh my memory,
4 and everyone else's, that case involved two ocean front
5 houses on Jacana that Judge Kemmerlin ruled, because of
6 various reasons in his order, should be torn down, among
7 other things

8 A Well, he ruled whatever he ruled

9 JUDGE KEMMERLIN Excuse me Whatever
10 happened to that case?

11 WITNESS It's in the Supreme Court
12 now

13 JUDGE KEMMERLIN I figured it had to
14 go

15 BY MR PATTERSON

16 Q And per an amended complaint you filed, which
17 is Exhibit 62B, in this case -- excuse me, 64B You
18 filed an amended complaint that referenced numerous
19 covenants and restrictions

20 A In which case?

21 Q In the Carolyn Austin vs W J Enterprises
22 case

23 A I probably did I don't recall the complaint
24 right now

25 Q Well, you can look at it It's Exhibit 64B

1 A All right 64B

2 Q All right You found 64B?

3 A I haven't got there yet, Mr Patterson 64B

4 All right

5 Q All right That's the amended complaint that

6 you filed?

7 A Yes

8 Q And you attached to that the subdivision plat

9 and certain covenants?

10 A That is correct

11 Q And in that second amended complaint you

12 stated the covenants were violated

13 A That is correct

14 Q And you also took the position that the

15 Jacana, as shown on the plat attached to the complaint,

16 was a street all the way to where it ended, as shown on

17 the plat, is that correct?

18 A That's correct

19 Q And in that case citing Judge Kemmerlin's

20 prior order, which is Petersburg vs Sokol --

21 A Yeah

22 Q -- which is Exhibit 63-1A in this case, you

23 argued that title to the beach trust property, or the

24 strand blocks, as a result of the application of statute

25 of uses, title had automatically been conveyed to the

1 property owners in Hilton Head Beach subdivision number

2 2

3 A I argued whatever I said I did there

4 Q No, sir That wasn't my question

5 A Is that's what's in my brief?

6 Q Well, that's my question to you

7 A All right And that was in what? Where did

8 I -- refer me to where you're referring

9 Q Exhibit 64E is a memorandum you submitted to
10 the Court, to Judge Kemmerlin

11 A 64B?

12 Q 64E

13 A Well, let's see Okay 64E Yes I signed
14 that

15 Q My question is that you cited to Judge
16 Kemmerlin his prior order in another case involving
17 Petersburg vs Sokol, which is Exhibit 63-1A in this
18 case You argued that title to the beach trust or the
19 strand blocks, as a result of the application of the
20 statute of uses, title automatically conveyed to the
21 property owners in Hilton Head number 2

22 A That's what I argued That's correct

23 Q All right And you put that in your
24 memorandum of Exhibit 64E to the Court

25 A I certainly did

1 Q All right And, basically, to summarize your
2 position that when the Hilton Head Company filed
3 bankruptcy in 1987 it had no interest in the strand
4 blocks or trust property under the -- and that the
5 trustee couldn't convey it to Property Research Holdings
6 because of the application of the statute of uses

7 A That's what I argued Correct

8 Q All right And the same logic would apply
9 if, for whatever trust property the Court finds exists
10 for Hilton Head Beach subdivision number 1 Would you
11 agree with that?

12 A No I would not

13 Q And why not?

14 A Because of two different statutes All
15 right First of all, we're talking about statute of
16 uses, are we not?

17 Q Yes, sir That's what you cited in your
18 brief

19 A All right And if a trust is naked, and
20 there are no duties placed upon the trustee, it is -- it
21 merges

22 So up to number two, it would have merged an
23 undivided -- it would have been tenants in common in
24 each of the land owners in the subdivision number 2

25 Q Okay

1 A Now, with regard to subdivision number 1, the
2 declaration of trust that you referred to was in a
3 period of, I think it was what, 1953?

4 Q Yes, sir That's the date of exhibit --

5 A Of the declaration

6 Q That's the date of Exhibit 85 and 86

7 A That is correct All right And then we
8 have a -- and I think that what you have talked about,
9 and I think it was eluded to in Judge Kemmerlin's Order,
10 in the Petersburg, that you would have to have a
11 situation relating to the rights of different co-
12 tenants Am I correct?

13 Q No, sir I'm trying to understand -- I
14 understand your theory that you submitted to the Court
15 on Hilton Head number 1 I want to understand why that
16 same theory does not apply to whatever the Court finds
17 is trust property in Hilton Head number 1

18 A Because, in this particular case Ms Bair
19 acquired the property, lot number 5, and went in -- in
20 1984

21 Q Okay

22 A She started, and took possession, and used,
23 as each of her predecessors in title had done, the
24 property, which has been referred to as the strand
25 property, which is the area seaward of her lot, and the

1 area seaward of the street

2 Q Right

3 A Now, at that point, absent a -- so she --
4 this lawsuit was started in 19 -- in 2000 -- in November
5 of 2004, that was over 20 years after the time that she
6 went into possession of the three parcels of properties
7 that we are discussing

8 Q Maybe I can simplify this Is the reason
9 you're saying it's different is because she's got an
10 adverse possession claim to this property?

11 A No

12 Q Okay

13 A Two reasons First of all, after 20 years
14 any claim of any co-tenant would be presumed to be
15 ousted

16 Q All right

17 A And so that the quiet title suit was fine,
18 and is certainly, at this point in time -- the
19 Plaintiffs here have no standing to oust her from
20 properties, because 20 years have passed and there --
21 was made no efforts to do it

22 Secondly, as we had discussed on that -- with
23 regard to the strand property, in any event -- secondly
24 is that the street, as we have discussed on other
25 occasions, in my opinion, the fee simple title to the

1 street always was in the abutting land owner

2 So with regard to the statute of uses on number --
3 on the strand property, 20 years have passed, and co-
4 tenants would be deemed ousted, and they're out

5 Up on the Jacana side, 20 years had not passed and
6 it was never raised

7 Q Okay And you believe a 20 year statute has
8 been raised in this case?

9 A Well, it's ousted It's presumed ousted

10 Q Okay Because I don't remember any 20 year
11 statute in any pleadings

12 A There is not a 20 year statute It's a
13 common law of South Carolina that after 20 years a co-
14 tenant is deemed to be ousted

15 JUDGE KEMMERLIN Presumed

16 WITNESS Presumed

17 JUDGE KEMMERLIN It's not deemed, but
18 presumed

19 WITNESS Presumed I'm sorry

20 Presumed I stand corrected, Judge

21 BY MR PATTERSON

22 Q But in the -- one last question on this In
23 your arguments in the Austin vs W J Enterprises case,
24 under your application and arguments for the statute of
25 uses, it's my understanding that you argued that title

1 to the strand block reverted to the property owners in
2 Hilton Head number 2 under the application of the
3 statute of uses, is that correct?

4 A If you were to apply the cases that Judge
5 Kemmerlin had earlier said, that would be correct

6 Q Right And that's what you argued

7 A That's correct

8 Q All right And so that's what you thought
9 was correct, is that correct?

10 A Yes, sir

11 Q All right And so wouldn't the same argument
12 be applicable to the trust property in Hilton Head
13 number 1, where you should have named all the property
14 owners that received title to that property under the
15 statute of uses in your quiet title action?

16 A At the time I didn't give it that
17 consideration

18 Q All right You just didn't think about that
19 Okay All right

20 All right In another case, Forest Beach
21 Association vs Farmer, that was litigation involving
22 another street extension at Heron and the setback

23 A Yes, sir

24 Q All right And that was in Hilton Head Beach
25 number 1, was it not?

1 A That's correct

2 Q All right And in that case --

3 JUDGE KEMMERLIN What case is this one
4 now?

5 MR PATTERSON This is a case you
6 didn't hear, Your Honor

7 JUDGE KEMMERLIN Yeah I know

8 MR PATTERSON It's Forest Beach
9 Association vs Farmer

10 JUDGE KEMMERLIN All right

11 MR PATTERSON And we have -- let's
12 see It's Exhibit 65 is the pleadings and the
13 answer

14 BY MR PATTERSON

15 Q And in that case the Forest Beach Association
16 took the position in the complaint, which is Exhibit
17 65A, that Heron Street, the street extension, was still
18 a street, is that correct?

19 A That's correct

20 Q And you filed an answer on behalf of your
21 wife, 65B, which agreed that it was still a street

22 A Heron Street?

23 Q Yes

24 A It was still a street

25 Q All right All right So that was a platted

1 street that you felt was still a street?

2 A In that one it did

3 Q All right But in this case you're saying
4 Avocet, which is also a platted street, is not a street

5 A That is correct

6 Q All right So in two different cases, the
7 Austin vs W J Enterprises, and Forest Beach vs
8 Farmer, you've taken -- you and your wife have taken the
9 position that platted streets are streets, but in the
10 Avocet Street you're saying it is not a street?

11 A That is correct

12 Q Okay

13 JUDGE KEMMERLIN Foolish
14 inconsistencies are the hobgoblin of a foolish
15 mind, but it has to be foolish

16 MR PATTERSON One second Give me
17 one moment

18 Your Honor, I don't have any other
19 questions of Mr Austin

20 JUDGE KEMMERLIN Okay Thank you

21 MR STEPP All right I've got a few

22 JUDGE KEMMERLIN Okay

23 CROSS EXAMINATION

24 BY MR STEPP

25 Q Mr Austin, just to start where we finished

1 You have just testified that you took the position in
2 the Farmer litigation that Heron Street was still a
3 street, and yet you're taking the position in this
4 litigation that Avocet Street is not still at street
5 Can you tell the Court why you think there's a
6 difference between those two?

7 A Well, first of all, Heron Street, as I
8 understand it, is a street that provided access to the
9 ocean, or to the beach, from that area, and that it was
10 constantly used by people for pedestrian traffic and
11 otherwise

12 Avocet Street, on the other hand, I have not found
13 anybody that ever used Avocet Street for any purpose,
14 other than Carolyn for a parking spot, and her
15 predecessors I have not been able to find one single
16 person that I can say, when you're talking about people,
17 that you could identify any person that ever used Avocet
18 Street as an access

19 Q Okay When you and then Ms Bair were
20 married in 1998, since that -- since then you have spent
21 time at the Avocet Street -- I mean, at the number 1
22 Dune Lane residence, correct?

23 A Of course

24 Q And have you ever seen anybody walk down the
25 street end to go to the beach?

1 A No

2 Q Have you ever seen anybody, other than you,
3 or Carolyn, or other members of your family, park their
4 car on that property?

5 A No

6 Q Mr Austin, when you undertook the quiet
7 title action and you made the decisions about who to
8 name and who not to name, were you doing that in
9 complete good faith?

10 A Absolutely

11 Q Did you deliberately fail to name somebody
12 for the purpose of obtaining any advantage in the
13 litigation?

14 A Absolutely not

15 Q Did you select counsel, or guardians, or
16 submit orders, or do anything in the course of the
17 litigation other than what you considered to be in the
18 ordinary course of process for suits of that type?

19 A No I did not

20 Q All right Had you -- you named Property
21 Research Holdings, correct?

22 A That is correct

23 Q Tell me why you named Property Research
24 Holdings as a defendant in that case?

25 A Because they asserted an interest in the

1 property of which Carolyn had been in possession of
2 since she took the property when she bought it, and it
3 was the property that she had acquired from the
4 predecessors in her title Only --

5 They were the only firm, person, or otherwise that
6 I knew to assert any interest in the property

7 Q In fact they had record title to it, did they
8 not?

9 A As I understand it

10 Q Or at least to claim the record title?

11 A Right

12 Q And was there anybody else that you were
13 aware had any claim to title -- well, that's the
14 question Was there anybody else of whom you were aware
15 that had any claim to title to that property?

16 A No

17 Q Mr Patterson asked you about the proceedings
18 in Federal Court involving Judge Duffy

19 A That's correct

20 Q Do you remember that?

21 A Yes

22 Q And -- let me see Just a minute You
23 testified at the trial of that case

24 A That's correct

25 Q Is that correct?

1 A Yes

2 Q I don't want to go back all through this,

3 because I think we got it Hold on a minute

4 Exhibit 66C is a complete transcript of your trial

5 testimony on that case

6 A That is correct

7 Q You've read that previous to this --

8 A Yes I have

9 Q All right Do you adopt that testimony as
10 your testimony for all purposes in this litigation?

11 A I do

12 MR STEPP I don't have any further
13 questions

14 MR PATTERSON Just one thing

15 REDIRECT EXAMINATION

16 BY MR PATTERSON

17 Q Mr Austin, I may not have done this Have
18 you met Mr and Mrs Howard?

19 A Here I have

20 Q Okay So you have met at least one -- two
21 people that used Avocet Street as a living person to
22 gain access to the beach?

23 A That's what they say

24 Q Okay

25 A But I have -- if that's -- I never met them

1 until this suit came about

2 Q Okay At least I -- you met at least two
3 people who have said they used it

4 MR PATTERSON I don't have any other
5 questions

6 MR STEPP Nothing further

7 JUDGE KEMMERLIN Okay You got other witnesses?

8 MR PATTERSON Your Honor, I have a surveyor
9 that's going to be very brief

10 JUDGE KEMMERLIN All right

11 MR PATTERSON But I didn't tell him to get here
12 until 2 00

13 JUDGE KEMMERLIN I understand What time is it
14 now?

15 MR PATTERSON It's almost 1 00 If we wanted to
16 take a brief break for lunch

17 JUDGE KEMMERLIN Well, I was going to wonder Is
18 there any chance of finishing today, to save people from
19 coming back, if we were -- you could either -- we could
20 run through lunch, or I don't mind waiting into the
21 night, but I don't know how other people feel about it

22 MS AUSTIN I wear out

23 JUDGE KEMMERLIN What?

24 MS AUSTIN I said I wear out I don't have
25 enough strength to -- for long days

1 JUDGE KEMMERLIN Well, then let's see what we can
2 do, and we might can finish it anyway then

3 MR PATTERSON Yes, sir

4 MR STEPP We've got three more witnesses to go
5 I mean, we've got to do the surveyor, Mr Guscio, and
6 Ms Austin

7 MR PATTERSON Right

8 JUDGE KEMMERLIN Well, we'll do the best we can
9 What, you all want to take lunch now, or what?

10 MR STEPP That would suit me

11 JUDGE KEMMERLIN Okay

12 (WHEREUPON, a brief break was taken off
13 the record)

14 MR PATTERSON Judge, we call Rodney Walker
15 Rodney, if you want to sit in that seat over there

16 JUDGE KEMMERLIN I saw him come in I didn't
17 realize he was a witness

18 MR STEPP Come around this way

19 MR PATTERSON That's the hardest part of
20 testifying is getting to that chair

21 JUDGE KEMMERLIN Have a seat Raise your hand

22 RODNEY WALKER, called as a witness,
23 having been first duly sworn, was examined and
24 testified as follows

25 ///

\\

DIRECT EXAMINATION

1

2 BY MR PATTERSON

3 Q Mr Walker, will you give me your full name,
4 please

5 A Rodney Joseph Walker

6 Q And what do you do for a living?

7 A I'm a chief draftsman and survey manager for
8 Rudy Wheeler at Atlantic Surveying

9 Q And how long have you had that position?

10 A Since August of '04

11 Q And what are your duties as a chief
12 draftsman?

13 A I compute all the metes and bounds I do
14 title work, deed research, complete all the AutoCAD
15 drawings for closings, whatnot, boundaries, tree
16 surveys, whatnot, deed descriptions Anything relative
17 to surveying

18 Q And how long have you worked for Mr Wheeler?

19 A Since August of '04

20 Q And prior to that what work did you do?

21 A I worked for Randy Carpenter over in Spruce
22 Pine, North Carolina I did that for three years

23 Q And what type of work did you do there in
24 North --

25 A Same position

1 Q And prior to that what did you do?

2 A Prior to that I was in Louisiana, where we're
3 from, that was from '95 through '99, for T Baker Smith
4 and Sons, in Holman, Louisiana

5 Q And were you involved with survey work in
6 Louisiana?

7 A I was a party chief I had not made that
8 jump yet to the current level

9 Q A party chief?

10 A Party chief, meaning I was in charge of a
11 three or four man crew

12 Q But you still did surveying work for four
13 years in Louisiana since 1995?

14 A Right

15 Q And prior to that did you do any surveying
16 work?

17 A I originally started in 1980, left in '84,
18 pursued other avenues - retail management - decided to
19 get back into surveying

20 Q Okay And have you plotted metes and bounds
21 descriptions before off of deeds and other documents?

22 A Yes

23 Q And you've done field work, where you draft
24 the actual metes and bounds descriptions?

25 A Yes I go out in the field everyday until

1 about 2 00, spend the rest of the evening, until about
2 7 00, computing everything that I shoot out there

3 MR PATTERSON Your Honor, we'd offer
4 Mr Walker as an expert draftsman

5 JUDGE KEMMERLIN Any objections?

6 MR STEPP Can I voir dire, Your
7 Honor?

8 JUDGE KEMMERLIN Sure

9 MR STEPP Mr Walker, have you done
10 any actual field surveying for purposes of your
11 testimony in this case?

12 WITNESS I have not done any field
13 work on subject property

14 MR STEPP So what -- can I ask what
15 you have done?

16 WITNESS I went ahead and plotted out
17 the deed -- the deed description

18 MR STEPP Did you do that with
19 reference to an existing survey?

20 WITNESS I had an existing survey and
21 the deed, the recorded deed

22 MR STEPP And your purpose is to
23 comment on what property is encompassed by the
24 metes and bounds description and the deed?

25 WITNESS Correct

1 MR STEPP No objection, Your Honor

2 JUDGE KEMMERLIN Okay Go ahead

3 MR PATTERSON Thank you, Your Honor

4 BY MR PATTERSON

5 Q Did you have the occasion to plot the legal
6 description found in the deed, which is marked as
7 Exhibit 73A in this case, from Property Research
8 Holdings to Carolyn Songer Austin?

9 A Yes

10 Q If you'll look at Exhibit 73A

11 A (Witness complied) This is the same one

12 Q Okay And so you did plat that metes and
13 bounds description?

14 A Yes I did

15 Q And is what I've marked as Exhibit 89 your
16 work on what that legal description looked like?

17 A That's a reflection of this deed

18 MR PATTERSON We offer that document
19 into evidence?

20 MR STEPP Was this in the notebook,
21 Russell?

22 MR PATTERSON No But I produced it
23 --

24 MR STEPP I object to it, Your Honor
25 I mean, I thought we had a set of stipulated

1 exhibits, and I haven't seen this before

2 MR PATTERSON No I produced that,
3 and I didn't assume you all were going to agree -
4 that that was the right plat

5 MR STEPP Well, I don't

6 MR PATTERSON So that's why I --
7 well, I know that That's why I didn't put it in
8 the stipulated exhibits But, I mean, certainly
9 both of us have the right to introduce whatever
10 other exhibits we want to in the case

11 MR STEPP Well, I just note my
12 objection

13 JUDGE KEMMERLIN Okay It's offered
14 and received

15 (WHEREUPON, a document was marked as
16 Plaintiff's Exhibit Number 89 for identification
17 into the case of Forest Beach Owners' Association,
18 Inc and Trevor G Howard vs Carolyn S Bair)

19 MR PATTERSON All right

20 BY MR PATTERSON

21 Q Is that the, as you plotted, the metes and
22 bounds description, is that the graphical depiction of -
23 -

24 A Yes It is

25 Q -- the property?

1 A Yes

2 Q And is that the same property description
3 that was found in the deed that you plotted also?

4 And so you don't have to go through that notebook
5 Hold on a second

6 Was that also the legal description in the amended
7 lis pendens, which is Exhibit 45, a copy of which I'm
8 handing you?

9 A It's identical

10 Q All right And is that also the same legal
11 description that was used in the final judgment in the
12 Bair quiet title action, which is Exhibit - hold on a
13 minute - 52, a copy of which I'm handing you, which is
14 also in the notebook?

15 A The metes and bounds are identical

16 Q Okay So whoever drafted those documents
17 used the same property description in the amended lis
18 pendens that what published in the newspaper for the
19 1988 [sic] quiet title action, and in the final
20 judgment, and in the deed that you've testified about?

21 A Verbatim

22 JUDGE KEMMERLIN All right Let me
23 interrupt for just one second Is this from the
24 deed, or is that just added?

25 WITNESS That's the last call in the

1 deed

2 JUDGE KEMMERLIN That's the last call

3 in the deed

4 BY MR PATTERSON

5 Q All right And does that --

6 JUDGE KEMMERLIN Okay

7 MR PATTERSON Any other questions,

8 Judge?

9 JUDGE KEMMERLIN No No

10 BY MR PATTERSON

11 Q And does that property description actually

12 close?

13 A No, sir

14 Q All right And as you just mentioned to the

15 Judge, the last description states -- the last call, it

16 says

17 "Then run northerly to the

18 point of beginning "

19 A Correct

20 Q Is that correct?

21 A Yes

22 Q Where should -- what is the correct

23 description if it were to close? What should it have

24 said, in your opinion?

25 A The actual call on the survey, which would

1 have been northeast 65-42-22, and I don't recall the
2 distance, I believe it will be a hundred feet

3 Q Okay

4 A Would have been correct That would have
5 made it close

6 Q All right Now why -- what is the difference
7 -- why do you say it doesn't close? What's the
8 difference between running northerly, and then running
9 northeast? Why is that such a big difference?

10 A Do you have a piece of paper I could use?

11 Q Yes, sir

12 A Okay For all intense and purposes we work
13 in a circle, 360 degrees, divided by four quadrants -
14 okay? -north, south, east, and west Your deed
15 descriptions take off on that by having 90 degrees being
16 due east and due west, 0 degrees is due north and due
17 south Okay? So you have 90 going up to 0, 0 going
18 down to 90, and vice versa Okay?

19 Northerly, to me - okay? - if you go 45 degrees in
20 either direction Okay? Anything from north 45 - okay?
21 - west 45 - okay? - in my opinion will be northerly
22 I'm not veering any to the east

23 The next quadrant, 90 degrees, 45 down, 45 up, that
24 would be easterly The call -- in order for this to run
25 northerly - okay? - that would be going up this way, not

1 this way (indicating)

2 That description, as per the survey, is northeast
3 65, which puts us below, which would be easterly, not
4 northerly

5 Q Okay And you also note of where the -- that
6 direction by looking at the survey --

7 A Yes

8 Q -- that's attached to the complaint in the
9 quiet title action, which is part of Exhibit 38?

10 A Yes

11 Q All right

12 A And if I may explain This here point of
13 commencement is right here (indicating) Okay? We go
14 this course and distance down to the POB, point of
15 beginning Okay? We have a series of courses and
16 distances from here, here This line here is the
17 addition of these two, and then these three here equal
18 this We come up to here We come down to here

19 At this point is where the deed goes wrong It
20 says, "Northerly " If they wanted to use a direction,
21 instead of the actual call, they should have said,
22 "Easterly " Okay?

23 But the correct call would have been what line 2 is
24 over here (indicating)

25 Q And what is that direction?

1 A It'll be identical to what's over here

2 Q And you say "here " Tell me what that course
3 and heading is?

4 A 65-42-22, Northeast - okay? - at a distance
5 of 68, 76 I'm sorry

6 Q Okay

7 A So the deed description is correct from my
8 point of commencement to the POB, up until this point,
9 and that's where it goes wrong

10 Q Okay And it's your opinion that the
11 property description does not close?

12 A No I can't complete the survey

13 Q Okay

14 A If I was given that to put this in the
15 ground, I couldn't do it

16 Q All right And if anyone had seen the lis
17 pendence that was published, or read the final decree,
18 or read the deed, would they be able to know what piece
19 of property was described?

20 MR STEPP Objection, Your Honor I
21 think that's beyond his expertise That's an
22 inference that he can argue, but I don't know that
23 this witness would know what anybody else would
24 understand by reading that

25 JUDGE KEMMERLIN Well, he doesn't know

1 what anybody else would understand, but anyone who
2 read it and was intelligent, they would realize
3 that what you've said is true Is that, basically,
4 right?

5 WITNESS I agree with that I am -- I
6 don't know if this is going to hurt or help, but I
7 -- if the individual doesn't have any knowledge of
8 preparing a deed, or completing any surveys, they
9 would have not idea what they were reading

10 MR PATTERSON I'd like to mark your
11 illustration as Exhibit 90 If I could offer that
12 into evidence?

13 MR STEPP No objection

14 MR PATTERSON Okay

15 JUDGE KEMMERLIN Without objection

16 (WHEREUPON, a document was marked as
17 Plaintiff's Exhibit Number 90 for identification
18 into the case of Forest Beach Owners' Association,
19 Inc and Trevor G Howard vs Carolyn S Bair)

20 MR PATTERSON Give me one second

21 JUDGE KEMMERLIN Now was 89 offered
22 without objections too? You had an objection?

23 MR STEPP It was over objection

24 JUDGE KEMMERLIN It was over

25 objection Okay

1 MR PATTERSON Your Honor, I don't
2 have any other questions for this witness

3 MR STEPP Thank you, Your Honor

4 CROSS EXAMINATION

5 BY MR STEPP

6 Q Mr Walker, let me get this right I'm
7 looking at 89

8 And I'm just going to sit here next to you I
9 don't bite much

10 So if this final call, instead of saying -- it
11 says

12 "Run northerly to the
13 point of beginning "

14 A Uh-huh

15 Q And what you're saying is, as a surveyor, you
16 can't interpret that call to get you from this point to
17 this point over here (indicating), the point of
18 beginning?

19 A Not at all

20 Q Because you think that's more east than it is
21 north?

22 A Right Because it's below the 45 degree
23 parallel

24 Q All right So had it said run easterly to
25 the point of beginning, there would be no problem?

1 A It would take me back there

2 Q What if it just said run to the point of

3 beginning

4 A That depends on different states Okay?

5 Q Well, we're in South Carolina

6 A I do not know if South Carolina allows that

7 Q Okay So you don't know

8 A But, typically, every deed I've done, and

9 I've been doing this for -- I've done thousands of deed

10 researches, title searches - okay? - they never just say

11 just run to the point of beginning, unless you're in the

12 mountains

13 Q All right But if it said run to the point

14 of beginning, you could see the point of beginning, and

15 that would create a line right across there, right?

16 And that --

17 A You could see it on paper, but you don't see

18 it on this

19 Q Well, I understand I'm just asking whether

20 --

21 JUDGE KEMMERLIN He's asking if it was

22 done directly

23 BY MR STEPP

24 Q If it was done some other way?

25 A Yeah There are other ways to do it One

1 would have been easterly One would have been the right
2 call off of the survey

3 If this was typed off the survey, that's the error
4 there

5 Q And you assume that this 65-42-22 is the same
6 direction?

7 A No, sir I'm not assuming It's written
8 right here (indicating) It's on the survey It's on
9 the survey and the --

10 MR PATTERSON He's referring to
11 Exhibit -- attached to Exhibit 38, I believe Yes

12 WITNESS Line 2 And then line 6

13 MR STEPP Okay

14 WITNESS Same course, different
15 distance

16 BY MR STEPP

17 Q And that's the only problem?

18 A Clarify that

19 Q That's the only problem with this description
20 is that it says northerly instead of easterly, or
21 instead of just saying run to the point of beginning?

22 A Or instead of saying the actual --

23 Q Okay

24 A -- course

25 Q Or --

1 A But it doesn't close There's nothing I can
2 put on the ground

3 Q Okay

4 A No way I can --

5 Q You can't figure that out? You can't, with
6 all your surveying experience, you can't figure out that
7 they're trying to get to this point (indicating), and
8 that's what that refers to?

9 A Yes, sir

10 Q That's a mystery to you?

11 A No It's not

12 JUDGE KEMMERLIN But that doesn't make
13 a difference

14 WITNESS I can compute anything you
15 want me to compute That's not a problem But the
16 thing is, I have to work on what's recorded, on the
17 instrument

18 MR STEPP I understand

19 WITNESS And the instrument is
20 incorrect

21 BY MR STEPP

22 A So when you're looking at this, you're
23 plotting it out, and you get to this point right here,
24 you can't figure out what's meant?

25 JUDGE KEMMERLIN I don't think it

1 matters He's -- I think -- it's obvious to me
2 what it meant, but you've got to go by what it
3 says, not by what it meant

4 MR STEPP Well, I think it's question
5 of intention though, Judge

6 JUDGE KEMMERLIN Well, go ahead

7 WITNESS The point of the instrument
8 is to go northerly, not easterly

9 MR STEPP Well, the intent of the
10 instrument was to return to the point of beginning,
11 right?

12 WITNESS Northerly But that's going
13 to take me the wrong direction

14 MR STEPP No further questions

15 JUDGE KEMMERLIN Okay

16 MR PATTERSON I don't have any other
17 questions May this witness be excused?

18 MR STEPP Yes

19 MR PATTERSON Thank you very much,
20 sir

21 WITNESS Thank you guys

22 MR STEPP See you later

23 MR PATTERSON Your Honor, we would rest our case

24 MR STEPP Well, Your Honor, can I, just for the
25 record, have a motion to -- for a directed verdict?

1 JUDGE KEMMERLIN Yeah But don't take too long
2 with it

3 MR STEPP No, sir I just did it

4 JUDGE KEMMERLIN All right You can argue it
5 later It's denied

6 MR STEPP Thank you, Your Honor

7 All right Let's call Mr Guscio, please, Frank
8 Guscio

9 FRANK GUSCIO, JR , called as a witness,
10 having been first duly sworn, was examined and
11 testified as follows

12 DIRECT EXAMINATION

13 BY MR STEPP

14 Q Mr Guscio, state your name for the record,
15 please?

16 A My full name is Francis Joseph Guscio, Jr ,
17 G-U-S-C-I-O

18 Q And where are you employed, Mr Guscio?

19 A I am actually retired

20 Q Okay Where were you formally employed?

21 A Fifty percent shareholder in Property
22 Research Holdings

23 Q Okay And tell me a little bit about
24 Property Research Holdings, what it is, or was, please?

25 A Property Research Holdings is a corporation

1 that was formed, originally with three shareholders, to
2 take title to certain assets out of the bankruptcy of
3 Hilton Head Company and Sea Pines Company

4 Q Okay And did Property Research Holdings in
5 fact acquire title to certain properties as a result of
6 the bankruptcy at Hilton Head Company?

7 A Yes We did

8 Q And did that property include what we call in
9 this litigation the street ends in the Forest Beach
10 subdivision?

11 A Yes

12 Q Or at least in number 1?

13 A Yes It did

14 Q And did it also include what we'd call the
15 strand block?

16 A Yes It did

17 Q Okay In 1998 was Property Research Holdings
18 served with -- let's look at -- let's look at Exhibit
19 38, I think Is that the --

20 MR PATTERSON Yes That's correct

21 BY MR STEPP

22 Q Okay Here we go All right The --
23 Exhibit -- Plaintiff's Exhibit 38 is a summons and a
24 complaint in which Carolyn S Bair is the plaintiff and
25 Property Research Holdings, Inc is one of the

1 defendants Do you recognize that?

2 A Yes I do

3 Q Was Property Research Holdings, Inc served
4 with that complaint?

5 A We were

6 Q And did Property Research Holdings, Inc
7 elect to defend or to contest that action?

8 A We elected not to

9 Q And tell me -- tell the Court why

10 A We had been in, pretty much, continuous
11 litigation regarding the Forest Beach area properties
12 that we acquired out of bankruptcy

13 We had been in discussions with Ms Bair and others
14 about conveying certain portions of the strand and the
15 road extensions, or what we had referred to also as park
16 areas, and Ms Bair had offered us \$5,000 00 for the
17 property

18 We had been contacted by Robert Graves, who told us
19 that it was worth \$2,000 00 maximum to him We
20 determined that it would cost us more than \$5,000 00 to
21 defend the litigation So we elected not to answer the
22 complaint

23 Q All right, sir And what did you understand
24 this complaint -- what relief did you understand to be
25 sought in this complaint?

1 A I understood it was a quiet title action on
2 behalf of Ms Bair to secure title to the strand in
3 front of lot 5, the road extension of Avocet Street, and
4 the extension of the road beyond Avocet Street to match
5 up with the extension of the strand

6 Q All right Take on Exhibit 38, there's a
7 plat attached Do you see that?

8 A Yes I do

9 Q Take the pen and mark the property that was
10 involved in the litigation, to your understanding You
11 can do just the outline of it, if you want

12 A (Witness complied)

13 Q Okay And when you got the complaint, and I
14 say "you," I mean Property Research Holdings When
15 Property Research Holdings received this complaint, did
16 you understand the property that you've marked on
17 Exhibit 38 to be the property that was the subject of
18 the action?

19 A Yes We did.

20 Q Okay Subsequent to the service of the quiet
21 title action on Property Research Holdings, did Property
22 Research Holdings elect to execute a quitclaim deed --

23 Well, let me back up

24 At the time the action was filed, did you consider
25 that Property Research Holdings, Inc was the title

1 holder to the property that you've enclosed in blue on
2 Exhibit 38?

3 A Yes We did

4 Q And subsequently did you execute a quitclaim
5 deed in favor of Ms Austin for that property?

6 A Yes We did

7 Q Okay Now let me -- I'm just looking at
8 that Now we're back to Exhibit 73 If you'll take a
9 minute and look at this, if you would, and tell me if
10 that's the quitclaim deed that Property Research
11 Holdings executed and delivered to Ms Austin in March
12 of 2001?

13 A (Witness complied) Yes It is

14 Q Okay Now this is signed by you, as
15 president of Property Research Holdings, is that right?

16 A That is correct Yes

17 Q As president of Property Research Holdings,
18 when you executed this deed, what property did you
19 understand you were conveying or quitclaiming any
20 interest in?

21 MR PATTERSON Your Honor, I'd object
22 It's under the pro-evidence rule It says whatever
23 it says He can't tell us what he attempted to try
24 to do, or --

25 JUDGE KEMMERLIN That's correct

1 MR STEPP Your Honor, I think he can
2 testify as to what his understanding is

3 JUDGE KEMMERLIN Not if --

4 MR STEPP Well, then no error could
5 ever get corrected, Judge A scrivener -- if a
6 scrivener's error -- if an instrument contains a
7 scrivener's error, because it doesn't conform to
8 the party's intention, then --

9 JUDGE KEMMERLIN A scrivener's error?
10 I don't think that fits the description of a
11 scrivener's error But go ahead I'll take it
12 subject to objection, and then I'll think about it
13 some more before I rule on it

14 MR STEPP Well, thank you, Your
15 Honor

16 BY MR STEPP

17 Q Mr Guscio, what property did you understand
18 did Property Research Holdings intend to convey to Ms
19 Austin at that time?

20 A We intended to convey the property that I
21 outlined on, what is it, Exhibit 38

22 Q Okay

23 JUDGE KEMMERLIN But did he sign the
24 deed?

25 MR STEPP Yes, sir

1 JUDGE KEMMERLIN Okay Go ahead

2 MR STEPP Yes, sir

3 BY MR STEPP

4 Q All right And then we'll look on the first
5 page of the deed here There is reference to

6 "The Real Estate described
7 below and in the Complaint in
8 the above referenced Action "

9 Do you see that?

10 A Yes I do

11 Q And you can look back if you need to, but is
12 -- is that plat that you just marked on a part of the
13 complaint in the action that's referred to in the deed?

14 A Yes, sir It was Yes

15 Q Okay Now, subsequently -- let's look at --
16 and I'm sorry The date of this deed is what?

17 A It's the 8th of -- I believe that's March,
18 2000

19 Q Okay Now subsequently let's look at --
20 which Exhibit is it, 24? Russell?

21 MR PATTERSON Our deed?

22 MR STEPP Yes

23 MR PATTERSON It is 24

24 MR STEPP Try to find Exhibit 24

25 JUDGE KEMMERLIN Just so you know

1 where I'm going As I understand the law, a
2 scrivener's error occurs when the parties both
3 agree that that's -- this is what we intend to do
4 And the error creeps in in reducing it to writing
5 That would mean that this was not a scrivener's
6 error It's a mistake of fact, which you stuck
7 with Unless you can --

8 MR STEPP Well, Judge, my position
9 would be that both parties to that instrument, and
10 I'll make a proffer, are going to testify that
11 their intention was to convey on the one hand and
12 receive on the other, the property that the witness
13 just marked on that plat
14 If that is not precisely the property described in
15 the instrument, then the instrument would contain a
16 scrivener's error, to the extent it does not --

17 JUDGE KEMMERLIN That may be if both
18 of them say that

19 MR STEPP Right And, obviously, I
20 haven't called the other witness yet, but that was
21 the purpose, Your Honor

22 JUDGE KEMMERLIN All right

23 MR PATTERSON Your Honor, If I could
24 just make one statement I think you've correctly
25 cited the law, but for rights of third parties that

1 come in intervening before you correct that
2 scrivener's error

3 JUDGE KEMMERLIN Yeah I think that's
4 right

5 MR PATTERSON I think in this case we
6 have --

7 JUDGE KEMMERLIN You've got an
8 intervening -- if you've got an intervening
9 innocent party for value, it would not -- it would
10 not protect them

11 MR PATTERSON Yes, sir

12 JUDGE KEMMERLIN But go ahead

13 MR STEPP I disagree with that, Your
14 Honor, but I'll talk to you about that later

15 BY MR STEPP

16 Q All right Look here We're looking at
17 Exhibit 24 now This is another quitclaim deed, and
18 this is also -- the grantor is Property Research
19 Holdings, Inc Is that your signature as president
20 (indicating)?

21 A Yes It is

22 Q And what is the date of this deed?

23 A That's the 23rd of May 2001

24 Q All right And just give the Court a little
25 background about how this deed came to be, please?

1 A Let's see which one it is This was a --
2 winding up in a settlement of litigation involving the
3 Town of Hilton Head, Forest Beach Owners' Association,
4 and Property Research Holdings

5 Property Research Holdings had submitted a plat to
6 the town to attempt to subdivide the strand area in
7 front of the lots, and it was denied -- approval was
8 denied, and I don't recall the entire sequence, but we
9 wound up in litigation as a defendant, and we had met
10 the attorneys, discussed different alternatives

11 Property Research Holdings had agreed to convey the
12 roadways in Hilton Head Beach number 1 and 1A to the
13 county, to convey what was called the beach lot, which
14 was, essentially, the hard beach from the landward toe
15 of the rock wall revetment out to the mean high water,
16 and convey to the Forest Beach Owners' Association the
17 road extensions and the extensions across the strand of
18 those roads out to the rock walls

19 Q Okay Who prepared this deed?

20 A I believe this was prepared by Novit and
21 Scarminach

22 Q Okay And who were they representing in the
23 --

24 A Chet Williams was our attorney in this
25 litigation, and they represented Property Research

1 Holdings

2 Q Okay

3 A Chet was with Novit and Scarminach

4 Q Okay

5 JUDGE KEMMERLIN Who was your attorney
6 now?

7 WITNESS Chet Williams

8 JUDGE KEMMERLIN Okay And those
9 other attorney was Scarminach?

10 WITNESS No, Your Honor Chester
11 Williams worked for Novit and Scarminach

12 JUDGE KEMMERLIN Okay I -- okay

13 WITNESS In fact at this time I think
14 he was a partner, I believe it was Novit,
15 Scarminach, and Williams

16 JUDGE KEMMERLIN Okay All right

17 MR PATTERSON So your lawyer prepared
18 the deed to that --

19 MR STEPP Do you mind waiting until
20 I'm done Russell

21 MR PATTERSON I'm sorry

22 JUDGE KEMMERLIN What's that? I was
23 talking to him and I heard you all say something on
24 the side What was the side?

25 MR STEPP Mr Patterson decided to

1 start his cross examination early, Your Honor

2 MR PATTERSON I apologize

3 JUDGE KEMMERLIN I understand, and

4 I'll tell you a story about that in a minute

5 MR PATTERSON I apologize, Your

6 Honor

7 MR STEPP But if that's your only

8 question I'll let you do it right now

9 BY MR STEPP

10 Q Who represented Forest Beach Owners'

11 Association?

12 A I don't recall whether Drew Laughlin still
13 represented them, or whether Mr Patterson did

14 Q Okay

15 A Now the property description in Exhibit 24
16 includes some designations of parcels that include lots
17 number A, and AA, and then others Do you see that?

18 A Yes I do

19 Q Okay Can you tell me what A and AA in that
20 description refer to?

21 A They refer to the road extension of Avocet
22 and the strand parcel beyond the extension of that -- or
23 an extension beyond the roadway out to the rock wall
24 revetment

25 Those are the parcels that we had previously

1 conveyed to Carolyn Bair

2 Q All right Well, if you had previously
3 conveyed parcel A and parcel AA to Carolyn Bair, what's
4 it doing in this deed a year later?

5 A It was supposed to have been taken out of
6 this deed It was taken out of the conveyance of the
7 declarant rights applicable to these areas, which was a
8 separate conveyance

9 We conveyed not only the real property described in
10 this deed, but we also assigned the declarant rights to
11 Hilton Head Beach subdivision number 1 to the Forest
12 Beach Owners' Association, and then if you look at the
13 description, Exhibit A to that quitclaim assignment, it
14 does not have A and AA

15 Q All right I'm going to get to that in just
16 in a minute But my question is When this deed was
17 executed in May of 2001, was it the intention of
18 Property Research Holdings to convey any interest in
19 parcel A and parcel AA, as --

20 MR PATTERSON Objection --

21 JUDGE KEMMERLIN Subject to the
22 objection I understand, and I think I agree with
23 you I'll take it subject to the objection I'm
24 not sure I do

25 WITNESS I had reviewed the legal

1 descriptions of this and the conveyance of rights
2 with Chet Williams, and it was my understanding
3 that it was going to be removed from both
4 documents

5 MR STEPP Okay

6 WITNESS Apparently it got removed
7 from the conveyance of -- or the assignment of
8 rights, but it did not get removed from the
9 certificate

10 BY MR STEPP

11 Q Okay At the time that this deed was
12 executed, or delivered, or at any time as a part of this
13 transaction, did you express to anybody on behalf of
14 Forest Beach Owners' Association that you had already
15 conveyed the interest of Property Research Holdings in
16 parcels A and AA?

17 A Do you mean anybody other than my attorney?

18 Q Right

19 A I don't recall

20 Q Okay There was some testimony that somebody
21 recalled -- you said you may have conveyed some of this
22 property away Do you recall making that statement?

23 A I don't recall, specifically, making it, no

24 Q Okay

25 A I very well may have though

1 Q Okay I mean, there was no question in your
2 mind in May of 2001 -- or was there any question in your
3 mind in May of 2001 whether you in fact had conveyed
4 whatever interest CRHI had in parcel A and AA to Ms
5 Austin a year earlier?

6 A No There was not question in my mind
7 Also, we had -- we had conveyed the roadways Pursuant
8 to the settlement agreement we had already conveyed the
9 roadways to the county in Hilton Head Beach number 1 and
10 1A subdivisions

11 Q Okay And so Avocet -- Property Research
12 Holdings no longer had any interest in Avocet Street up
13 through the end of Dune Land, is that right?

14 A To Dune Lane, but county said that they were
15 -- they would not accept title to the road extensions

16 Q Okay Now you mentioned some covenants that
17 were executed and delivered as a part of this same
18 transaction, is that right?

19 A That's correct

20 Q Let me show you Exhibit -- Plaintiff's
21 Exhibit 30, and this is a document titled "Declaration
22 of Restrictive Covenants "

23 Take a minute and look at that, it's dated July
24 20th, 2001, and the declarant is Property Research
25 Holdings, Inc Do you see that?

1 A Yes

2 Q Are these the covenants that you were
3 referring to earlier in your testimony?

4 A Yes They are

5 Q And do these -- does this document purport to
6 impose any covenants, easements, or restrictions on what
7 we just referred to as Parcel A or Parcel AA?

8 A It does not

9 Q And why not?

10 A That area had already been conveyed to Ms
11 Bair

12 Q Okay

13 A This starts with lot 6A

14 Q Okay Mr Guscio, how long have you lived on
15 Hilton Head?

16 A I moved to Hilton Head in 1989 I have
17 worked on Hilton Head since 1973

18 Q Okay Now from -- when did you first become
19 familiar with property in Forest Beach subdivision
20 number 1?

21 A The first real knowledge that I had of that
22 subdivision was in 1982

23 Q Okay Were you familiar with Avocet Street
24 in 1982?

25 A Yes I was

1 Q And were you familiar with the house that was
2 on lot 5 that's now -- same house, now -- still on lot
3 5, but in 1982 were you familiar with it?

4 A I had gone past it, but it didn't stand out
5 any more than any of the other houses

6 Q All right Well, do you know anything about
7 the history of any walkway to the beach, or pathway to
8 the beach that's at or near the Avocet Street extension?

9 A The Avocet Street itself used to be a dirt
10 road until the county took it over and paved it

11 Q Okay

12 A And as a dirt road it was, pretty much,
13 undefined as to what the right of way would be It
14 appeared that it was just a dirt road leading toward the
15 beach, and then narrowed down somewhat into the pathway
16 to the beach

17 Q Okay Let me -- let's go back to Exhibit 38
18 and look at this survey again, the one that you marked
19 on in ink

20 A (Witness complied)

21 Q And you see here where it says, "Existing
22 Beach Access Path"? You see that?

23 A Yes I do

24 Q Are you familiar with the path that's shown
25 on this Exhibit?

1 A I don't know that that's the location of the
2 path I mean, at that time what was on the ground was
3 not necessarily defined by curbside, or curbing, or
4 anything else, it was just a sand trail

5 Q All right

6 A It appeared that there was significant
7 landscaping along the, what I would say, the western
8 side of the extension of Avocet

9 As you come down Avocet on -- to your left you
10 would have to jog somewhat to the right to go around a
11 significant amount of wind prune oaks [sic] that
12 appeared to have been there for a significant amount of
13 time

14 Q And those oaks were, approximately, where on
15 Exhibit 38 here? If you'd just put an "X" where the
16 oaks were

17 A I think now knowing where the right of way
18 is, I think they were, let's see, starting, probably,
19 right in here (indicating)

20 Q Okay

21 A Coming on down this way

22 Q And if you were coming --

23 A I don't know if that -- you know, that that
24 shows that existing walk, so they could have been over
25 just a little bit, but I know they sort of veered over

1 to the left

2 As you can see, the walkway goes over to the left
3 as you would be walking in this direction, and it went
4 around significant vegetation in this area (indicating),
5 in particular in this area here

6 Q Okay What was your understanding if you
7 came prior to the construction of the, what I'm going to
8 call, the new Sea Crest, or Sea Crest Condominiums? Is
9 that what it is?

10 A Yeah I guess

11 Q Okay

12 A That's good

13 Q Well, it used to be the -- the Sea Crest
14 Motel used to be there

15 A Right

16 Q We know that

17 A Right

18 Q And then that got torn down, and whatever's
19 there now got built, Sea Crest Condominiums

20 A Okay

21 Q Prior to the construction of the Sea Crest
22 Condominiums, if you walked down Avocet Street and
23 walked down to the beach, do you know where -- what
24 property you would walk on if you followed any
25 established path at that point?

1 A I think that the roadway came down on the far
2 western side of what's shown here as Avocet Street 36
3 foot right of way That it came down and came across
4 this portion, which is off at the end of Dune Lane, the
5 western right of way of Avocet Street, and came into -
6 because it was almost a straight shot down - came into
7 the Sea Crest Motel property, it was the Sea Crest Motel
8 at that time

9 Robert Graves had built the house on this lot in
10 the late 60s, and in doing so the only access, the only
11 parking that's available is the extension of Avocet
12 Street, and I do know that I've seen cars parked in here
13 that are cars that are owned by the people who are
14 either living or staying in that house

15 Q Okay But was it your understanding that the
16 path was in fact on the Sea Crest property?

17 A I believe a significant part of it was

18 MR STEPP I don't think I have any
19 other questions for you Thank you

20 CROSS EXAMINATION

21 BY MR PATTERSON

22 Q Mr Guscio, the way -- in the 1980s, when you
23 were talking about, there weren't any boundary line
24 markers between the Avocet Street extension and the Sea
25 Crest property, were there?

1 A Not to my knowledge

2 Q All right

3 A I never saw any of those

4 Q All right So walking down there you

5 wouldn't really be able to tell where one property ends

6 and another begins, just walking down the trail, could

7 you?

8 A That's exactly right

9 Q All right So when you're saying that you

10 think part of the beach path was on there, you're really

11 just guessing as to where that property line is, aren't

12 you?

13 A I'm basing it on the fact that I know where

14 it is now And when I was aware that there was an

15 access way to the beach that appeared to be relatively

16 open, judging the distance off of the house on lot 5, it

17 would have to have been over onto the Sea Crest

18 property

19 Q All right You've had a lot of experience

20 with surveying Actually, your whole life you've worked

21 with surveyors and property descriptions

22 A Off and on, yes

23 Q And looking at the survey that's attached to

24 Exhibit 38, you would agree with me that it must be a

25 fairly well worn path if a surveyor is going to denote

1 the existing beach access path on the survey?

2 A In that time I don't know whether that was
3 the worn path or whether that was the path that Robert
4 Graves established when he redeveloped the Sea Crest,
5 because when he redeveloped the Sea Crest he put in a
6 boardwalk, and it was a covered boardwalk to protect the
7 pedestrians going to the beach, and I don't know if this
8 -- this is a mighty straight line on the plat So I
9 don't know which it was

10 Q But Mr Graves developed the Sea Crest well
11 after 1997, didn't he?

12 A I think he started in '97

13 Q Okay

14 A And of course that would have been one of the
15 first things before he tore the buildings down is to put
16 in some sort of a protected boardwalk, pathway, covered
17 -- from a liability standpoint

18 Q So you think this survey attached to Exhibit
19 38A show what the beach -- where the beach walkway is
20 today?

21 A I don't know if that's where it is today

22 Q One second

23 A I believe today it's close to where it's
24 always been

25 Q All right Is the existing walkway on the