THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2013000714

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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CASE NUMBER 2009-CP-26-3596
Consolidated with
CASE NUMBER 2010-CP-26-11320

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Ronald Jarmuth Appellant,

v.

The International Club Homeowners Association, Inc., Rosemary Toth, and K. A. Diehl & Associates Respondents.

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# CORRECTED RECORD ON APPEAL

## VOLUME 2

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| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | |
| | Civil Action No. 2009-CP-26-3596 |
| Ronald Jarmuth | consolidated with |
| Plaintiff | Civil Action No. 2010-CP-26-11320 |
| vs. | PLAINTIFF'S POST-TRIAL BRIEF |
| | SUPPORTING |
| The International Club | PROPOSED ORDER |
| Homeowners Association, Inc., | |
| et al | |
| Defendants | |

- DIVISION 19 -

# DEFENDANT's COUNTER-CLAIMs ARE BASELESS AND VIOLATE THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEDINGS SANCTIONS ACT

**On October 24, 2011 in the case numbered 2009-CP-26-3596, two of the three Defendants – The International Club HOA ("IHOA") and Rosemary Toth ("Toth") filed their "Amended Answer to Complaint and First Amendment to Complaint and Counter-Claim".**

**Their prior Answer to the Amended Complaint in this caption was filed on June 19, 2009. The significant differences were that in this amended answer these defendants had abandoned their omnibus counter – claim that they were entitled to attorneys fees, said claim made without any substantiation or basis, and that had substituted a replacement counter – claim that the defendants were entitled to attorneys fees and fines because**

> **" the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board."**

| |
|---|
| Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board. |

**Jarmuth's Case No 2010-CP-26-11320 began as a Magistrate Court**

complaint with the IHOA as the single defendant. It's case number in that Court was 2010-CV-26-1072943, The IHOA filed it's Answer to that Complaint, while still in the Magistrate Court, on November 16, 2010. The IHOA was represented in that case by McNair, the same law firm that represents all Defendants in the "3596" case, and by the same attorneys.

The Defendant IHOA, through counsel, secured the transfer of the Magistrate Court to the Circuit Court over the objections of Plaintiff. This transfer was NOT an Appeal.

The Answer of the Defendant in the 2010 Magistrate Court case had no counter – claim.

Upon transfer to this Court the Magistrate case was renumbered 2010-CP-26-11320 and later consolidated – at the request of the Defendants.

On October 24, 2011 the Defendant IHOA filed it's "Amended Answer to the Complaint and Counter – Claim".

In the 2010 case the Defendant's Counter Claim is contained in paragraphs numbered 22 through 47. In the 2009 case the Defendants' Counter – Claim is contained in paragraphs 50 through 75. In the Counter – Claims in both cases, the "Relief" requested was identical in paragraphs "b" through "e" ("a" being differentiated in that the 2010 case asked for the dismissal of the Complaint and in the 2009 case it asked for the dismissal of the Amended Complaint").

On January 17, 2012 when the consolidated cases were originally scheduled for trial, the Hon. Judge Stephen John ruled from the bench that Defendant Toth would not receive any money from the counter – claim.

At court and in this Brief the two Counter – Claims were and are addressed together, because they are one and the same cause of action, because they are posed exactly the same, and because the same infirmities relate to both.

Counter – Claim Failed to State Date of Tort

In the Counter – Claim(s) the Defendants failed to state the date ("time") of the supposed tort, contrary to the procedure set out in SC Rule of Civil Procedure Rule 9(f) and should thus be denied..

Co – Defendant KA Diehl Has No Cause of Action

The Court is asked to note that while the Counter – Claim was stated in the combined answer of both Rosemary Toth and the IHOA. KA Diehl filed it's own answer with no counter – claim.

**Bearing of "No Wall / No Fence" on Counter - Claim**

**There are two elements to the Counter – Claim, both of which are false.**

**The first of these is that there is an actionable tort at this time which the Defendants label as failure to seek the prior approval of the Architectural Review Board, ("ARB"), or of "the Defendant HOA" ("IHOA").**

**The second prong of their counter – claim is that a restricted "brick wall" was constructed by Plaintiff.**

> Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

**Prior Approval**

**At trial Plaintiff proved that there is no requirement (Section 7.2) to seek prior ARB approval of anything.**

**At trial Plaintiff proved that per the Procedures 13.2 of the Bylaws, no fine is owed if a violation has been abated prior to a hearing before the board.**

**The Procedures 13.2, which is part of the putative Bylaws at Pl # 548 which appears as Exhibit C to the Covenants, lays out a step by step escalation which terminates in imposition of fines and sanctions. It does not begin with that.**

**At Plaintiff's # 627 is the "Violation Letter" written and sent by Defendant KA Diehl on September 27, 2010. It starts out saying that Plaintiff had been fined by the contractor without hearing or decision by the IHOA Board or by the ARB.**

> Please be advised the following covenant violation has been noted at your residence for which a $50 fine has been added to your association account in accordance with the ARB Guidelines:

**The Court is reminded of the numerous cases which Plaintiff has here to fore cited to which specifically reject the notion that rules, particularly those which change with the season and which are ambiguous at best, can supplement covenants.**

**This initial and illegal fine is an element of what the Defendant claims it is entitled to.**

**At trial Defense Counsel led Freiboth through an iteration of what the Defense is demanding:**

**First, $ 2,500, the deductible for when the IHOA answered the Human Affairs Commission Complaint.**

Plaintiff at trial led Freiboth through an admission that the IHOA was not the complainant in the Human Affairs Complaint, that this was not a civil action, and that at the conclusion of the Human Affairs Complaint, although the IHOA prevailed on the basis of what Toth wrote – the Commission assuming she was telling the truth – no change on Plaintiff's property occurred. Freiboth admitted that at no place in the entire Human Affairs correspondence did the IHOA demand that Plaintiff do anything and that Plaintiff was not compelled to do anything.

The Court was asked to note that a key element in obtaining attorneys fees under the covenants is the a violation be restored to it's prior condition or otherwise Abated.

The Court is asked to FIND that the demand for the $ 2,500 stated by Defense in court is frivolous.

Secondly, Defense Counsel led Freiboth through a demand for an additional $ 2,500 deductible because the Defense had to defend against Plaintiff's 2010 Magistrate claim that he was improperly refused permission to extend Plaintiff's Palm Tree Bed. At trial Freiboth conceded that Plaintiff never actually did anything, except sue, after the November, 2010 denial of the Palm Tree bed extension request, and Freiboth was unable to point to a single alleged violation of covenants in that regard. A successful suit to enforce covenants must, again, result in mitigation or removal. There was nothing to mitigate or remove.

The Court is asked to FIND that the demand for the second $ 2,500 stated by Defense in Court is frivolous.

Thirdly, Defense Counsel led Freiboth through a demand for a third $ 2,500, that being to assert the Counter – Claim relating to the none – existent Brick Wall.

The Court is requested to take judicial notice of Defense's contention that the violation was erection of a "brick wall" stated in the September 27, 2010 Violation Letter,. Pl #627. It reads that Plaintiff had altered a "landscape bed with curbing" and had installed a "brick/stone addition to your side yard"

> Please submitt an application for the exterior modification of the landscape bed with curbing as well as the brick/stone addition to your side yard.

The violation alleged in the letter is not what is alleged in the complaint. In the Complaint the Defendants claim that Plaintiff never filed an ARB application prior to installing a "brick wall". One can not in good conscience be accused of failing to submit an application for something never built. In the complaint the IHOA Counter – Plaintiff does not allege failure to submit an ARB application for the landscape bed with curbing or for a "brick / stone addition". The Defendant plead with extreme specificity and is bound to that specificity.

**At trial Plaintiff led Defense Witness Freiboth through a lengthy examination of the IHOA's putative bylaws focusing on the Procedures Section, 13.2 of the Bylaws.**

**At trial, Freiboth ultimately admitted that the Procedures of Bylaws Section 13.3 begins with the absolute prohibition against what KA Diehl did – a contractor imposing a fine when the contractor alleges a violation has been observed.**

**He admitted that the IHOA considers the Bylaws binding on them.**

**He admitted that Section 13.2 begins:**

> **"... the Board shall not impose a fine ... or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:"**

**Section 13.2.1.3 provides that the IHOA must first serve a demand letter which includes that no sanction will be imposed if the alleged violation is abated within ten (10) days. "Abated without ... sanction".**

**Defendants conceded that Plaintiff filed a "putative" ARB Application relating to what was on the ground and what was further intended on September 30, 2010, Pl # 629, which was three (3) days after the Violation letter was signed, and the day that said violation letter was received.**

**This abated within ten days the alleged failure to submit an ARB violation.**

**The Defendants are thus not entitled to any recourse relating to submitting or not submitting an ARB application.**

**Second Prong – Brick Wall**

**At trial Plaintiff entered into evidence numerous photos of Plaintiff's lot which proved conclusively that no "brick wall" had been erected and that what was erected, by the preponderance of the evidence, could not be confused for a brick wall. Plaintiff attaches by reference the prior proof that what was erected was not a "brick wall" and that no reasonable person could construe it as such.**

**Plaintiff attaches in way of reference all the exhibits and photos that related to the refusal of Defendant to permit the erection of the requested Fence.**

**At trial, Freiboth conceded that the Procedures lays the entire burden on the IHOA to schedule an appeal on a continuing alleged violation, and that the home owner alleged to have a continuing violation is not, in the procedures, required to**

request such an appeal hearing before the IHOA Board.

Plaintiff entered into evidence the IHOA's disapproval of Plaintiff's fence which was dated October 8, 2010, Pl #632. No where in that letter is there any reference to having to file an "appeal".

Plaintiff entered into evidence his letter to the IHOA Board of Directors on October 11, 2010, Pl # 633, which states on the subject line of page 1 that this is an "appeal" of the "disapproval of fence"

At trial Freiboth first asserted that the Board expected Plaintiff to file an appeal with the IHOA Board and, he repeated this several times under oath, that Plaintiff never filed such an appeal. The Court is reminded that there is no requirement for the putative violator to file such an appeal. The Bylaws that the IHOA purportedly use enjoins them from any further action until the BOARD itself independently schedules a hearing, invites the homeowner, holds a hearing, and finds an actual CONTINUING violation has occurred.

In this instance there was no continuing violation.

No invitation to or hearing or finding took place.

No sanctions were entered into the minutes of the board as is required by Procedures 13.3.3.

There are no sanctions against Plaintiff lawfully imposed.

The allegation in the Counter Claim that the IHOA has lawfully imposed a sanction which is actionable at court is false and frivolous.

At trial, after Freiboth was through repeatedly stating under oath that no appeal was made by Plaintiff, he was presented Plaintiff's October 11, 2010 to read.

He clearly was familiar with it because he now frivolously stated that on the last page of the letter Plaintiff had "waived" any appeal. Disregarding this, procedurally, the Procedures of 13.3 do not consider such an eventuality but provide a very strict step by step procedure which includes holding that appeal hearing with or without the violator.

At trial the Court was asked to note that the plain language of the text in question, which Freiboth was required by Plaintiff to read, doesn't waive an appeal. Instead it puts the Defendants on notice that their action will subject them to law suit to enforce Plaintiff's rights.

| |
|---|
| 4. I reserve my right to take parallel recourse at law or in equity, since by disputing the authority of the HOA in this matter I am disputing the necessity of an "Appeal". |

**Plaintiff entered into evidence Pl # 634 which is the IHOA's response to Plaintiff's October 11th 2010 Appeal. The IHOA response was mailed October 21, 2010, exactly ten days after Plaintiff mailed his appeal, to fraudulently make it look that Plaintiff had been given timely notice to file an appeal. The IHOA letter mailed October 21, 2010, as evidence by the postmark to the IHOA envelope which is page 1 of the exhibit, and the letter at page 1 being mis-dated October 14, 2010, now stated that fines and sanctions will continue "Unless you successfully appeal the ARB decision"**

| |
|---|
| Unless you successfully appeal the ARB decision, you must remove the brick fence foundation already installed and restore the sod to its previous condition. Restoration is necessary to avoid fines for an ARB violation. |

**Plaintiff at trial next introduced into evidence Plaintiff's letter of reply to the IHOA Board dated October 23, 2010, Pl # 635.**

**Freiboth was required to examine this document and to read from it.**

**This letter put the IHOA on unmistakable notice about it's burden under it's own procedural rules. This letter and the prior letter of appeal were omitted by Defense when it enumerated the correspondence relating to the alleged violation.**

**Paragraph 2a of Plaintiff's October 23, 2010 letter placed the IHOA on unmistakable notice that the prior October 11, 2010 letter was an "appeal".**

**These documents alone prove by the preponderance of the evidence that the counter – claim is frivolous in the extreme, and fraudulent as well.**

**Plaintiff will leave it to the Court to characterize the testimony of Freiboth and the attempt of Defense Counsel to assert, through Freiboth, fraudulent claims for an additional $ 5,000 related to the Human Affairs Complaint and the Palm Tree Complaint in Magistrate Court.**

## THE SPECIFIC ALLEGATIONS OF THE COUNTER CLAIM ARE FALSE

**In addressing the Counter Claim(s) paragraph by paragraph, the first number is the paragraph number in the 2009 "3596" Complaint and the second number is paragraph number in the 2010 "11320" Complaint. Both are word – for – word identical text.**

**56/28. "Section 7.2 of the Declaration provides:" This is the requirement to seek "Prior Review of All Plans."**

**This was deleted on May 10, 2000 through Amendment #1 to the Covenants.**

**59/31. Upon information and belief, the Plaintiff applied to the Architectural Review Board for approval of improvements on several occasions, and the Plaintiff's plans and specifications were approved."**

**The Court is asked to take judicial notice that on August 5, 2009, the IHOA / ARB Denied Plaintiff's application for a swing set. The Defendant implied that all prior applications were approved. The Court is asked to consider the Defendant's assertion as meant to deceive and "disingenuous".**

**60/32. Upon information and belief, the Plaintiff constructed a *brick wall* on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.**

**The Court is asked to take judicial notice that at all times in BOTH counter – claims in both cases, Defense Counsel meiticulously chose and used the phrase "Brick Wall". The Court is asked to conclude that the party on whose behalf a pleading is filed, the IHOA Defendant, is responsible for the contents of the pleading. The phrase "or on whose behalf it is filed" is used in this context.**

**The Court is asked to note the prior discussion which points out that an ARB application is not required for something hypothetical – not actually built.**

**62/34. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the *brick wall* and a fence, as well as a flower bed and edging.**

**The Court is asked to take judicial notice that Plaintiff's "application", September 30, 2010, Pl #629, never used the phrase "brick wall".**

**63/35. Pursuant to Section 7.4 of the Declaration:**

***"Fences.*** *No fences* ***whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio*** *fences or walls* ***approved by the Developer and the Architectural Review Board in their sole discretion may require ...*** *No fences* ***shall be permitted which obstruct the view of any stream or other body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interfere with the playing of golf on any nearby golf course or with the use of any Recreational Amenity."***

**The Court is asked to take judicial notice that Section 7.4 explicitly mentioned both "fences or walls" and the deletion of this through Amendment #1, May 10 2000, explicitly removed any controls on both fences and walls.**

**It is thus irrelevant whether what was constructed was a fence or a wall. Neither were or are subject to any restrictions on use.**

**Clearly through the pendency of Plaintiff's pre-existing complaint filed in 2009 Defense Counsel was aware that the requirement to apply to the ARB as well as the restrictions on fences or walls were all deleted.**

**An attempt to enforce a non-existent covenant provision after notice of the deletion (and without even discussion of same in the counter – claim) is at the least frivolous.**

**64/36. The Architectural Review Board approved the Plaintiffs request for the flower bed and edging and denied the Plaintiffs request to construct the fence and wall, because the proposed construction violated the Governing Documents and the Architectural Guidelines and did not comply with the general scheme of development for the International Club.**

**In this paragraph Defense Counsel added a non – existent non-fact to the statement of facts supporting her claim for relief. Defense Counsel asserted, fraudulently, that the ARB denied a request for a "wall". That is NOT what the Denial letter said was denied. Here is what the IHOA letter of October 8, 2010 said was denied:**

| **Install 6ft vinyl fence with a brick foundation to side yard.** |
|---|

**Rather, they denied a brick foundation to a fence, not a "wall" and the areas where the denial applied as the "side yard" not the front of the house.**

**The denial letter further is at odds with facts and law, because that letter also**

gave as it's reason for denial:

> "This request has been denied due to its direct conflict with the covenants."

There is no conflict with the covenants. The IHOA's actions conflict with the covenants in that the IHOA is asserting powers it does not have. The IHOA is only empowered to advocate for actual violations of covenants and when the covenant provision under which it purports to act ceases to exist, acting under such a deleted provision is itself ultra – vires.

> 65/37. The Architectural Review Board also demanded that the *brick wall* be removed from the Property within fifteen (15) days or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars.

The Court is asked to note that under the IHOA's purported bylaws which includes Section 13.3, neither the contractor, defendant Diehl, nor the IHOA's ARB committee, has any authority to threaten anything, and that fines and sanctions do not begin to run until after the property notice and held IHOA Board hearing on the minutes of the Board of Directors.

Once again, "brick wall" is alleged.

> 67/38. Upon information and belief, the Plaintiff paid a fine for constructing the brick wall in the amount of Fifty and 00/100 ($50.00) Dollars imposed by the Defendant HOA under protest several weeks later and threatened to sue the Defendant HOA.

1. The violation notice never spoke of a "brick wall". Once again Defense counsel inserted a phrase which she asserted was in a document where it was, in fact, not used.

2. The text implies that Plaintiff dallied and went beyond the ten (10) days in which a violator is allowed to act before sanctions begin to run. She used the phrase "several weeks".

In point of fact the violation letter was dated September 29, 2010, Pl #627, and the receipt for the fine is dated September 30, 2010, Pl # 630, THE NEXT DAY. The Court is left to it's own discretion as to how to characterize Defense Counsel's mis-statement of material facts.

3. The allegation of Defense Counsel in this paragraph is that instead of mitigating, Plaintiff acted recklessly and "threatened to sue". The actual documents show that an action at law was not mentioned until the Plaintiff's letter to the IHOA reminding it that the IHOA Board was remiss in it's procedural obligations and that

**it had ignored Plaintiff's "appeal" leaving Plaintiff no recourse except an action at law. No threat was made. Plaintiff used the phrase:**

**"I reserve my right".**

> **68/39. Although the Plaintiffs application for the fence and the *brick wall* were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the *brick wall* constructed.**

**Again Defense Counsel uses the phrase "brick wall".**

**The IHOA's ostensible Bylaws Article 13.3.2 allows a violation to continue for up to "two (2) months of such demand,"**

**Further, there does not exist a letter where Plaintiff "refused to remove" anything. Plaintiff instead demanded that the IHOA follow it's own procedures and that it take note of the covenants as they are amended.**

> **72/44. ... As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the *brick wall*, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.**

**"Brick wall" again. Also, since the hearing mandated in the Bylaws had neither been noticed or held and no action on the minutes entered, no enforceable debt exists. Plaintiff's repeated references to the Procedures in his two letters, the last one even quoting the procedures in their entirety, put the IHOA Defendant AND it's counsel on notice of this.**

**The Defense assertion of deb in paragarphs 72/44 in and of itself is fraudulent and frivolous.**

> **74/46. As a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs.**

**No home owner can control the irresponsible act of the IHOA Board and of it's counsel. If Defense Counsel and the IHOA Board decided to launch a frivolous, unfounded, and false counter - claim, they need to look only to themselves to find who instigated the expense. There is no "direct and proximate" path from what Plaintiff did to the IHOA counter – suing.**

**At trial Beckie Abel an employee of KA Diehl who was a Defense witness was directed by Plaintiff to discuss the Community Association Institutes classes. Under oath she indicated that she had extensive training from this purported source of**

applicable knowledge, one area of which, Plaintiff recalls, was applicable law and procedures. Abel testified at trial that she has been engaged in home owner association management for many years and Diehl has been present since the first Board meeting of record, September 10, 2002.

Clearly the IHOA Board had the paid expertise to point the IHOA board to it's own procedures, especially after Plaintiff pointed them out, in writing.

> 75/47. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, ...

Plaintiff refers the Court to the prior discussion regarding the Covenants, and court decisions relating that home owner association rules and bylaws do not extend or alter restrictions in the covenants, and that the Covenants must be strictly construed in favor of the free use of property, and that doubts and ambiguity will likewise be so resolved.

The Court is asked to conclude that the IHOA Board and it's Defense Counsel were aware that no terms of the Covenants or even the ARB Guidelines at the time were breached. To recall, the Guidelines off.

Plaintiff's Claim That Defendant and Defense Counsel Violated the South Carolina Frivolous Civil Proceedings Sanctions Act

When Plaintiff addressed the Counter Claim he explicitly invoked SC 15-36-10 et seq, and in particular subsections 10 and 100 of that act, Pl #200, 201, and 202.

Plaintiff asserts that sufficient facts are before the Court for it to determine what certain Counter Claims of Defendant IHOA and it's Counsel are Frivolous.

Plaintiff asks the Court to perform the analysis set out in the statute, and to conclude that the Counter – Claims that Plaintiff in the brief supra asserted are frivolous are in fact frivolous. Plaintiff then asks the Court to determine, per the statute, appropriate

> "sanction(s) which the court considers just, equitable, and proper under the circumstances."

RELIEF

Plaintiff through the preponderance of the evidence has proved that there are sufficient facts and basis in law for the Court to enter the following relief.

(1) Denial with prejudice of each and every counter - claim of the Defendants.

(2) A finding that the Defendants IHOA and KA Diehl acted maliciously,

**purposely, and without authority to interfere with Plaintiff's lawful use of property.**

**(3) A finding that the Defendants, both the IHOA and KA Diehl, acted fraudulently towards Plaintiff and knowingly violated the rules of procedure they stated were applicable to their actions.**

**(4) A finding that the IHOA Defendant and it's Counsel of Record acted in violation of the South Carolina Frivolous Civil Procedures Act, and appropriate sanctions as determined by the Court.**

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|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | |
| ) | Civil Action No. 2009-CP-26-3596 |
| Ronald Jarmuth ) | consolidated with |
| Plaintiff ) | Civil Action No. 2010-CP-26-11320 |
| ) | |
| vs. ) | PLAINTIFF'S POST-TRIAL BRIEF |
| ) | SUPPORTING |
| The International Club ) | PROPOSED ORDER |
| Homeowners Association, Inc., ) | |
| et al ) | |
| Defendants ) | |

- DIVISION 20 -

## DEFAMATION

From the Evidence of Record and the Testimony of the Witnesses, the following underlying facts are undisputed:

Sometime between April 13, 2009 (when Plaintiff's Complaint was served) and May 8, 2009 (the date at the bottom right of the McNair printout from Westlaw of a Jarmuth v Reynolds case description), per the testimony of Defense witness Maureen Sullivan, the IHOA Board met and unanimously agreed to the course of action relating directly to Plaintiff about which Plaintiff has asserted Defamation claims.

In the testimony of Julie Case (a KA Diehl employee) she admitted that she received direction, as part of her official duties, to take part in the matter. Case admitted to preparing a package of material and a list of home owner addresses and to providing same to a "mail house". Evidence was later collected and put into evidence, without dispute, that "Carolina Mail House" was the contractor employed to copy and print the mailing passed to it from Defendant's employee Julie Case, including custom color printing, to assemble the material, to insert same into oversize envelopes, to print custom mailing labels, to affix these individually to said oversize envelopes, to sort these by zip code, and for Carolina Mail House to take them to the post office for mailing. It was also learned and undisputed that the person at Carolina Mail House who did this was Angela Goodman. It was learned that because of what said Goodman did in connection with this at the Murrells Inlet Post Office, said post office lost it's authority to accept bulk mail, all such bulk mail now having to be delivered (for mailing) to the Myrtle Beach main post office.

All the aforesaid was stated under oath by Plaintiff at trial.

**The deposition testimony of Rosemary Toth was that she concurred in the matter. The deposition testimony of both Toth and Defense witness Maureen Sullivan, who was a Board Member and present through this, was that the Board made the related decisions in secret and purposely kept all record of this out of the minutes of the board.**

**Until ordered to by the Court in 2012, despite discovery demands made early in 2009, the Defendants never gave up the name of either Carolina Mail House or Angela Goodman. They specifically failed to answer the question of what entity owned the postage license / imprint used on the oversize envelopes.**

**The testimony of Sullivan and Toth was that neither bothered to do anything to verify anything contained in the letter(s) and email(s) and web page(s) created relating to the alleged character and behavior of Plaintiff.**

**The testimony of Toth was that she was familiar with the contents.**

**The testimony of Sullivan was that she held the matter in so little regard that she didn't bother to read much of it, which Plaintiff disputed.**

**In her deposition, Case admitted to the creation of web pages at the behest of the IHOA Board and the direction of her employer and that she was the one with access to the web site to be able to post material about Plaintiff – the same material she had mailed – on the web site.**

**In testimony at trial Sullivan stated that the intent of the IHOA Board was to provide as much information as possible about the "3596" complaint Plaintiff had filed against the IHOA in early April, 2009. Under oath and under repeated opportunities offered for her to amend her testimony, Sullivan swore that the web site then, and since, contained the 3596 case Complaint, the IHOA's Answer, and the subsequent Amended Complaint and Amended Answer(s).**

**Sullivan admitted at trial that the email sent to as many home owners as they had email addresses for included a link to the material that the IHOA Board had directed be placed on it's web site so that homeowners would see the various attachments. Sullivan stated that part of the IHOA Board's determination was that as new home owners bought into the PUD, who would not have received the original material by mail, those new home owners would also see the material the IHOA Board had prepared relating to Plaintiff. Sullivan boasted that over the period from 2009 through the present, the IHOA Board "pushed" home owners to the material on the web site.**

**One example of the "push" is seen on page 3 of Plaintiff's #526, where clicking on the inviting and self evident phrase "CLICK HERE" took home owners to the web page on page 4 of that exhibit.**

After numerous repeated professions of knowledge about the web site, Sullivan was shown page 4, which has a date of May 28, 2009. That date is significant because it perpetuates the contents of the web site at the time AND shows that on that date the web site had been fully assembled, and that material, such as the "Click Here", had been assembled ahead of time so that the link destination would be known and the link would work. This was a lot of technical work. The material which was sent in writing also had to be uploaded to the web site and converted to Adobe Acrobat files.

It is unclear how much KA Diehl was paid for this because that information is not apparent from the HOA 2009 General Ledger.

Page 4 of the document shows that at the time the web page did not contain Plaintiff's Complaint nor the Defendant's Answer.

Plaintiff testified that with the assistance of other home owners (who have "signed up" to the IHOA web site), Plaintiff verified that as recently as the day before trial, August 7, 2012, the IHOA web site still was exactly as it was on May 28, 2009 – the 2010 Complaint not there, no amended complaints, no amended answers, not a single document that actually came from the 2009 or 2010 cases.

Sullivan was unable to cite a single piece of information that home owners would get about the Actual case at bar from what the IHOA put on it's web site with the assistance of Diehl.

In deposition, Case testified that the IHOA does not actually "have" a web site, but that the material is carried on the KA Diehl web server.

In her deposition, Toth conceded that the IHOA is the "owner of record" of the web site address www.internationalclubhoa.com. Plaintiff's Exhibit # 532 documents that as of May 31, 2009, three days after the defamatory email and defamatory web site material, Defendant Toth admitted that it correctly identified her as the "administrator" and "technical contact" for that web site. She identified the address for the owner of the web site as that of her personal residence in the PUD.

Because Plaintiff's evidence set had fragmented the documents contained in the mailing and email and web site into individual exhibits, Plaintiff filed with the court a unified copy of what Defendants mailed – regarding Plaintiff – and this was accepted by the Defendant as authentic. It is not among Plaintiff's list of exhibits filed before trial but was assigned a separate number by the Court Reporter and was accepted into evidence.

At trial Plaintiff put into evidence Pl # 522, material he received directly from Angela Goodman the proprietor of Carolina Mail House pursuant to a

subpoena duces tecum and also pursuant to a FOIA request Plaintiff submitted to the US Postal Service – after he was unable to get this material directly from the IHOA or Diehl defendants. The authenticity of the material was uncontroverted.

The material shows page 3, PS Form 3600-R1 "Total Pieces" that 646 copies of the mailing were presented to the Murrells Inlet Post Office for mailing in 8 trays.

The Court is asked to take this as the definitive count of how many copies of the mail relating to Plaintiff the IHOA and KA Diehl, jointly and separately, republished as separate defamations relating to Plaintiff.

On May 24, 2012, pursuant to an Order entered by Hon Judge Stephen John on January 17, 2012 that the IHOA and Diehl must finally provide Plaintiff the list and count of home owners to whom they sent the defamatory email, the IHOA provided Plaintiff (on a CD) a document with their "Bates" numbers 4406 through 4430. It took 25 pages to report to whom the IHOA sent defamatory emails relating to Plaintiff.

IHOA Bates numbered page 4406 was put into evidence as Plaintiff's # 525. It affirms that Julie Case, by name, as an employee of Defendant KA Diehl, attempted to send 577 emails to home owners, of which 354 were successful.

During the trial Defense Counsel objected to the admission of the document that Defense Counsel, itself, had provided Plaintiff by Order of Court only a little over two months earlier. This was clearly a document kept in the normal course of business, and is the automatically generated report "given: to the sender after KA Diehl's facilities are used to generate an "email blast".

It states that:

The Sender was Julie Case.

It was sent from a KA Diehl email address, julie.case@kadiehl.com.

It verifies Plaintiff's assertion in his complaint that "hitting the reply button to the defamatory email brings up Julie Case's email address as the sender". Pl # 526 page 2.

That it was sent to PUD property owners.

That the contents was "litigation details" on the subject line, the same as the package put into evidence and as admitted by Case at her deposition.

There is nothing privilege about it, particularly since it was previously provided by Defense Counsel to Plaintiff to use in evidence at trial, and since it bears the McNair Bates identification at the bottom right.

Plaintiff asks the Court to take the number 354 as the definitive number of emails sent relating to Plaintiff.

From page 4 of Plaintiff's # 526 it may be seen, and this was not

controverted, that the IHOA / KA Diehl web site contains the following:

- No actual document from this case.
- A letter from Henrietta Golding
- A separate document titled "Jarmuth associated List of Lawsuits"

The following four (4) separate documents:

- Jarmuth v Cox
- Jarmuth v Frinzi
- Jarmuth v Reynolds
- Jarmuth v Weiss

At trial Plaintiff placed into evidence a complete copy of what was mailed by Carolina Mail House which included the complete text of the "Jarmuth v Frinzi" attachment. Plaintiff asked the Court to take the opportunity to note that on page 2 of the document, bottom of the left column, the mailing repeated unproven allegations that Plaintiff is a child molester and had engaged in various sexual misconduct involving a child. Plaintiff pointed to the rule of pleading relating that a defamation plaintiff can describe the defamation in general terms without having to repeat it.

The Court is asked to note that Plaintiff's Amendment #1 to the 3596 Complaint states the accusation in paragraph 108 of the Amended Complaint.

The Court is asked to note that both on the web site and in paper form (in the mass mailing), the Defendants IHOA and KA Diehl republished a defamatory restatement relating to Plaintiff and that this republishing was not done by a party to the case from which it was taken, that the republishing was made out of the courtroom. The court is also asked to note that what was published was a selective "cut" of the document, just the first two pages, and that the publisher chose to omit the balance of the document for self – serving purposes.. Plaintiff asks the Court to take judicial notice that the decision of which Defendants have extracted two pages consists of thirty five pages.

In testimony Toth, Case, and Sullivan testified that they made no effort to obtain any clarifying information from Plaintiff prior to or after publishing the material about Plaintiff.

In testimony Plaintiff stated that through the Defendants refusing to provide Plaintiff the "list of voters" they denied Plaintiff the opportunity to provide contradictory information.

In his trial testimony, Plaintiff's witness Louis Astorino testified that a home owner, John Marzetti, who Astorino pointed to in the Court room, and William Fletcher, a neighbor across the street from Plaintiff who (Fletcher) at the time was an IHOA appointed member of an IHOA committee, both told Astorino that "Jarmuth is a Pedophile". Astorino further elaborated that this was after the

**IHOA letter about Plaintiff was mailed and that he had not heard any statement from any home owner relating to Plaintiff prior to the mailing.**

**Defense did not call Marzetti to contradict Astorino.**

**At trial Sullivan stated that one of the considerations the IHOA Board took into account was that, at the time, no home owner had any idea who Plaintiff was and they collectively decided to give the home owners the IHOA Board's desired characterization of Plaintiff.**

**Plaintiff does not controvert that is exactly what they did.**

**Sullivan also testified that through the present it is the intention of the IHOA, at every opportunity, to continue to "push" home owners, particularly new ones, towards the web site material relating to Plaintiff.**

**At trial Butryn, Pete Pizzi, Jane Pizzi, Astorino and Plaintiff all acknowledged receiving the mail package from the IHOA. The copy filed with the court has Plaintiff's name and address on the envelope which is also of record.**

**Butryn, the two Pizzi's, and Plaintiff all acknowledged receiving the email from Case relating to Plaintiff. The copy filed with the court has Plaintiff's email address on the printed image of the Case's email.**

**At trial Sullivan testified that she, as a member of the IHOA board, knew that Plaintiff was a foster parent, relating that she had seen Plaintiff "at the pool with three wonderfully behaved foster children".**

**Plaintiff is asked the Court to take judicial notice that accusations of misconduct relating to children can have an adverse effect on status as a licensed foster parent, and that neighbors are on occasion interviewed relating to licensing as part of background checks. The material published or republished by Defendants clearly had the potential to harm Plaintiff's reputation.**

**At trial Plaintiff's witness Astorino testimony relating to Marzetti and Fletcher is evidence that the material from Defendants more likely than not had a detrimental impact on Plaintiff's Reputation. When Fletcher made his comment it was an admission against interest because he held the capacity of officer or employee of the IHOA (an ARB committee member).**

**At trial Plaintiff introduced into evidence a set of emails addressed to him, stating that these were only some of the many that followed the IHOA publications by mail, by email, and by website.**

**Some of those emails were introduced into evidence at Pl # 518.**

From the top of the page it can be seen that the original Julie Case email was transmitted at 12:58 on May 28, 2009.

Plaintiff read the salient defamatory points of these into the record at trial to show that there was in fact a predictably negative impact on Plaintiff's reputation. As Sullivan and Plaintiff both testified, Plaintiff did not know any of these people and, to the best of Plaintiff's knowledge, had never met them (or would not know them if he saw them, and the other way around).

Comments included that Plaintiff had caused these home owners pain and suffering, that Plaintiff had a mental condition and needed to be institutionalized or medicated, that they had the impression from the material that frivolous and un-successful pro se law suits consumed Plaintiff's life.

Particularly troubling was the treat of one individual, Aine Hukazaelie, whom Plaintiff knows he has never met, to bring a mob to Plaintiff's house "to take action against him in person". Plaintiff was called a "bully" with the contents of the IHOA material clearly the source of their perception.

Of record are the Horry County Police Reports which were filed by the Horry County Police Pl # 530 which (the second) perpetuates that Plaintiff was receiving threatening phone calls as well and that Plaintiff was fearful for his safety.

At trial Butryn testified that the IHOA Board took active steps to try to isolate Plaintiff. Butryn testified that he was told to "fire" Pete Pizzi as a member of the Buildings and Grounds Committee for the sole reason that Pete Pizzi was seen going into Plaintiff's house holding papers. Astorino testified that he was told by Fletcher that he, Astorino, should have nothing to do with Plaintiff.

At trial Plaintiff entered into evidence as related to Defamation all his exhibits numbered between 500 and 539.

At trial Plaintiff noted that the elements of proof of Defamation (Pl # 519) included that the Defendants communicated a defamatory statement, relating that the material mentioned so far fits that requirement. Plaintiff stipulated that the List of Cases, which was not an abstract of cases but which composed specifically for the purpose of defamation has additional defamatory content as judged by it's intent to harm the reputation of Plaintiff in the Community.

Plaintiff testified that he had proved far beyond the preponderance of the evidence that the material was communicated to hundreds of persons other than the writer or Plaintiff == third persons.

Plaintiff put into evidence that since Plaintiff's name was on the document, the recipients knew that Plaintiff was the subject of the communications.

From the material addressed in this brief so far, and addressed more completely at trial, it is clear that Plaintiff's reputation was damaged.

Plaintiff asked the Court to take judicial notice of the definition of Defamation at Black's First Edition, Pl # 528 and of Black's First Edition Definition of Conspiracy, Pl # 527.

Plaintiff alleges that through the testimony of Abel, Case, Sullivan and Toth, there clearly was a conspiracy between the IHOA Board and KA Diehl to injure Plaintiff by Defamation.

At trial Plaintiff noted that the letter from McNair was, on it's face, a private communication between McNair (Defense Counsel) and the IHOA Board. However, a copy was also provided (Pl # 523 page 5) Beckie Abel, an employee of KA Diehl. At the time KA Diehl was not a party defendant and McNair had no related attorney – client relationship with Diehl or Abel. This was not controverted at trial. Abel was a Defense witness at trial.

Plaintiff asserted that he took the inclusion of the letter from Golding as a token which would lend credibility to the rest of the material. Plaintiff did not allege that what Golding said on the five pages of her letter was actionable and specifically stated that he was not making such an allegation.

Plaintiff's witnesses Astorino, Butryn and Pete Pizzi testified that the fact that the other material was attached to the McNair material led them to believe that everything in the remaining material must be true. They also testified that they were unable to independently verify the truth of the matter because the material form the IHOA did not suggest how they could go about doing this.

All these witnesses testified that the following statement in the McNair letter was critical to the way they perceived what followed:

> "I have discovered that he has been a Plaintiff in at least (13) thirteen different claims / lawsuits (not counting this lawsuit) and it appears that he was pro se in each one. It also appears that he was not ultimately successful in any of the thirteen (13) lawsuits."

Plaintiff's witnesses testified that the implication was that each of the items on the attached "List of Lawsuits", which list is a separate items on the IHOA web site and a separate enclosure in the mailing, was in fact a civil complaint, that Plaintiff was pro se in each, and that he was ultimately unsuccessful in each.

This was a lie.

The Defendants acted recklessly in failing to do anything to verify any of it.

Their reckless disregard as well as the content of the List of Lawsuits, which

was more than a list of lawsuits, injured Plaintiff in and of itself.

At Plaintiff's # 517 is a letter written by Butryn which he authenticated. It is mis-dated May 27 2008 when it was written 2009, because it states it was perpetuating what happened in April, 2009. Butryn authenticated it. At trial he even testified that it was on speaker phone so it was heard by many others in Butryn's presence. They were identified as "George and Adele".

It perpetuates that the phone call from Board Member Mike Templeton reflected a decision by Board Member at the time Bill Jacques to fire Pete Pizzi because he was seen associating with Plaintiff.

The List of Lawsuits

Plaintiff placed the List of Lawsuits into evidence as Pl # 515, and then proceeded to show the defamatory nature of the material and the fact that it is not true.

In a Defamation Suit it is not sufficient for the Publisher to aver that the statements are all true; the burden is on the publisher to prove it is true.

Defense Counsel made no attempt to prove anything was true. Defense Counsel did not controvert anything that Plaintiff testified to.

Plaintiff at trial pointed out that the Defendants had three contentions about every item on the List:

(1) That Plaintiff was Pro Se; and
(2) That Plaintiff was unsuccessful.
(3) That each item was in fact a civil suit as a home owner would envision it.

The implication of this was that Plaintiff advocates issues that are so devoid of merit, attorneys will not take the case. Another implication is that numbers matter so the numbers cited by Defendants in their list was a material element. Except not each one was a civil case, or a court case at all.

The first case was titled "Jarmuth v Waters and Frinzi" with a Civil Action number 1:04cv63. It was asserted that the list of cases was what was to be found on Westlaw, which the Court can confirm is a rather complete list of cases. This case began in Pennsylvania in the Middle District federal court. Plaintiff testified that he was represented by the Pennsylvania Deputy District Attorney for Washington County in this matter. The Pennsylvania wire tap statute should have been a clue.

This case was transferred to the United States District Court for the Northern District of West Virginia, where Schwerha did not practice.

**The summary written by Defendants did not indicate that the case never went to trial but instead that the case was dismissed on the basis of Statute of Limitations issues without ever hearing the evidence or going to trial.**

**The second case on the "List of Cases" bore a caption where a defendant was listed as "Dr. Brian Krolczyk in his capacity as Acting Director of Clinical Services for Valley Community Mental ..."**

**The implication was that Plaintiff had some sort of mental health situation, was treated by a mental health facility, and disliked the diagnosis or treatment by the Psychologist or Psychiatrist on duty.**

**This was all untrue.**

**First, Plaintiff was represented by attorney Pamela Folickman.**

**Second, it is notable that in this case, the author did not write an explanation. Plaintiff points out that if the author could find the case the author could find the description. In fact Krolczyk was never a licensed psychologist or psychiatrist in any state. He could not legally use the term "Dr.". In the litigation the caption did not include the phrase "Dr. Brian Krolczyk". That was an invention of the author of the List of Case.**

**Plaintiff never was a client of Krolczyk nor of the facility.**

**Krolczyk had falsely represented himself to be a licensed psychologist and was admitted based on his representation as to licensure and experience an expert witness on another matter. At trial he was opposed by several licensed experts of many years standing. The crux of the Krolczyk case was that Krolczyk perjured himself regarding his credentials and about other matters. In deposition testimony taken as part of discovery in this case, Krolczyk implicated the judge in the case as having come to an arrangement with Krolczyk to "fix" cases for a certain lawyer by using Krolczyk in cases – where the judge knew of Krolczyk's true situation and appointed him as the court appointed expert, through which Krolczyk received substantial sums of money. This became public and the judge in question was shortly thereafter no longer on the bench. Upon information and belief, to this day that particular attorney / former judge has not been practicing law.**

**The matter came before the West Virginia Board of Examiners of Psychologists,, Pl # 507. It noted that it had a peculiar situation because it's options were limited, since Krolczyk was not licensed. It found that he had perjured himself, had none of the training or experience he claimed, and barred him for many years from even applying for a license. The publication of the Order in the Official West Virginia State Register is the only instance Plaintiff is aware of that such a decision has been included in the State Register, the official record of West**

Virginia state decisions.

The civil court had limited jurisdiction over Krolczyk and the matter was resolved, with Plaintiff successful, before the West Virginia Board of Examiners of Psychologists.

Also in evidence was Pl #506. "4 Most" was, in West Virginia, the payment intermediary for West Virginia Medicare / Medicaid as well as for most health insurers paying mental health benefits in West Virginia. It terminated the payment of any claims, upon information and belief, forever, because Krolczyk was not a licensed provider and they found he had submitted claims for payment despite his unlicensed status, which is a crime.

The third item on the List was "Jarmuth v Tara Patterson, Esquire". No case caption was given, which should have alerted questions among people who are familiar with these things, but the target audience was home owners who had no such knowledge.

Plaintiff's witnesses testified that they recognized the "Esquire" as meaning lawyer and assumed that Patterson had done some legal work for Plaintiff, of which Plaintiff was dis-satisfied, and that Plaintiff had thereafter sued his attorney.

Nothing could be further from the truth.

Plaintiff never sued Patterson. There was no such case.

At trial Plaintiff introduced the docket of Case Number 1 on the List of Cases. It could plainly be seen that Tara Patterson is listed as an interested party, and that she was a Pennsylvania Deputy Attorney General. During discovery she had sat in on the deposition, in Pennsylvania (held by order of the federal court) of a particular Pennsylvania State Police Sergeant. At the deposition the particular State Police Sergeant admitted under oath that he had come into possession of incriminating evidence against James Frinzi and K. Waters, and that he, the State Police Officer, had been asked by the FBI to provide it to them and that he, the State Police Officer, had destroyed that evidence. Supporting testimony had been gathered earlier in a deposition from another State Police Officer who had direct knowledge of this – she was present in all aspects of the matter.

The entire case was supposed to be "under seal" and Tara Patterson petitioned the Court for a copy of the deposition transcript of the Pennsylvania State Police Sergeant, which she needed to prosecute that individual criminally.

She was never a defendant. Plaintiff never sued her. The facts would also have been known if the Memorandum order, the rest of it, were made public by the Defendants. See Pl # 512, the docket of the case.

**The Fourth case on the List of Cases was "Jarmuth v Janet Reno, US attorney General". That was not the caption but the author took editorial license to add the "US Attorney General" to the caption for impact value.**

**Plaintiff put into evidence a print out from the US Department of Justice of Freedom of Information Cases, PL # 505. 1996 DOJ FOIA Cases. The case is listed on the second page as "Jarmuth v Reno" – no US Attorney General in the caption.**

**At trial Plaintiff testified that under federal law, FOIA cases are filed naming the custodian of records, Jarmuth also testified that the case did not end with a verdict against Plaintiff but in an agreement for Plaintiff to get access to the sought files, and a waiver of fees by the DOJ.**

**Plaintiff testified that this was in fact a "sting" operation to deal with a dishonest DOJ contracting officer who colluded with the major contractor with the DOJ who was defrauding both the DOJ and vendors. Plaintiff testified that after the records were copied by a team of attorneys, it was proven that the contractor, with the knowledge and collusion of the contracting officer, was "selling" the DOJ non-existent Word Perfect licenses (which he had not bought for resale) and non-existent Oracle data base licenses. The contractor had also sold the DOJ the software the DOJ used for scheduling and managing civil and criminal cases – without paying the author, and this resulted in bankrupting the firm. Plaintiff testified that ultimately the US Bankruptcy Court for the District of Columbia ordered the DOJ to pay the bankruptcy estate the proper licensing fees for that software. There were other issues such as mis-representing hardware and pricing violations.**

**But no case description was provided by Defendants.**

**Case number 6 was <u>Jarmuth v McLemore</u> which had a noticeably peculiar item as part of it's case number "MISC:. Plaintiff introduced as evidence Pl #500 which was the 1993 DOJ FOIA list. The second item on page 2 of that list is this case – added without an explanation. She was the custodian of records. Plaintiff received the records he desired.**

**Again, this was not an ordinary "civil suit" as home owners would understand it.**

**Case No. 8 was "<u>Jarmuth v Verizon</u>", The Defendants write their own version of what went on. This description did not come from the final order and the author is fully responsible for what they wrote.**

**Plaintiff put into evidence what is readily found to home owners – and certainly to board members, if the "googled" this case. Pl # 536. Khuri v Verizon West Virginia, which refers to the "Jarmuth v Verizon" decision. The Khuri case clearly states that what happened in "Jarmuth v Verizon" is that:**

1. This was not a civil suit. It was a Public Utilities complaint.
2. It was about DSL service.
3. The Jarmuth matter was "dismissed" because the WV Public Utilities Commission lacks jurisdiction over DSL service.

Plaintiff asserts he has the actual four page Order. On Page 2 Paragraph 4 the Order recites a finding that DSL service is subject to federal, not state, regulation, and thus the Commission lacked jurisdiction.

This was not a civil case as home owners would understand it.
Plaintiff had a valid cause of action.
The "case" was not denied on the merits.
The complaint never asserted that Jarmuth was given a party line. Defendant's choice of text was an absolute deception.
The purported "finding" was not the "finding" of the Commission.

The Tenth case on the list is, again, the Court should not be surprised, "Jarmuth v Frinzi" – the same case as #1 on the list.

When Plaintiff questioned his witnesses Astorino, Butryn, and Pete Pizzi, all testified that they thought this was another case. The Defendants left out "Kathleen Waters" =- they manipulated the caption.

The description written by the Defendants themselves indicated that:

1. Jarmuth alleged that a co-employee at the FBI defamed him.
2. Jarmuth alleged that the defamation by his FBI co-employees led to Jarmuth being fired by the FBI.
3. Frinzi was an FBI employee.
4. Jarmuth was fired from a federal job because he falsely accused FBI co-employees of defaming him.
5. The document attached was a decision of the Court of Appeals.

And by implication, Plaintiff was again pro se.

Plaintiff's witnesses testified that what they read on the summary sheet was what they relied on. This summary "separate case" and the description, they testified, was important to how they viewed Plaintiff and if they had not known Plaintiff they likely would have believed what was alleged.

Plaintiff put into evidence his federal personnel file Pl # 511. From it the Court was asked to note that in almost forty years of government service (including military time) Plaintiff has never been "terminated" and instead at the time in question was receiving cash bonuses for superior service.

**Plaintiff testified that at the time Plaintiff's supervisor was the Deputy Director of the FBI for white collar crime, and that later this same person became Deputy Director of Homeland Security and after 9/11, this same individual brought Plaintiff over to Homeland Security for certain purposes – which Plaintiff testified at trial included the systems which are used to identify individual who need greater scrutiny at airports and in applying for certain licenses and certifications to work certain places.**

**Plaintiff also testified that he was placed under the FBI's charter by a direct request from Janet Reno to the Assistant Secretary of the Army for Financial Management (after the supposed Jarmuth v Reno case).**

**At trial Plaintiff testified as follows:**

1. **Frinzi was never a federal employee of any kind.**
2. **Plaintiff never made any allegation against any FBI employee.**
3. **Plaintiff has never been terminated from any position with the federal government.**
4. **The document provided by the Defendants was NOT a decision of the Court of Appeals.**
5. **At the Court of Appeals Plaintiff was represented by attorney Ern Reynolds.**

**Case No. 11, Jarmuth v Reynolds. Plaintiff put into evidence Pl # 502, an involuntary Chapter 7 Bankruptcy Petition involving Oxana Turetsky about which more was said later. On Page 3 it can be seen that Ern Reynolds was the attorney of record for Plaintiff.**

**The germane part which was left out is that The bankruptcy case was In Re Oxana Turetsky, and that Plaintiff petitioned the Bankruptcy Court to hold that her debt to Plaintiff was an intentional tort which could not be discharged in Bankruptcy. Turetsky was represented by various attorneys. The Court held in Plaintiff's favor. This was upheld by the USCA District of Columbia Circuit. Plaintiff won an important victory here. The matter the Defendants cited to was an interlocutory matter, not a separate case, where the entire creditor's committee, including Sears Roebuck, two stock brokerage houses, and others were united in demanding that the selection elected by the Creditor's Committee be seated as Chapter 7 Trustee – and Plaintiff did not request that he be the one.**

**Case No 12, "Jarmuth v Weiss". Plaintiff put into evidence the parallel case before the same court which was "Weiss v Jarmuth", Pl #503. In this matter Plaintiff was represented by the Assistant United States Attorney. Jarmuth prevailed and it was upheld by the USCA-4th.**

**The Defendants here wrote an untruth, that "the Appellate Court confirmed the jury verdict". This parallel case never went to the jury, which had been seated.**

It was dismissed on procedural grounds. The implication was that a jury had ruled against Jarmuth – a serious matter and one which carries weight for a homeowner. This never happened. Perhaps the trial court felt it was enough that Weiss was "fired for cause" by the federal government.

Which brings us back to the "Frinzi" case. Plaintiff's witnesses, Butryn in particular, testified about how hard it is to terminate a federal employee of long time standing. The implication of the Frinzi case, as was stated by Pete Pizzi and Butryn and Astorino, was that Plaintiff must have done something so terrible that a federal agency was able to terminate a long time employee. This was absolutely defamatory in implication and false.

Which brings us finally to Jarmuth v Turetsky. This case started out in the Circuit Court for Prince George's County, Maryland. It alleged that Turetsky had forged a power of attorney and used it to get Charles Schwab to move certain stocks and money from Plaintiff's account to hers, and thereafter she "made off with the goods".

Through today there is a warrant for her arrest issued by the USDC-MD.

The case was moved to the USDC for the District of Columbia where the crime took place. She was represented by counsel. Plaintiff was represented by Ern Reynolds. A multi – day jury trial resulted. Plaintiff's # 501, entered January 11, 1994, was a judgment on the verdict in the amount of $ 153,000. So Jarmuth was represented by counsel and Jarmuth prevailed. Turetsky filed for bankruptcy – and the judgment was never the less upheld as subject to collection.

Defense counsel and any one with access to the internet and willing to pay for the use of the US Party Case Index (PACER) could plainly find the list of cases involving Turetsky. Pl # 510.

This is a particularly "wild" description. The Court is asked to look to the Judgment on the Verdict in case # 92-2164 (Pl #501) to see the case number. One then finds it in the Case index and sees that this case was filed on September 23 1992, # 20 on the list. So Plaintiff and Turetsky were already "removed" to federal court – where Plaintiff wanted to be, removed at Plaintiff's behest and motion. The case was there through at least January 11, 1994 when the verdict in Plaintiff's favor came in, and remained in the Circuit through the Bankruptcy proceeding.

The Turetsky case 93-7054 is #26 on the Party Case index and was filed on April 13, 1993, in the middle of Jarmuth's DC federal case. It is nonsensical to state that Jarmuth was protesting the removal of his case to the federal court when he put it there before. The fact of the matter was that Turetsky had "removed" the case from Prince George's County in Maryland to the USDC-MD trial court although it was already moved to the federal trial court in DC, a year earlier. When the federal Maryland trial court "kicked it back" to state court, it accidentally wrote language

**which seemed to "dismiss" Plaintiff's claims in federal court in DC – which it could not do to a parallel trial court with prior jurisdiction. Upon information and belief, Turetsky appealed the rejection of her "removal" which was denied.**

**-- Conclusion –**

**At trial Plaintiff carried his burden of proving with a preponderance of the evidence facts and law sufficient to prove the elements of defamation.**

**The Defendants communicated a statement which was defamatory and injurious to Plaintiff's reputation.**

**The statements were communicated to hundreds of people – other than Plaintiff (a third party).**

**The communications clearly referred to Plaintiff by name. The recipients of the communication could clearly identify Plaintiff as the person about whom the matter was about.**

**The communications injured Plaintiff's reputation.**

**<u>Relief</u>**

**The defamatory material was sent by US mail to 646 recipients. This is 646 separate defamation publications.**

**The defamatory material was emailed successfully to 354 recipients which email redirected each one to the same material as in the postage mailing, at Defendants' web site – as if this was part of each email.**

**In addition, the defamatory material was and still is posted on the Defendants' web site to which Sullivan testified the HOA 'pushes" new home owners so they can see the same material – and learn about Plaintiff.**

**Plaintiff asserts that it is not unusual for a single defamation containing even some of this material – such as the allegation of being fired from the FBI for cause – to result in an award of thousands of dollars.**

**Plaintiff believes that it is not unreasonable to ask for an award of $ 1,000 per publication, and for the Court to find that there have been at least 646 + 354 + 1 publication, and to award direct damages in the amount of 1001 defamations at $ 1,000 each, an award of $ 1,001,000 (one million, one thousand dollars);**

**And to further order that**

**(1) the Defendants immediately remove all material related to Plaintiff from any web site under their ownership, access or control;**

**(2) the Defendants send a letter of apology to every individual to whom they emailed or mailed the material relating to Plaintiff.**

**By:**

**Ronald Jarmuth, Plaintiff Pro Se**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | |
| ) | Civil Action No. 2009-CP-26-3596 |
| Ronald Jarmuth ) | consolidated with |
| Plaintiff ) | Civil Action No. 2010-CP-26-11320 |
| ) | |
| vs. ) | PLAINTIFF'S POST-TRIAL BRIEF |
| ) | SUPPORTING |
| The International Club ) | PROPOSED ORDER |
| Homeowners Association, Inc., ) | |
| et al ) | |
| Defendants ) | |
| ) | |

## - PLAINTIFF'S PROPOSED ORDER -

This case came on for trial on an Order of Reference entered by the Court on July 13, 2012, referring this case for trial before Hon. Ralph Stroman as Special Referee.

A trial was held in these combined cases commencing on August 8, 2012 and ending on August 10, 2012.

The Plaintiff appeared pro se. The Defendants appeared through common counsel, Henrietta Golding and Alicia Thompson of the McNair Law Firm.

Prior to the commencement of trial the Plaintiff, Ronald Jarmuth, filed with the Court transcripts of the depositions of Peter Pizzi, Jane Pizzi, Michael Butryn, Louis Astorino (with a supplemental by Order of the Court), Julie Case, Co-Defendant Rosemary Toth, William Freiboth (President and Board Member of the Co-Defendant Home Owner Association), and R. Scott Pyle (President of the Developer Corporation Plantation AD), Their testimony was taken previously for the express purpose of use at trial. The transcripts of their testimony was admitted subject to the objections of the parties at the depositions, as ultimately determined by the Court.

At the trial the Plaintiff submitted a set of exhibits using his numbers one (1) through seven hundred and nine (709) with some numbers not used. All were

admitted subject to the Court's later determination of admissibility. At trial the Plaintiff submitted additional evidence which he presented for impeachment purposes or for clarification.

Also at trial the Defendants, through counsel presented one hundred and four (104) exhibits numbered as such, plus ten (10) "Plat Exhibits" numbered "A" through "J". At the beginning of the trial Plaintiff stated that until minutes before the beginning of the trial he had never seen these exhibits (except for three plats) and the list was totally different from the list he had been given prior to the original January 17, 2012 trial date. Plaintiff testified that heretofore he had received the list by email, but not on paper, at noon August 7, 2012, the day before, but never any of the exhibits. Plaintiff stated that he had hand served paper copies of every document on his list at least ten days before at the offices of Defense Counsel, and most prior to January 17, 2012. The Court stated it would admit all of Defense exhibits subject to later determination by the Court as to admissibility.

At trial the Court heard the additional testimony of Mr. Michael Butryn, Mr. Peter Pizzi, Ms. Jane Pizzi, Mr. Louis Astorino, Mr. William Freiboth, Rebecca Abel, and Maureen Sullivan as fact witnesses. The Plaintiff, Ronald Jarmuth, testified as a fact witness as well. Ms. Denise Ambuhl, of Horry Telephone Cooperative, also testified as a fact witness.

Defense Counsel also presented as expert witnesses Mr. Christopher Sullivan to testify as to the installation of wells and irrigation systems, and Mr. Jeffrey W. King, Esq, to testify about Home Owner Association incorporation, the creation of associated Bylaws, and the creation of covenants for planned unit developments.

The Court considered all the testimony and evidence. It applied the standard of "More Likely Than Not" for findings of fact and independently determined the application of law to the case.

This case asked the Court to interpret the Covenants and Bylaws and to Interpret them and to declare the rights and obligations of all the parties to those documents.

This case is novel in that it challenges established practice in the area but can be determined by long established common law and statutes because all of the issues

have well established precedents. In deciding the issues the Court concluded that there is nothing about this case to cause it to deviate from the well established precedents.

In evaluating the issues the Court concluded that much of the problem arises from the confusion by the parties over the roles that Covenants and Bylaws have regarding property and corporations. The Covenants that properly touch and run with the land control the rights and obligations of individuals regarding the use of the land. Such covenants can not extend their reach to exercise control over the operations of non-profit corporations, of which the Defendant International Club Home Owners Association is one. In the same manner the affairs of home owner associations which are incorporated as non-profit corporations are controlled by it's Articles and properly adopted Bylaws, which have no dominion over the use of private property.

The Court therefore finds and Orders that none of the provisions of the Covenants that apply to the land in the International Club Planned Unit Development which relate to the operation of a home owner association are valid. In the same context, the Court therefore finds and Orders that none of the provisions of any Bylaws applicable to the Association named in the Covenants, and none of the provisions of the Bylaws applicable to the Defendant home owner association, control any use of the property in the Planned Unit Development.

The Court has examined the circumstances leading to the formation of the International Club Home Owners Association and to the naming of an Association for governance in what is now known as the International Club PUD.

The Court finds and Orders as follows:

The Defendant International Club Home Owners Association, Inc (IHOA), has no properly adopted Bylaws. However, because that Association has held out to all comers that the Bylaws set out as Exhibit C as it's governing documents, until such time as the IHOA membership by vote as provided for in the South Carolina Non-Profit Corporation Act adopt proper Bylaws, the IHOA has procedural obligations under that document but not rights.

The Court further finds that the effect of Amendment # 1 to the Covenants is

to establish the International Club Association Inc, (ICA) another South Carolina Non-Profit Corporation, as The Association named in the Covenants. The Court further finds and Orders that because ICA has been properly merged into yet another South Carolina Non-Profit Corporation, the Murrells Inlet Golf Plantation Association, Inc, (MIGPA), MIGPA be and is The Association defined in the Covenants.

The Court has examined the Circumstances relating to the declaring of the Covenants for the PUD by Plantation AD, the former developer and owner of the PUD, as they intertwine with the sale of what is now Pebble Creek to another developer, Sunbelt, from the larger pre-existing property of the PUD. The Court finds that the Declarant Plantation AD lacked equitable interest and horizontal privity in Pebble Creek when the Covenants were declared and thus the Covenants for the PUD do not run with the land within Pebble Creek.

The Court has taken note of the point raised by the Plaintiff that South Carolina is alone among it's surrounding states in that it's home owner associations are governed by the same statutes which govern all non-profit corporations, where as South Carolina's sister states augment the non-profit statutes with provisions specific to home owner associations. The Court is aware in that in the past the legislature has done this for home owner associations related to condominiums, and for the sale of time share ownership. At this time, however, the South Carolina legislature has made the informed decision to leave the governance of home owner associations in South Carolina under the Non-Profit Corporation Act.

The Court therefore Orders:

1. No home owner may be forced to join The Association associated with the Covenants running with the PUD, in as much as they do so, without their consent.

2. No home owner may be restrained from resigning from such Association at any time he desires, subject to paying for accrued goods or services he has consumed.

3. No home owner may, indirectly or directly, be required to pay for the debts of The Association and home owners are responsible only for the payment of

such dues as are required to support the purposes of The Association stated in lawfully adopted Bylaws, and for the goods and services they willingly consume.

The Court has examined the circumstances of the creation of the IHOA and finds related to elections and officers as follows:

1. The term of office for members of the board of the IHOA, based on the willing performance under the Bylaws of Exhibit C to the Covenants, begins on the second Saturday of each year and, except for the initial directors, runs for a term of three years.

2. The term of office for members of the board of the IHOA appointed to fill a vacancy expires at the following annual membership meeting or at a meeting held for the purpose of electing one or more members of the board.

3. Members of the board were illegally in office until the September 7, 2007 annual meeting and election of board members by home owners. Consequently, all contracts and acts of those prior boards are not binding on the IHOA nor are any contracts they entered enforceable. All their acts are declared to be Ultra Vires.

4. The Defendant IHOA shall hold an Organizational Meeting within 60 days of this order at which time the membership shall have an opportunity, by vote of the membership as provided for in the South Carolina Non-Profit Corporation Act (The Act), to create Bylaws for the governance of the IHOA. At such time and place the membership shall elect an initial Board of Director for such terms as are stated in the Bylaws it adopts, and if no such provision can be agreed upon, the IHOA shall be governed by the default provisions of The Act.

5. The IHOA shall strictly abide by the requirements of The Act to provide the list of voters of the IHOA and shall liberally construe the requirements of the Act for access to and copying of the records of the IHOA.

6. Any act of the IHOA taken which is not reflected in the Minutes of the Board of Directors or as an Action Without Meeting as provided for by The Act is hereby declared null and void.

7. The IHOA is enjoined from attempting to exercise any right which the Covenants for the PUD provide for The Association.

8. Each Committee of the IHOA is Ordered to adhere to the Open Meeting and Records requirements of the Act. The Court finds that there are no circumstances where a Committee of the IHOA is entitled to have a closed meeting and so Orders.

9. Each Committee of the IHOA shall have two voting members of the IHOA's Board of Directors on that committee.

10. No home owner is obligated to accept any goods or services offered by any home owner association.

11. The IHOA shall not use any dues or funds which it collects from it's members except for the express purposes stated in it's Bylaws.

12. Funds collected by The Association under the Covenants shall be used exclusively and only for the repair and maintenance of areas Declared as Common Areas, Owned by The Association, and within the PUD. No assessments may be collected by The Association for any other purpose except for Capital improvements made in the Common Area or for the purchase of property within the PUD which is intended to be, and shall be, declared as Common Area owned by the Association.

13. The Court is mindful that in the past members of the board of directors illegally appointed by the Developer entered into acts and agreements which were conflicts of interest or transactions prohibited by The Act. The Defendant IHOA Board of Directors is explicitly ordered to cautiously evaluate all future acts to conform to the Standards of Conduct stated in The Act and any departure there from will be considered a Contempt of Court as well as a Violation of The Act.

14. The Golf Course agreement entered into November 3, 2003 is hereby set aside as being entered into on behalf of the IHOA and on behalf of The Association by personnel with no authority to do so and under circumstances which prohibited their participation. The provisions of the Covenants as written shall continue to control the obligations and rights of the Golf Course within the PUD and to The Association.

15. The Common Area is declared to be that area within the PUD owned by The Association and declared to be Common Area.

**The Court has closely examined the circumstances of the granting of the easement to Central Electric to run overhead utility lines and to allow Central Electric to destroy the landscaping in what has come to be commonly called "The Front Entrance". The Court finds that this transaction is governed by The Act and by the obligations that the IHOA imposed upon itself by stating that it was subjected to the Bylaws as Exhibit C to the Covenants. The Court finds and Orders as follows:**

**1. The landscaping and overhead easement are assets of the IHOA not used in the normal course of business.**

**2. The IHOA board was required to seek approval from the Home Owner members of the IHOA for permission to enter into the transaction. The HOA board was on notice by home owners of a demand to put the proposed agreement to a vote, but did not. That decision was an intentional act of the IHOA Board which , by The Act, was ultra – vires. The transaction can not be undone because Central Electric is an arms – length purchaser of the easement in due course. However, the distribution of the funds was also contrary to The Act and The Bylaws.**

**3. The Court finds that the $ 10,000 mentioned in the Central Electric agreement was and is funds restricted for use in the restoration of or planting of new landscaping. The Court finds that the distribution and use of that money and the funds that the HOA Board decided to distribute to home owners is violative of The Act and an ultra – vires act.**

**4. The Court finds that the damage to the IHOA is in the amount of Sixty Thousand Two Hundred and Fifty Dollars ($ 60,250) which, per The Act, is owed by the IHOA Board members at that time individually and collectively to the IHOA. The Court finds that Co-Defendant Rosemary Toth is one of them and, per her testimony at trial and by virtue of the fact that the IHOA Board at the time were co-defendants in fact, this judgment also applies to Sullivan as well. The Court finds that per The Act Sullivan and Toth are free to sue the other board members at the time for contribution.**

**The Court has inquired into the circumstances of the Sale of the Golf Course Property by Plantation AD to Plantation Golf LLC and finds that the Golf Course, and it's successors, are subject to the Covenants. The voting rights in The Association or in any Association shall be and are governed by the lawfully adopted Bylaws of such Association, and not by any provision in The Covenants.**

**If on appeal it is held that the Bylaws of Exhibit C to the Covenants are effective on the IHOA, the Court provisionally finds and Orders as follows:**

**(1) the Golf Course is not a member of the IHOA;**
**(2) the Golf Course has no voting right in the IHOA;**
**(3) no employee or representative of the Golf Course can legally have served as a member of the Board of the IHOA;**
**(4) the Developer was a member of the IHOA;**
**(5) the Developer could cast votes at elections of the IHOA dependent on the number of units the Developer owned in the PUD;**
**(6) no employee or representative of an owner could hold office in the IHOA.**

**The Court has been asked to declare what the extent of the Planned Unit Development (PUD) is. The Court finds that the extent of the PUD is controlled by agreements reached between the Horry County Planning Commission and the Developer and is independent of any provision in The Covenants.**

**The Court has examined the deeds and plats related to the Ownership of Land which might be considered to be in the PUD and the agreements between the Planning Commission and successor developers and finds as follows:**

**(1) Pebble Creek is within the PUD.**

**(2) The Meadows is not within the PUD.**

**(3) The Golf Course and Club house are within the PUD.**

**(4) The Enclaves and The Fairways are within the PUD.**

**(5) The Grand Vistas and Front Entrance are not within the PUD.**

**(6) The other communities shown on Plat Book 160 at 79 are within the PUD, that being the Highlands, the Links, The Glens, the future Ballycastle, and The Cambridge.**

The Court was asked to interpret the Covenants as amended and the interplay between the PUD Documents and the Covenants to determine which areas in the PUD are subject to the Covenants.

First, the court finds that no area outside the PUD may be subjected to The Covenants, thus the "Front Entrance" and "The Grand Vistas" are not subject to the Covenants.

The Court finds that The Links, The Highlands, The Villas, The Cambridge, and The Glens are subject to the Covenants. The Court finds that The Golf Course and The Club House and the future Ballycastle are subject to the Covenants.

The Court finds that, by virtue of a strict reading of the Declarations in the Covenants prior to amendment, The Enclaves and The Fairways are subject to the Covenants.

The Court has examined the situation of The Meadows which the Court has found is outside the PUD. To allow a developer to incorporate an area outside the PUD into the PUD by the operation of a document which is created entirely by the developer without the concurrence of the Planning Commission would defeat the clear purpose of the requirement for Developers to gain approval from the Planning Commission for the alteration of an agreed upon PUD. The Court finds that, not withstanding an amendment to the covenants by the Developer, The Meadows is not subject to the Covenants.

The Court has examined the facts and the law concerning an organization commonly called the Highway 17 Connector Association's practice of assessing home owners within the PUD for the operations of that Association. The Court takes note that despite it's name, it is not a Road Maintenance District and lacks tax authority. The Court will not disturb the operation of that Association because it is not a party to this case. However, the Court finds and Orders that neither the IHOA nor The Association may collect assessments or other funds on behalf of any other entity without the express knowledge and consent of home owners.

Defendant Rosemary Toth, a co-Defendant in this case, is cautioned that she is a party to this case and is Ordered to cease and desist from any action in her own

capacity or in any other capacity which could be considered an attempt to collect unwilling assessments from home owners in the PUD on behalf of any other association.

The Court has examined the facts and law related to the ownership and control of the roads and streets in the PUD and makes the following findings of fact and conclusions of law:

(1) All roads in the PUD with the exception of Madrid Drive are owned by Horry County and are not subject to any Covenants.

(2) No easements were preserved when the roads were conveyed to Horry County.

(3) Horry County took title to the Roads by virtue of the stipulation incorporated into approval of the development of the PUD and by virtue of the Dedication of the Roads to the County by the Developer. The County's title is vested further by the free and continuous use of the roads by the public and by the County's continued maintenance and control of the roads.

(4) The act of the IHOA in obtaining encroachment permits waived any claim which might have been preserved; however the Court finds that no such right of ownership existed at the time encroachment permits were sought.

(5) Provisions of the covenants not withstanding, no provision of the covenants controls what may or may not be done within the area of the roads as delineated in Plats titled Lantana PUD, International Club Golf Course, and Murrells Inlet Golf Plantation which were entered into evidence at trial.

(6) No association has any authority to regulate or control the road ways in the PUD.

(7) There are no restrictions other than those imposed by County or State regulation on what may or may not be done in the streets in the PUD.

(8) The Court finds that the area of the roadways in the PUD owned by the County extend from private property line to private property line and valid obligations and restrictions on the use of property begin and end within private lots.

(9) The obligation to maintain the roadways lies with Horry County which owns the road ways with the exception of Madrid Drive and that portion of

**International Club Drive not yet dedicated to the County. The Court finds that the responsibility for the maintenance of Madrid Drive is subject to such agreements as have been lawfully made between the IHOA and The Glens HOA.**

**(10) Any and all provisions of the Covenants, including those of subordinate HOA regimes, which contradict these findings are null and void.**

**The Court was asked to interpret the legal effect of Amendments to the Covenants subsequent to the Original Covenants. The Court has examined the covenants, the amendments thereto, and applicable statutes and cases and finds as follows:**

**(1)q Every instance in an Amendment where the term "waiver" is used shall be taken to mean "deleted"**

**(2) Despite Amendment 1's waiver of Section 4.17. Wells and Effluent, that deletion is ineffective because it impaired the equitable rights of The Association in to it's riparian ownership of the water in ponds, lakes and streams in the PUD.**

**(3) No amendment to the Covenants which imposed an additional requirement for owners subsequent to the original owner to pay any sum of money at the transfer of ownership of land in the PUD is effective and such amendments are declared to be null and void. No amendment to the covenants which altered the way any assessments shall be based or collected made without the vote of the home owners as provided by The Act shall be effective and any amendments made in a manner not provided for by The Act are declared null and void.**

**(4) The Court explicitly finds that the following Sections of the Covenants have been deleted:**

> **Sections 4.10, Section 4.11, Section 4.16 and Section 4.17 of the Declaration.**
>
> **Sections 7.2, Section 7.4, Section 7.25 and Section 7.31 of the Declaration.**
>
> **Section 7.37 (c) of the Declaration.**

**The Court was asked to resolve the question as to which areas subject to the**

Covenants are "multi-family areas" as defined in the Covenants.

The Court has evaluated the evidence made available to it, to include covenants, deeds, and Plats and finds and Orders as follows: The Cambridge, The Glens, the Ballycastle, and The Villas are multi-family areas as defined by The Covenants.

The Court has previously looked at the viability of contracts entered into by the IHOA prior to the September, 2007 election and found that because the IHOA boards at the time were not properly seated, the contracts and other acts of those boards are not enforceable. However, the Court was asked specifically to examine the circumstances of the cable television contract to prospectively determine whether any similar contract would be viable if entered into by a future board under similar circumstances. The Court has considered the evidence, the law, and the testimony of witnesses and finds and Orders as follows:

1. No home owner has any obligations under the existing cable contract for provision of cable tv services entered into between HTC and the ICMA. There is no entity in the name of the International Club "Master HOA" (ICMA) legally capable of entering into any contract at this time and until and unless such an entity properly incorporates, no present or future contract in it's name is enforceable.

2. The IHOA has no standing or rights to enforce the contract in it's own name. The Association which presently has rights and obligations under the covenants is not bound by the ICMA cable contract or by any other contract entered into in the name of the ICMA.

3. The IHOA lacks a required cable tv franchise from Horry County and is enjoined from offering cable tv services to end users until and unless it obtains a proper cable tv franchise from Horry County permitting it to do so.

4. Home owners in the International Club PUD are free to choose without any interference from the IHOA the source and method of delivery of television programming.

5. Plaintiff is individually entitled to a refund from the IHOA of any money the IHOA had collected from Plaintiff related to the provision of television services reaching back to January 1, 2006, three years prior to the date this complaint was filed. This sum is included in the award stated next.

The Court was asked to interpret the law and the covenants to determine whether and to what extent home owners subject to The Covenants can be

involuntarily forced to join, remain members of, and pay for the maintenance and other costs of the Amenity Center complex. The Court looked further into the matter of ownership of the IHOA Amenity Center Complex and found that the IHOA has valid and equitable title to the facility and to the land associated with it, to include the two parking lots.

The Court found that the Amenity Center Complex is a special use Common Area but that this does not control the greater issue of involuntary membership in and payment of assessments for the Amenity Center Complex. The Court has determined that applicable law is that involuntary membership in and the payment of money for an Amenity Center does not touch and run with the land.

The Court has previously held that Plaintiff could not involuntarily be forced to be a member of the IHOA and that the IHOA is not the HOA contemplated by the Covenants.

The Court Orders as follows:

(1) The Amenity Center located in the International Club PUD at the general vicinity of the intersection of Pickering and International Club drives is owned by the IHOA.

(2) No home owner in the International Club PUD is subject to any obligation under the covenants to join the Amenity Center owned by the IHOA, nor any obligation under the covenants to pay money for the support or maintenance of any Amenities. Such a requirement is a personal services contract which must be freely entered in by a homeowner and is not a proper covenant which touches and runs with the land. As a finding of Fact and Conclusion of Law the Court finds that there is no enforceable personal services contract for such a duty or obligation exists.

(3) The IHOA is free to operate the aforementioned Amenity Center under a "voluntary membership" basis, or under a "fee for use" basis as a "private club" in the manner this is allowed for in the Covenants.

(4) The Amenity Center resides on land governed by the Covenants and is subject to the Covenants.

**(5) As a private club the Court finds that membership in The Amenity Center is not governed by any restrictions relating to multi-family area use of PUD Amenity Center facilities. If this aspect of the decision is overturned on appeal, the restrictions on multi-family use of the Amenity Center Complex will apply.**

**(6) The Defendant IHOA has no rights under the Covenants to force any homeowner to pay assessments or dues for membership in, support or maintenance of the Amenity Center, or to involuntarily become a member of the Amenity Center. The Defendant IHOA is enjoined from any act which is contrary to this decision.**

**(7) The Plaintiff is awarded direct damages in the amount of One Thousand Four Hundred and Fifty Eight Dollars ($ 1,458.00) which is levied against the IHOA by virtue of involuntary membership in the Amenity Center which will be considered part of an award of Six Thousand Five Hundred and Seven Dollars ($ 6,507.00) total award for assessments wrongfully collected by the IHOA from Plaintiff or his predecessor for the years 2006 through September of 2012.**

**The Court was also asked to inquire into the status of the two parking lots associated with the Amenity Center Complex. As part of it's examination of the IHOA Amenity Center the Court has determined and held that title to both parking lots is in the name of the IHOA. Unless provisions of this Order are overturned on appeal relating to the involuntary use of the Amenity Center, the use of the parking lots shall be governed by the same terms the Court has declared for the use of the Amenity Center Complex.**

**The Court has made the following additional findings and enters the following additional mandates:**

**(1) That the IHOA is enjoined from removing the existing "no parking / subject to towing" signs completely but is free to alter the locations and text so long as they provide notice to the public that the two lots are private property for use by Amenity Center patrons and that use by others is subject to towing with the text meeting the notice requirements of Horry County towing ordinances.**

**(2) That the IHOA is enjoined from any act which will restrict the use of the Amenity Center parking by any home owner paying for the use or support of the Amenity Center who is also permitted to use said facility under the covenants.**

(3) That the IHOA institute and enforce policies and procedures to insure that neither the golf course nor any so called academy acting with it's permission or accord nor the employees nor customers thereof make use of the parking lots.

K.A. Diehl is a Defendant in this suit and subject to the personal jurisdiction of this Court on any matter related to the Complaint which was or should have been litigated between the parties during the pendency of this case.

The Plaintiff complained about certain business practices of Defendant Diehl. The Court heard the related testimony of witnesses and considered related evidence. It was noted that during the course of the trial the Defendant had every opportunity to but did not controvert any thing set before the Court during the trial which related to those business practices. While the Court has given the parties the opportunity to present briefs after the close of the trial, the Court was only permitted to consider the dimensions of the briefs which related to evidence and testimony that was properly before the Court through the close of the trial. This finding of the Court relates to all matters set before the Court at trial.

The Court finds that through the preponderance of the evidence KA Diehl has engaged in prohibited business practices which it likely engages in for all of it's customer home owner associations. The Court finds it has the authority to require the Defendant KA Diehl to apply the same mitigating remedies to all of it's business practices that it is ordered to apply to it's relationship with the IHOA and The Association.

The Court has made findings of fact and conclusions of law to support the following Order:

1. That the IHOA and KA Diehl be and are enjoined from signing any contract which even purports to allow a management company to keep any rebates, discounts, or other consideration related to the purchase of goods or services to a customer HOA.

2. That KA Diehl be enjoined from such practices with any home owner association it manages.

3. That KA Diehl be Ordered to refund to any vendor the "fees" it collected from such vendors.

**4. That KA Diehl, The Association, and the IHOA be required to publish or announce requirements for goods and services, (as to KA Diehl, for any association it provides services to) and to accept bids from any responding prospective vendor; that it not engage in any "prequalification" scheme or program.**

**5. That KA Diehl, The Association, and the IHOA be required to liberally distribute homeowner / voter lists to home owners on demand.**

**6. That KA Diehl, The Association, and the IHOA be required to issue annual statements of privacy rights to home owners.**

**7. That KA Diehl be required to pay to the IHOA and any other association it manages any discounts, rebates, or other consideration it has received for the period reaching back to 2006 related to the provision of goods or services to the IHOA.**

**8. That KA Diehl be enjoined from releasing any information about home owners to any other entity.**

**9. That KA Diehl be enjoined form using any information about home owners to solicit business from home owners.**

**10. That any provision in any contract between KA Diehl and any home owner association restricting in any way the provision of goods or services to a home owner association by said association's board or committee members be and is null and void.**

**11. That KA Diehl be enjoined from requiring any prospective vendor or any home owner association to join CAI, and that Diehl be required to refund to the IHOA any membership or other fees which the IHOA has paid to CAI.**

**The Court examined the evidence and testimony set before it concerning the circumstances relating to the approval of an agreement between the IHOA Board and Central Electric which concerned an over head electric utility easement and the destruction and replacement of landscaping on property commonly called "The Front Entrance" which is a part of International Club Drive and which is owned by the IHOA. The findings of the Court included that the IHOA Board, in concert and unanimously, decided that it would allow over head utilities and the destruction of landscaping without the prior benefit of a court order secured by Central Electric through it's legal capability to secure such an order. The Court found this to be**

contrary to the mandates under which the IHOA Board operates. The Court also found that the easement and landscaping are property not used in the ordinary course of business and that the IHOA was not then in the process of dissolution.

The Court further found that the IHOA Board, unanimously and in concert, determined to distribute a portion of the proceeds to home owners who had no equitable claim to the proceeds and that this distribution was explicitly not permitted. The Court further found that the funds received from Central Electric which were marked "contingency" were restricted to landscaping purposes and could not be used for any other purpose. The Court enters an Order which finds and Orders as follows:

(1) The IHOA Board was prohibited by the Covenants from approving above ground utilities.

(2) The landscaping at the front entrance were assets not used in the normal course of business by the IHOA.

(3) The IHOA owned the front entrance at the time of the events in question.

(4) The IHOA Board was prohibited by law and the Bylaws from making the transaction with Central Electric without the appropriate consensual vote of the homeowners.

(5) The Board unanimously decided not to have a vote of home owners.

(6) A demand for a vote was made by home owners.

(7) The Board acted recklessly in failing to obtain an independent estimate of the value of the effects of the Central Electric / IHOA decision.

(8) The Board unanimously decided to distribute $ 50, 250 to homeowners out of the proceeds from Central Electric.

(9) The home owners who received that distribution had no equitable or legal right to any portion of that distribution and the Board was aware of this.

(10) The $ 10,000 in contingency funds received from Central Electric was a restricted fund to be used for landscaping purposes.

(11) The Board unanimously decided to distribute the $ 10,000 in partial settlement of an unrelated money judgment against the IHOA.

**(12) The use of the $ 10,000 to pay the judgment to The Villas HOA was a prohibited use of the proceeds from Central Electric.**

**(13) The members of the board are individually and collectively responsible for the damages to the IHOA.**

**(14) The direct damage to the IHOA is $ 60,250.**

**(15) As a judgment is entered against the board members at the time, in 2010, specifically including Rosemary Toth and Maureen Sullivan, to repay $ 60,250 to the IHOA.**

**(16) As provided by SC 33-31-851, the insurance company for the HOA is enjoined from reimbursing or otherwise providing the funds to satisfy this judgment against the Board members themselves.**

**(17) Any excess money remaining from the proceeds received from Central Electric shall be treated as restricted funds to be used for the restoration of landscaping damage on property owned by the IHOA or it's successor.**

**The Court was asked to interpret the Covenants together with it's amendments and applicable law to determine the basis under which the Golf Course must pay Assessments to The Association, and under what circumstances that basis may be changed. The Court was further asked to determine the extent to which an agreement entered into between the Golf Course and the IHOA in 2003 has any legal effect. In making this examination the Court was particularly disturbed to learn of the blatant self – dealing and prohibited acts by those who represented themselves as IHOA Board Members, by the Golf Course, and by DR Horton. The related acts of the IHOA Board and of Doug Brown in particular are representative of the course of behavior that the Standards of Conduct in The Act are meant to prohibit. The Court restricts its' order to those who are properly before the Court.**

**The Court has examined the evidence before the Court, the testimony of witnesses and applicable law and finds and Orders as follows:**

**1. That the rate of assessment of the golf course be and always has been that specified in Section 6.5 of the Covenants, it being fifty times the rate of assessments charged to a single family home owner entitled to use the Amenities of**

the Association.

2. That the agreement between the golf course, the IHOA, and DR Horton signed on or about November 3, 2003 ("The Agreement") be and is void and was never of force or effect.

3. Future members of the board of the IHOA and of The Association are cautioned to closely read the standards of conduct for members of the board and for officers of non-profit corporations as they are stated in The Act.

The Court examined the practices of the IHOA complained of by the Plaintiff regarding its use of assessment money to maintain property, commonly referred to as "Buildings and Grounds" efforts. The Court examined related evidence and considered the related testimony of witnesses and applied applicable law and the Covenants. The Court found that that assessment money may only be spent to maintain property that is (1) owned by the IHOA; (2) that is also within the PUD; and (3) that is also subject to the covenants. The Court found that Defendant Rosemary Toth in particular was made aware of these mandates by the experts in this matter appointed by the IHOA Board and that those individuals made a diligent study and a clear recommendation with a basis in fact. The Court found that in 2008 the Buildings and Grounds Committee clearly informed the IHOA Board and Ms. Toth in particular that the bulk of the IHOA's landscaping money was spent on non-HOA property, that no reimbursement was being sought for that maintenance, and that the IHOA should cease and desist from spending unreimbursed money on landscaping property the IHOA did not own. The Court found that Ms. Toth had access to the general ledgers of the IHOA and knew or should have known that the assessments actually paid by the Golf Course was far below the money the IHOA was expending to maintain Golf Course property.

The Court thus enters the following findings and mandates:

1. That Defendant Rosemary Toth be and is required to pay to the IHOA the sum of One Dollar ($ 1.00) as a token of the consequential damages her misconduct caused the IHOA in 2008. The Court further finds that her conduct with regard to use of IHOA landscaping money was intentional and that she acted against the beset advice available to her in her capacity as Board Member and IHOA President.

2. That because of SC 33-31-851, the indemnificatin of board members or officers, Toth may not be indemnified for this award and that she is personally liable for the cost of her defense in this litigation.

3. That it is unlawful for the IHOA or The Association to spend assessment funds on areas not owned by the IHOA or The Association, respectively, which are not also declared to be Common Areas within the PUD.

4. That the IHOA and The Association are enjoined from collecting in the form of assessments any funds for, and they are likewise enjoined from expending any funds for any purpose at all upon lands which are not (a) in the PUD; (b) owned by the IHOA or The Association, respectively; and (c) declared to be Common Areas.

The matter of the Defendants IHOA and Rosemary Toth interfering with Plaintiff's erection of a swing set on his property came before the Court. The IHOA's answers to related interrogatories posed by Plaintiff, the many related photos placed into evidence, and the testimony of Peter Pizzi were especially persuasive to the court in considering the other evidence and testimony of the Plaintiff. The Court is of the opinion that the IHOA prevailed in the related Human Rights Complaint filed by Plaintiff because Defendant Rosemary Toth wrote that the swing set location is prohibited in the Covenants and enforceable rules and that as a consequence the IHOA does not allow swing sets in side yards and does not approve them there. The Court found that those statements by Toth to the Human Rights Commission did not reflect the Covenants nor any enforceable rules, and that the IHOA did in fact permit a swing set to be erected in a comparable location at a comparable home.

The Court finds it especially egregious that the Defendant IHOA sought to collect two thousand five hundred dollars ($ 2,500) from Plaintiff to reimburse itself for the cost of defending itself against this discrimination complaint. The Court has examined the letter that Defendant Toth sent to the Human Rights Commission, which Plaintiff identified as his Exhibit # 603, and the Order and Findings of the Commission which the Defendants identified as their Exhibit # 63 in the light of the evidence and testimony presented to the Court in this case. The Court takes issue with the assertion made on behalf of the IHOA that appeals from the ARB were

governed in any way other than by Section 13.3 of the Bylaws which the IHOA professed to use, and that there were any location related restriction for swing sets, enforceable or not, in the Covenants, the Bylaws, or even in the ARB Guidelines.

Plaintiff has presented applicable statutes and case law and credible evidence and testimony and by the preponderance of the evidence he is entitled to the findings of fact and to the relief stated in the following Order of Court:

(1) That the Defendants IHOA, Rosemary Toth, and KA Diehl, acting in concert together, willfully deprived Plaintiff of the free use of property by using standards and regulations that they knew or should have known either did not exist or were inapplicable.

(2) That Defendant Rosemary Toth, in her answer to the South Carolina Human Affairs Commission, acted willfully and unlawfully to obstruct the Plaintiff's lawful resort to relief from that Commission.

(3) That there are no restrictions on the placement of swing sets within the PUD other than Horry County set back requirements.

(4) That the Defendants are enjoined from any action directly or through others acting on their behalf or in concert with them from enforcing any restriction on swing sets and from imposing any restriction on the free use of property not explicitly stated as a restriction on use in a section of the Covenants not "waived" or "deleted".

(5) That Defendant Toth is ordered to provide Plaintiff a written apology for the action of the IHOA.

(6) That Plaintiff is entitled to an award of Punitive damages in an amount that the Court deems appropriate which be and is $ _____.

Also before the Court were the circumstances relating to the prohibition, by the IHOA through and with it's Architectural Review Board, whereby the same refused to permit the Plaintiff to erect a fence on his side of the property's right side common boundary he shares with another landowner identified as Jay Cartman. The Court was also asked to consider the role of the Defendant KA Diehl in this matter. The denied request also involved the installation of brick landscaping edgers along that same property line which edgers are extensively already used

**throughout Plaintiff's property and throughout the community. The Court found especially persuasive the numerous photos of fences and walls throughout the community and that the Court found that the covenant's restrictions on fences or walls had been deleted years before through an Amendment that the Defendants had actual knowledge about. The evidence and testimony related to the fence application revealed eggregarious violations of The Act in the conduct of the business of the IHOA's Architectural Review Board (ARB) and in the conduct of KA Diehl and it's employees in discharging their duties as the contractor management company of the IHOA.**

**The Court found especially troubling the IHOA Defendant's representation of what Plaintiff had done as a "brick wall" in it's counter complaint and it's assertions that a "brick wall" had actually been erected. The Court found that the IHOA and Diehl Defendants singled Plaintiff out and selectively and capriciously dealt with his application with malicious purpose, and that these purposes included interfering with the running of this court case.**

**The Court finds and Orders That:**

**1. Plaintiff is entitled to the return of Plaintiff's $ 50 "fine" plus interest at the rate allowed for judgments, and this is entered as a judgment against the IHOA and KA Diehl..**

**2. The Court enjoins the Defendants, all of them, and The Association, from attempting to enforce Sections 7.2 and 7.4 and any other sections of the Covenants that the Court declares as deleted against anyone.**

**3. Court Costs plus all other of Plaintiff's costs which can be documented as relating to this case are awarded Plaintiff in his suit against the IHOA and other Defendants. The Court finds that the Plaintiff in filing his suit was enforcing the provisions of the covenants and that the Covenants provide for the plaintiff to recover all costs if he prevails in such suits.**

**4. The Defendants shall make a joint written apology to be published to every homeowner for the ARB - related actions against Plaintiff. This letter will state that the provisions of the Covenants requiring an ARB application and will state the sections of the covenants that the Court has declared deleted, specifically**

**including the provisions regulating fences, walls, roads, the storage of material on the property. The letter shall include an admonition that other restrictions on the use of property continue.**

**5. The Court enters an award of $ _____ against the IHOA and KA Diehl, singularly and collectively, as a punitive damage award.**

**The Court also addressed the matter of the IHOA's refusal to act on an Application by Plaintiff to extend his existing Palm Tree beds, said application being made after the matter of the fence. The Court found that the numerous related photos and the testimony of Plaintiff's witnesses and of Plaintiff himself to be especially persuasive. The Court closely examined the applicable covenants and the Bylaws that the IHOA defendant purports to be it's governance. The Court finds that the IHOA defendant and it's ARB committee violated numerous provisions of it's rules of procedure in this and in every other ARB matter between the Plaintiff and all Defendants. The Court finds that this is representative of the handling by the Defendants of ARB applications by home owners in general, given the testimony of Defense witnesses Freiboth, Abel, Case, and Toth.**

**The Court found that the Defendant's attempt at trial to secure another $ 2,500 for having to defend it's actions related to the palm tree application offensive, in that Plaintiff clearly had not violated any covenants through the mere pendency of his application. In examining the photos related to Plaintiff's Palm Tree Bed extension application, the Court found that the IHOA Defendant had approved the same landscape edgers, as landscape edgers, in connection with the existing palm tree bed that it now called a "brick wall" in the context of the fence application. It was likewise troubling that KA Diehl considered the fence edgers a "violation" when it had no trouble with like edgers through out the PUD which Diehl's employee Beckie Abel, at trial, admitted to observing on her frequent violation detection trips throughout the neighborhood.**

**The Court concurs with the allegation of Plaintiff that approval of a Palm Tree application is "time sensitive" and delays will increase the costs of securing suitable palm trees.**

**The Court thus makes the following findings of fact and conclusions of law and mandates of the Court:**

**1. The restriction on landscaping found in the covenants is inapplicable to Plaintiff's lot because –**

**a. nothing that is planted or that could be planted on any area of Plaintiff's lot within it's property lines can impede the view of traffic; and**

**b. nothing that is planted or that could be planted on any area of Plaintiff's lot can impede any view of natural areas because Plaintiff's lot is not adjacent to any natural areas nor to the golf course.**

**2. The Court Enjoins the IHOA or anyone acting in concert with them, to include any ARB entity acting under any asserted authority of the IHOA's bylaws, rules, or other resolutions, from enforcing any landscaping controls on Plaintiff's lot.**

**3. The Court Orders that the IHOA may not impose a fine on anyone until it has completely and exactly fulfilled the procedures stated in it's bylaws relating to notice and hearing, and directing it to examine it's books and to return every fine that was imposed prior to the completion of a Board hearing with an outcome adverse to a homeowner.**

**4. The Court Enjoins KA Diehl and it's employees and agents with regard to this PUD from issuing any letters which purport to impose any fines; and enjoins KA Diehl from acting in this manner for any other property it manages unless the covenants that run with that land expressly permit the delegation of such authority. The Court declares as against the public interest the provisions of any contract to which KA Diehl is a party allowing the imposition of a fine before a home owner has been afforded a hearing on the matter.**

**5. The Court Orders KA Diehl to return to the IHOA any fees or other proceeds it received related to the writing of such "fine" letters.**

**6. The Court Orders the IHOA, the ARB, and all elements thereof to conduct all it's meetings and business in public, except for those matters which have traditionally been deemed by the court as within court accepted privilege, such as "attorney – client". Additionally, the Court finds that deliberations leading to the**

approval or disapproval of any matter relating to the restrictions, obligations, rights and duties of the covenants is a matter of interest to every property owner in the PUD and is not subject to any such claim of privilege.

7. The Court holds that no ARB as mentioned in the covenants can require a pre-work application and enjoin the IHOA from asserting such a requirement.

8. The Court holds that the association related to the PUD through the covenants may not condition any right stated in the covenants on anything except the terms explicitly stated in the covenants related to that right.

9. The Court holds that the IHOA has violated the implied covenant of good faith and fair dealing and impose a sanction of the court's determination.

10. The Court hold that no guidelines or rules issued by the association related to the PUD through the covenants may expand upon the restrictions explicitly imposed in the covenants.

11. The Court holds that any provision of the covenant which through amendment has been stated as "waived" is in fact to be taken as "deleted".

12. The Court holds that any prior or future act of the IHOA or it agents or the association related to the PUD through the covenants which attempts to enforce a "waived obligation" or to extend the restrictions is an act in violation of the covenant of good faith and fair dealing.

13. The Court holds that the attempt to pre-condition Plaintiff's right to the free use of his property (by planting trees and landscaping) on the payment of money to the IHOA is extortion and or exaction, and for the court to impose sanctions on all defendants payable to Plaintiff.

The Court addressed the issue of the Defendant's Counter claim which related to an assertion that the Plaintiff erected a "Brick Wall" on Plaintiff's side of the property line between Plaintiff's Property and that of his neighbor to the right, Jay Cartman. Despite the testimony of Defense Witness Freiboth at trial (said Freiboth being the current president and a current board member of Defendant IHOA) that the IHOA meant "foundation" or other alternative phrases that he used, the Defendant's counter – complaint is bound by the assertion in the Counter – Claim that the IHOA Defendant filed in both the joined cases.

**The determination of this issue incorporates the earlier findings of the Court relating to the issues of the Swing Set application, the denial of the Fence application, and the subsequent handling of the Palm Tree extension application, all of which occurred prior to when the Defendant filed it's counter – claim.**

**The evidence and testimony related to the other issues were directly applicable to the consideration of the counter – claim.**

**The Court found that the failure of the IHOA Defendant to act on Plaintiff's timely written "fence appeal" (given the subsequent letters reminding the IHOA defendant of that appeal) and the failure of the IHOA Defendant to abide by the published procedures it purports to govern itself under (those being the Procedures stated in Section 13.3 of it's purported Bylaws) are <u>both</u> fatal to the counter – claim of the Defendants even without having to determine whether what was built was a fence or wall.**

**Also fatal in and of itself was the deletion, years ago, of the requirement to apply to the ARB for any property modification and the deletion of specific controls on fences and walls in the covenants. The Court also determined that the IHOA defendant could not extend or impose additional restrictions on the free use of property through it's Bylaws or rules, finding that the "ARB Guidelines" are not enforceable restrictions on the use of property.**

**At trial the Court noted the uncontroverted testimony regarding the harm that Plaintiff's neighbor, Jay Cartman, was doing to Plaintiff's irrigation system, the need for Plaintiff to take some action to control the situation, and the compounding of the problem that the IHOA's decision made which exposed Plaintiff's property to further damage by Cartman.**

**The Court has found that through the preponderance of the evidence the Plaintiff has proved that there are sufficient facts and that there exists a basis in law for the Court to enter the following relief.**

**(1) Denial with prejudice of each and every counter - claim of the Defendants.**

**(2) A finding that the Defendants IHOA and KA Diehl acted maliciously, purposely, and without authority to interfere with Plaintiff's lawful use of property.**

**(3) A finding that the Defendants, both the IHOA and KA Diehl, acted**

fraudulently towards Plaintiff and knowingly violated the rules of procedure they stated were applicable to their actions.

(4) A finding that the IHOA Defendant and it's Counsel of Record acted in violation of the South Carolina Frivolous Civil Procedures Act, through the filing of the Counter – Claims against the Plaintiff and in the defense raised in this case on behalf of the IHOA Defendant relating to the "Fence and Wall" application..

(5) The Court enters the following sanctions against the IHOA Defendant and it's counsel for violation of the South Carolina Frivolous Civil Proceedings Act:

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The Court was last asked to deal with allegations that all three Defendants acted in concert and conspired to defame Plaintiff with the intention of injuring his reputation in the community and that they did in fact defame Plaintiff and injure his reputation in the community.

The Court carefully considered the facts averred in Plaintiff's Complaint, specifically including the retelling of the injurious speech relating to conduct towards children, the exhibits presented to the Court at trial, to include supplemental exhibits entered during the course of the trial, the deposition and court testimony of the witnesses, and law applicable to the case.

The Court finds that the statements of Defense Witness Sullivan that the intent of the Defendants was to inform the home owners about the case is self serving and more likely than not untrue. The uncontroverted "screen shot" of the IHOA web site proves that because the Defendants did not post the Complaint or the Answer, nor the Amendments to the Complaint and to the Answers, is conclusive that the intent of the Defendants was to defame the Plaintiff.

The uncontroverted testimony of all witnesses who testified on the matter was that the Defendants all acted with reckless disregard for the truth and for the injury they might be causing to Plaintiff's reputation. The burden in such a matter is on the Defendant to prove the truth of what they say and at trial Defense Counsel offered nothing in rebuttal.

**At trial the Plaintiff proved the elements of Defamation:**

**1. That the Defendants communicated a defamatory statement(s).**

**2. That the statement(s) were communicated to at least one third party.**

**3. That the communication was about the Plaintiff and the recipients could identify the statements as relating to Plaintiff.**

**4. That Plaintiff's reputation or standing in the community was injured by the communication (s).**

**The Court finds that each letter and each email is a separate publication.**

**The Court finds that the retelling of an allegation that an individual acted improperly with regard to a child is defamatory per se.**

**The Court finds that telling another that the Plaintiff had been terminated for cause from a job with a federal agency is defamatory per se because to do so would require a finding of fact by the agency that a federal rule or law had been so badly violated that the only recourse for the government was to terminate the employee.**

**The Court found that William Fletcher held a capacity as an officer or employee of the Defendant IHOA when he is reported to have made a defamatory comment about Plaintiff to Mr. Louis Astorino, and that such a statement by Fletcher is a statement against interest and an excited utterance.**

**The Court found that the various e-mails entered into evidence by Plaintiff which were written after the defamatory publications by the defendants about Plaintiff is conclusive evidence to damage to consequential Plaintiff's reputation.**

**The Court finds that the testimony of Sullivan, a member of the board of directors of the IHOA at the time, that the IHOA "pushed" individuals who became home owners after the original publication to the IHOA's web site where the identical material was posted so that they could, to paraphrase Sullivan, "know the facts about Jarmuth", was particularly probative about the intentions of the Defendants. Also probative was the testimony by Sullivan that prior to the publication by the Defendants the Plaintiff was largely unknown in the community.**

**The Plaintiff produced evidence that was provided him by the Defendant or was collected by subpoena or through Freedom Of Information Act to the United**

States Post Office, which was uncontroverted, that the number of defamatory mailings made by the Defendants was six hundred and forty six (646) and the number of successful emails made by Defendant KA Diehl's employee Julie Case was three hundred and fifty four (354). There was in addition the publication through the IHOA web site created and hosted by defendant KA Diehl and the defamatory statement by William Fletcher. All told Plaintiff proved that there were at least one thousand one hundred and one defamatory publications. This was uncontroverted at trial.

The burden of proving the material to be true fell on the Defendant. The Defendant took no action to prove the truth of the matter.

The only assertion of Defense witnesses regarding reckless disregard, which is a compounding factor in damages and not a controlling factor in determining defamation, was that the defendants had reason to believe that the source of the material they sued was credible which is not an admissible defense to defamation.

At trial Plaintiff demonstrated that the "List of Cases" was in fact an editorial creation of or for the Defendants and it was not, per se, a direct quote from sources. At trial Plaintiff showed that alterations, omissions, or outright fabrications had been made which were clearly intended to enhance or be in itself a defamatory message relating to Plaintiff.

At trial Plaintiff stepped through many of the items in the "List of Cases" and demonstrated either the outright falsehood or the distortions or omissions which more likely than not were taken by the Court as not being accidental and as contributing to the overall defamatory message.

In Evaluating the List of Cases the Court finds that the list should be taken as a whole and that taken as a whole it clearly sends a message that is injurious to Plaintiff's reputation to third parties and that the overall message is untrue as well as many of the material particulars.

Through the testimony of witnesses Plaintiff demonstrated that in addition to the defamatory publications, the Defendants took overt action to socially isolate Plaintiff from the community and to punish those who were found to socialize Plaintiff. This was probative to identifying the intent of the Defendants.

**The Court took note of the testimony by Sullivan that the Defendants have continued through the present to publish the defamatory material on their web site and that although other persons and entities have sued the IHOA Defendant, only the Plaintiff has been singled out for publication of material other than actual pleadings related to current cases involving the IHOA Defendant. Sullivan also testified that she and the board were aware that Plaintiff is a foster parent, and the Court finds that the accusations published by the Defendants have an especially damaging potential to foster parents who are licensed by the state. The continued publication coupled with the knowledge of this dimension is probative to the court of a continuing malicious intent.**

**The Court finds that in defamatory publications which involve tortuous conduct with children and violations of the law resulting in termination of employment, direct damages are implied and need not be proven and it is common for large compensatory and punitive amounts to be awarded for a single defamatory publication. The Court is presented with a situation where just as grievous a defamation was repeated over one thousand times and finds that the number of publications does not justify a reduction in the damages properly awarded for a single such publication.**

**The Court makes the following additional findings of fact, conclusions of law, and determinations as to appropriate relief:**

**1. The Plaintiff has proven by the preponderance of the evidence that he has satisfied all elements of proof relating to Defamation.**

**2. The defamatory material was sent by US mail to 646 recipients. This is 646 separate defamation publications.**

**3. The defamatory material was emailed successfully to 354 recipients which email redirected each one to the same material as in the postage mailing, at Defendants' web site – as if this was part of each email.**

**4. In addition, the defamatory material was and still is posted on the Defendants' web site to which Sullivan testified the HOA 'pushes" new home owners so they can see the same material – and learn about Plaintiff.**

**5. The allegation that Plaintiff was fired from the FBI for cause is defamatory**

per se.

6. The republication of accusations that Plaintiff had engaged in prohibited conduct with a minor is defamatory per se.

7. The Court finds that an appropriate award for each publication is $ 1,000 per publication. The Court finds that there have been at least six hundred forty six plus three hundred fifty four plus one ( 646 + 354 + 1) publication, and awards direct damages for one thousand one (1001) defamations at One Thousand Dollars each ( $ 1,000), a total award of $ 1,001,000 (one million, one thousand dollars) as a judgment against all defendants, individually and collectively.

8. The Court further orders that

(1) the Defendants immediately remove all material related to Plaintiff from any web site under their ownership, access or control; and

(2) the Defendants send a letter of apology for their collective conduct towards Plaintiff to every individual to whom they emailed or mailed the material relating to Plaintiff.

_____ _____

Enter Special Referee by Order of the Court

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| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc., )<br>Rosemary Toth, )<br>and K.A. Diehl & Associates, Inc. )<br>)<br>Defendants. ) | **FINAL ORDER DISMISSING PLAINTIFF'S CLAIMS AND AWARDING JUDGMENT AGAINST THE PLAINTIFF IN THE AMOUNT OF $7,326.00 AND GRANTING INJUNCTIVE RELIEF** |
| ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc. )<br>)<br>Defendant. ) | |

The above entitled actions were referred to the undersigned, as Special Referee, by Consent Order filed with the Clerk of Court's office on June 15, 2012. The Parties agreed that this referral to the undersigned is a referral with finality with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. The trial was held before the undersigned on August 8, 9, and 10, 2012. In accordance with Rule 52, South Carolina Rules of Civil Procedure, the following are my Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. The Plaintiff became a property owner in the International Club subdivision (hereinafter known as the "Community"), when he purchased a home in the Pebble Creek subdivision by Deed dated October 23, 2006.

2. The Community, since it is located in Horry County, is subject to the Horry County zoning ordinances. From the evidence introduced at trial, it appears that this Community was approved as a planned unit development ("PUD") by Horry County Council in the late 1990's.

3. The Community is a residential community consisting of over 670 single family and multi-family units located off of Highway 707 in Horry County approximately 10 miles south of Myrtle Beach. In addition, situated within the Community is the International Club Golf Course (hereinafter "Golf Course"). This Golf Course is privately owned and open to public play.

4. According to the plats introduced as exhibits and the Declaration of Covenants and Restrictions recorded in Deed Book 2117 Page 1353 in Horry County Registar of Deeds Office on February 8, 1999 (hereinafter "Declaration"), the Community currently encompasses over 300 acres.

5. Initially, this Community was named Murrells Inlet Golf Plantation but its name was changed in the first amendment to the Declaration filed in Deed Book 2258 at Page 1453 in the Horry County Registrar of Deeds Office on May 9, 2000 ("First Amendment").

6. The Declaration and the First Amendment for the Community was recorded by Plantation A.D., LLC, the original Developer and Declarant. The Declaration sets forth the real property subject to the restrictive covenants, additional real property that may be added, criteria

for governance, provisions relating to the creation of a homeowners association and an Architectural Review Board (hereinafter "ARB"), and other related provisions. The Developer attached to the Declaration as Exhibit "C" the Bylaws for the homeowners association. The Bylaws were also incorporated into the Declaration by reference pursuant to Section 1.5 of the Declaration. These are the only Bylaws that the Defendant HOA has utilized since its incorporation.

7. Plantation A.D., LLC, as well as its successors and assigns, were defined as the Declarant in the Declaration. Plantation A.D., LLC added acreage to the Community by way of amendments to the Declaration. In 2003, the developer rights were assigned to D.R. Horton, Inc.

8. The Declaration was amended five times and the following are the amendments:

- First Amendment, May 9, 2000: This Amendment changed the name of the Community to "International Club", added the property that was developed as the Villas Horizontal Property Regime; however no property description was attached to this Amendment. With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration.
- Second Amendment, April 25, 2003: This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community. Thus, as of April 25, 2003, the Developer was D.R. Horton.
- Third Amendment, March 26, 2004: This Amendment added approximately 100 acres for the developments known as The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Declaration regarding capital contributions from purchasers.
- Fourth Amendment, December 23, 2004: This Amendment resolved the mistake in the first amendment by attaching the property description for the Villas Horizontal Property Regime. It also required a $150.00 contribution from each multi-family owner for road maintenance.
- Fifth Amendment, June 20, 2008: This Amendment added 14.10 acres for the development of a multi-family phase. This property was also subjected to the Declaration pursuant to Exhibit "A" of the governing documents. The development has not been constructed.

9. The Defendant homeowners association, the International Club Home Owners Association (hereinafter "Defendant HOA"), was incorporated as a South Carolina nonprofit corporation on March 1, 2001. Its status with the South Carolina Secretary of State has not changed since its incorporation.

10. Until 2007, the Defendant HOA was controlled by the Developer. In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowners. Since September 2007, the Defendant HOA has held annual elections for Directors. According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected.

11. The Defendant HOA contracts for cable television services and garbage collection services for the single family owners in the Community. By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection. The cable television contract is dated October 30, 2003; this contract is a bulk services contract providing cable, at reduced rates, to the Defendant HOA members. According to the testimony of Denise Ambuhl, a sales representative of HTC, some single family homeowners in the International Club contract for video services through other providers including, however they have the option of utilizing HTC's cable services.

12. The streets and the roads in the Community were initially owned by the Developer. D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006. Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are

maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

13. After D.R. Horton assumed the rights of the Declarant and Developer, it entered into a Developer's Agreement on May 16, 2003 with the parties being D.R. Horton and Sunbelt Associates, LLC (hereinafter "Sunbelt Associates"). This agreement sets forth that D.R. Horton agrees to construct an "amenities center" and that "the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..." Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the Agreement with the monies being for the construction of an amenity center (hereinafter "Amenity Center").

14. On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with the parties being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use its turbine pumps and ponds to irrigate the Community's Common Areas. As consideration, Defendant HOA forgave unpaid assessments before December 31, 2003 from the Golf Course owner and discounted future HOA assessments due from the Golf Course owner through 2014.

15. In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community. These properties, as well as other areas in the Community, are landscaped by the Defendant HOA. The Defendant HOA irrigates these Common Areas with water provided by the Golf Course. If the Defendant HOA did not have rights to the Golf

Course water, it would have to construct, and maintain, 2 deep water wells with the necessary pumps and the requisite piping. According to Chris Sullivan, an irrigation contractor, the cost for the installation of the 2 deep water wells is approximately $34,000.00; however, he testified that the cost for the installation of the piping was unknown due to the probable need to install under some of the roads.

16. The Community has an Amenity Center consisting of a clubhouse, swimming pool, and 2 adjacent parking lots. The Amenity Center property and 1 parking lot is owned by the Defendant HOA for it received a Deed from Plantation Golf A.D., LLC recorded on August 22, 2002. The second Amenity Center parking lot, previously owned by the Golf Course, was deeded to the Defendant HOA by deed recorded on August 4, 2004.

17. The Amenity Center is maintained by the Defendant HOA for its members who have a home in a single family subdivision or who live in a multi-family development that does not have separate amenity facilities. According to Section 6.5 of the Declaration, members in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA. As a result, the Defendant HOA does not utilize assessments paid by members living in such a multi-family development for expenses relating to the Amenity Center.

18. One neighborhood in the Community is a development known as the Glens. The Glens is a townhome community. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as paid the assessments for use of the Amenity Center, because the Glens does not have a separate amenity facility.

19. The Plaintiff has utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012.

20. Defendant K.A. Diehl is the manager for the Defendant HOA. Since the early 2000's, it has served the Community in this capacity. It contracts with the Defendant HOA, and since January 1, 2008, this contract has been renewed upon the expiration of the previous contract.

21. Plaintiff filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. Shortly after service of the Complaint on the Defendant HOA, the Defendant HOA's Board of Directors met with the Defendant HOA's attorney, Ms. Golding. According to Maureen Sullivan, a member of the Board of Directors, the Board requested that Ms. Golding prepare a letter regarding the Plaintiff's claims that included information that could be provided to the Community members. On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Defendant HOA's position as to the various claims asserted by the Plaintiff as well as providing information as to Plaintiff's involvement in previous litigation. A list setting forth cases that the Plaintiff was a party to was included, as well as published Court decisions. The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members.

22. Also, after commencement of this legal action, Plaintiff directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency status. This request was denied by the Defendant HOA's attorney due to the Plaintiff seeking email addresses, phone numbers and information regarding a member's

payment of assessment as well as Plaintiff's failure to set forth a good faith basis for requesting the list. Further, the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners.

23. On April 20, 2010, the Defendant Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). As consideration for this easement, the Defendant HOA received $83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation agreement with the Defendant HOA.

24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members, for each member received $75.00. The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010.

25. The Declaration required the formation and existence of an ARB. Beginning in the early 2000's, the ARB members were appointed by the Defendant HOA Board of Directors. The Declaration specifically requires that an ARB exist with the authority to approve or disapprove "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, ... vegetation cover, landscaping, grading, filling, or any other item ... upon any portion ..." of the Community. According to K.A. Diehl's representative Beckie Abel, over the years the Community's ARB has processed hundreds of applications that it has received from Community homeowners.

26. Since 2006, the Plaintiff submitted applications to the ARB for a variety of matters. He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set to be installed on the side of Plaintiff's home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission when it issued its determination of no reasonable cause on December 11, 2009.

27. In the fall of 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/stone addition to his yard along the property line. The Defendant ARB issued a Notice Violation requiring Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. The Defendant ARB approved the request for the flower bed and edging in the County easement near a power box as long as the Plaintiff had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation. The Plaintiff, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess $50.00. He further stated that he disputed the necessity of any appeal.

28. The Plaintiff has refused to remove the brick foundation as required by the Defendant ARB, and as a result, he is being fined $100.00 a month. The Plaintiff has refused to

pay the monthly fine, and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00.

29. In February 2012, the Plaintiff applied to the Defendant ARB for a landscape modification. By letter dated March 16, 2012, the ARB informed Plaintiff that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. The letter further stated that his account balance as of the date of the letter was $1,735.00.

30. The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys' fees to seek Plaintiff's compliance with the Declaration.

## CONCLUSIONS OF LAW

1. **The Defendant HOA is the Proper Homeowners Association to Exercise the Powers in the Declaration.**

The Declaration provides that there should exist a non-profit corporation for the purpose of exercising the functions set forth in the Declaration and the attached Bylaws. The Declaration identified the association as the "Murrells Inlet Golf Plantation, Inc.". This name was changed by the First Amendment, recorded May 9, 2000, with the name change being to the International Club. On March 1, 2001, the Articles of Incorporation for the Defendant HOA were filed with the South Carolina Secretary of State. The evidence at trial established that the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration and the Bylaws. It is the entity that the original Developer, Plantation A.D., LLC, established in accordance with Article 3 of the Declaration. It is the entity that owns the Common Areas in the Community, that collects the assessments and fines, and that contracts with third parties for maintaining and administering the common facilities and providing

common services. Finally, it is the entity that enforces covenants and restrictions in the Declaration.

In the fall of 2010, the Plaintiff established 2 South Carolina non-profit corporations known as Murrells Inlet Golf Plantation Association, Inc. and International Club Association, Inc. According to the Plaintiff's testimony, he intends to utilize one of these non-profit corporations to manage the affairs of the Community in the event that the Defendant HOA is declared to be without the requisite authority to do so.

At trial, the Plaintiff contended that the Defendant HOA is not the entity entitled to manage the affairs of the Community, for the Defendant HOA is not named in the Declaration. I find this claim to be without merit. The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name.

It is basic law that in reading the governing documents of a non-profit organization, including any amendments, they must be read together to determine the intent of the Developer. *Palmetto Dunes Resort v Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985). Having reviewed the Declaration, together with the amendments, as well as the Defendant HOA's Articles of Incorporation, I find that the Defendant HOA is the proper legal entity designated by the Declaration.

**2. The Bylaws are Valid and Binding.**

Plaintiff argued that the Bylaws are invalid because the Bylaws were not signed, not indexed to any homeowners association, not adopted by homeowners association Board, not approved by the homeowners, were recorded a year prior to the establishment of the Defendant HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Home Owners Association". I find that Plaintiff's claims are without merit.

The Defendant HOA came into existence at the time that the Declaration was filed. The Developer, Plantation A.D., LLC, had certain rights under the Declaration with respect to the Defendant HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

The Declaration Recitals, as amended, state:

> "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

Pursuant to Section 3.1 and the Recitals, the Defendant HOA, whether it was incorporated or not, is governed by the Bylaws. According to the testimony of Jeff King, an expert lawyer in real property development, it is common practice in South Carolina to attach Bylaws as an Exhibit to property restrictive covenants, then record the property restrictive covenants with the attached Bylaws. Mr. King also testified that bylaws are often filed with the property restrictive covenants before an association is incorporated. Notably, the Bylaws are also specifically incorporated into the Declaration by Section 1.5.

Pursuant to South Carolina law "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). The Developer, as the incorporator of the Defendant HOA, adopted the Bylaws by attaching the Bylaws to the Declaration and then recording the Declaration.

The Non Profit Corporation Act ("Act") does not mandate that the Bylaws be signed or separately adopted by the members or the Board. Plaintiff relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they conflicted with the recorded Bylaws for the association and were not properly signed, acknowledged, and indexed. The Bylaws in this case are different, because they are attached as an Exhibit to the Declaration, which was properly signed, acknowledged, and recorded with the Horry County Registrar of Deeds Office.

In addition, the Defendant HOA's Bylaws have been utilized for over ten years to govern the Defendant HOA. To declare, at this late stage, that these Bylaws are invalid or ineffective when they have been relied upon by all of the homeowners within the Community would be inequitable. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 393-94, 680 S.E.2d 289, 291-92 (2009) (holding that a homeowners' justified reliance on a restrictive covenant weighs in favor of its enforcement). Plaintiff has not pointed to any provision in the Bylaws which is unreasonable (*See Armstrong v. Ledges Homeowners Association, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006) (holding that unreasonable covenants are unenforceable)), that is indefinite, or violates public policy (*Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 494 S.E.2d 465, 467 (Ct.App. 1998)(covenants are void if they are indefinite or contravene public policy), *see also, Palmetto Dunes Resort*, 287 S.C. at 6, 336 S.E.2d at 18).

**3. The Pebble Creek and Meadows' Subdivisions and the Golf Course are Subject to the Declaration.**

The Plaintiff contends that two subdivisions in the Community are not subject to the Declaration. The first is Pebble Creek subdivision where Plaintiff resides. The Pebble Creek subdivision was developed by Sunbelt Associates. Sunbelt Associates purchased the property from Plantation A.D., LLC. The Plaintiff introduced two deeds, Plaintiff's Exhibits 544 and 545,

as being deeds relating to the real property developed as Pebble Creek. The Plaintiff testified that since these two deeds are dated prior to the filing of the Declaration, the Pebble Creek subdivision is not subject to the Declaration. However, both deeds describe the real property being conveyed to Sunbelt Associates as being:

> ... conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration") ....

Even though one deed from Plantation A.D., LLC to Sunbelt Associates left blank the particular deed book and page, this does not negate the provision in the property description that real property is subject to the Declaration. Furthermore, the deed Plaintiff received for his property in Pebble Creek clearly states that it is subject to the Declaration.

I find that the Plaintiff's contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiff's contention that the Meadows development in the Community is not subject to the Declaration, this is also without merit. In the Declaration, the Developer specifically provided that additional real properties can be added to the Community and these additional properties were identified in Exhibit "B" attached to the Declaration. The Meadows is part of the real property described in Exhibit "B". The Meadows was added to the Community by the Third Amendment. Therefore, the addition of the Meadows to the Community is proper and, the Meadows is subject to the Declaration.

As to the Golf Course property, this property is subject to the Declaration, for the Golf Course is part of the property described in Exhibit "A" to the Declaration. However, the Golf Course, even though it is subject to the Declaration, is not subject to certain provisions in the Declaration for the Golf Course property is not a "Unit" as defined in Section 1.27 of the Declaration. Therefore the Golf Course owner is not an owner as defined in Section 1.22 of the

Declaration. I find that the Golf Course, even though it is subject to the Declaration, is not subject to all of the covenants in the Declaration since the definitions control the applicability of the specific covenants in the Declaration.

**4. The Golf Course is Current in the Payment of its Assessments.**

On November 20, 2003, the Golf Course entered into an agreement with D.R. Horton, the Declarant/Developer. This Golf Course Agreement provided for a reduction in the actual dollar amount that the Golf Course pays for assessments in exchange for the Defendant HOA receiving certain real properties. One of the properties that the Defendant HOA received was a parking lot for the Amenity Center. The Defendant HOA President testified that this property was needed in order to obtain a permit to construct the swimming pool. In addition, the Defendant HOA received the right to utilize the Golf Course ponds and pumping system for irrigation of the Community's Common Areas. The Defendant HOA's right to use these ponds and the pumping system is a significant consideration; otherwise, the Defendant HOA would have to construct and maintain 2 deep wells. Further, according to Chris Sullivan, an expert irrigation contractor, additional significant costs are likely for the installation of pipes.

Plaintiff argued that the Defendant HOA had the authority to access the Golf Course irrigation system, without permission, under Section 4.17 of the Declaration, and as a result, the Golf Course Agreement is not supported by consideration. Illogically, he also argued that Section 4.17 of the Declaration was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities

> and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, testified that the Defendant HOA ties into the Golf Course's irrigation system through its pump house and that the Defendant HOA could not simply pump water out of the pond to irrigate the Community. The HOA President, William Freiboth, testified that the Golf Course pump house is not located on Common Area. For these reasons, the Defendant HOA does not have the right or ability to access the irrigation system of the Golf Course without the owner's permission.

The Defendant HOA's decision to accept the parking lot property and obtain its needed water from the Golf Course in exchange for a portion of the assessments is a valid exercise of its powers. The Golf Course owner's payment of this consideration was in lieu of assessments. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." *Dockside Ass'n v. Deyton*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).

Plaintiff also contended that the Golf Course Agreement was invalid due to conflicts of interest in that the Golf Course provided membership opportunities to D.R. Horton, the developer, which, at the time, controlled the Defendant HOA. Even though the Plaintiff, not being a property owner in 2003 lacks standing, the Defendant HOA accepted the benefits, the land and the water, from the Golf Course. Furthermore, the transaction was fair to the corporation at the time that it was entered into, as the Defendant HOA received significant benefits from the agreement. If a transaction is fair, it is not voidable pursuant to the Act, SC Code Ann. § 33-31-831.

The Golf Course Agreement was entered into in 2003 and the Defendant HOA and the Golf Course have abided by this Agreement since its inception. Plaintiff became a property

owner in the Community in October 2006 but did not challenge the Golf Course Agreement until April 2009. Aside from the fact that Golf Course is not a party to this lawsuit, the undue delay on the part of the Plaintiff in challenging the validity of the Golf Course Agreement is prejudicial not only to the Golf Course but to the Defendant HOA. I find that the Plaintiff has waived his rights to assert any claims as to the Defendant HOA's compliance with the Golf Course Agreement (*Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)), and that his claims are barred by the doctrine of laches. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583, 598 (Ct.App. 1999). Plaintiff is also estopped from objecting to the agreement regarding assessments pursuant to his failure to object for almost three (3) years. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (holding that the doctrine of estoppel bars a refund of assessments to homeowner who has paid without objection for several years even if assessments were not properly voted upon). The Golf Course Agreement is an obligation of the Defendant HOA that it properly enforces and the Plaintiff's claim that the Defendant HOA does not have the authority to abide by the agreement is without merit.

Plaintiff lastly contends that the Defendant HOA did not collect funds from the Golf Course pursuant to the terms of the Golf Course Agreement. However, William Freiboth testified that the funds were collected in accordance with the agreement. As a result, I find that that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement.

**5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center.**

As set forth in the Findings of Fact, the Defendant HOA owns the real property upon which is situated the Amenity Center. The Plaintiff contends that he is not obligated to pay the assessments for the Amenity Center. This contention is without merit because, as a member of

the Community, he is subject to the Declaration. Whether he uses or does not use the Amenity Center is not a factor in determining his obligation to pay for the assessments. Restatement (Third) of Property (Servitudes) § 6.5 (T.D. No. 7, 1998) (setting forth that homeowner's obligation to pay assessments is unconditional); *see also*, S.C. Code Ann § 27-31-190 ("no co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.").

It appears that Plaintiff believes that because Section 6.5 in the Declaration states that "... both annual and special assessments must be fixed at a uniform rate for all Units ..." the Declaration is being violated by the Defendant HOA since single family owners are assessed for the Amenity Center but multi-family owners who have their own amenities are not. However, this section specifically states that multi-family Unit owners with separate recreational facilities are not assessed for the Amenity Center. I find that the Plaintiff agreed to Section 6.5 by accepting the Deed to his property and that he is obligated to pay assessments for the Amenity Center.

**6. The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable and were Properly Enforced.**

The Defendant HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the Defendant HOA "shall pay to [HTC] for the Service fee set forth in Exhibit 'B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the Community unit owners. Ms. Denise Ambuhl testified that the contract is a bulk billing arrangement. The Defendant HOA pays for the cable services with funds from the assessments. In exchange for the bulk billing arrangement, Community homeowners receive cable services at a significantly discounted rate.

The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the Defendant HOA or upgrading HTC services. In other words, as testified to by Ms. Ambuhl, the HTC contract is not an exclusivity agreement.

The Defendant HOA also entered a contract with Waste Management Industries for the collection of homeowners' garbage on May 31, 2001. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community.

a. The Services "Touch and Concern" the Land.

Plaintiff argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. *21 C.J.S. Covenants § 42.* "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore 'run with the land'." *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 358, 628 S.E.2d at 911. Assessing all owners for cable and garbage collection services lowers the cost of the services for all the units within the Community. Because the assessments have a beneficial effect on the owners' properties, the assessments touch and concern the land and are enforceable.

b. The Defendant HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Plaintiff argues that the HTC Contract is void, therefore, the cable assessment violates public policy. He relies on the following authority:

- *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007);

- *National Cable & Telecommunications Ass'n v. Federal Communications Commission and United States of America*, 567 F.3d 659 (D.C. Cir. 2009); and
- Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).

The Defendant HOA agrees that contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations. However, the HTC Contract does not contain an exclusivity clause; the contract constitutes a system of bulk billing several owners within an MDU.[1] The Community homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the Defendant HOA and by paying the assessments to the Defendant HOA. The FCC specifically addressed this issue *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):

> The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

[1] Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

Pursuant to the FCC's 2010 Order, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, Plaintiff's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is without merit.

c. The Rate Increases and Credit Allocations were Consistent with the HTC Contract.

Plaintiff also testified that the HTC contract increased the rate annually in violation of the terms of the agreement. He also attested that HTC issued credit allocations to the Defendant HOA that were misappropriated by the Board of Directors or K.A. Diehl, however, he did not present evidence that credit allocations were made. In contrast, Ms. Denise Ambuhl testified that the rate increases were consistent with the HTC contract. She also clarified that no credit allocations were made to the Defendant HOA for cable services, because that particular line of business has not been profitable since 2003. Accordingly, I find that the payments made by the Defendant HOA to HTC were proper and that no credit allocations were made to the Defendant HOA.

As noted with the Golf Course Agreement, the cable contract and the contract with Waste Management Industries have been in existence for many years. In fact, Plaintiff was a property owner in the Community for over 2 1/2 years before he challenged the validity of these agreements. Further, it should be noted that neither HTC nor Waste Management were parties in this action.

I find that the Plaintiff's arguments with respect to the HTC Cable Contract and the Waste Management Industries Contract are without merit and the Defendant HOA has the authority to enter into and enforce these Contracts. Furthermore, I find that the Defendant HOA

has the right to assess the Plaintiff and other single family homeowners for the cable services, and the Plaintiff has an obligation to pay the assessments.

7. **The Defendant HOA has the Right to Govern Parking in the Amenity Center Parking Lot and the Streets and Roads Within the Community.**

Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. Street and Amenity Center Parking.

Section 7.25 of the Declaration specifically addresses parking on the streets and Common Areas in the Community. This Section specifically authorizes the Defendant HOA to tow or remove vehicles and enforce parking as it does assessments.

The streets and the parking lots in the Community, with the exception of a small portion of International Club Boulevard and Pickering Drive, are within the property descriptions in the Declaration; therefore, they are subject to the Declaration. Subsequent to the filing of the Declaration, certain Community streets were dedicated to Horry County. Plaintiff argued that the dedication and conveyance precludes the Defendant HOA from enforcing Section 7.25. The dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the referenced plats, shows the portions of International Club Drive. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Declaration.

"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville*, 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated,

whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.*

"The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations, appropriate and specific language must be used." *Id.*, *See also*, *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.*

Additionally, the Horry County Zoning Department has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants.

I find that the streets within the Community were dedicated subject to the Declaration and all amendments thereto.

b. Declaration Section 7.25 was not Deleted.

Plaintiff argued that section 7.25 was deleted by the First Amendment due to the language that the Developer waived the architectural controls in certain provisions. I find that

the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive the applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments.

**8. Plaintiff's Request for Members' Information was Properly Denied.**

Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. In response, Defendant HOA's attorney sent a letter denying his request.

The Act sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose." *See* S.C. Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

Plaintiff failed to state a good faith basis for his request for the voting list as required by the Act. According to his email, he requested the list to "communicate with fellow homeowners" after he filed his complaint in the 2009 Lawsuit. His request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was properly denied.

Finally, the evidence established that the Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.

**9. The Sale of the Easement to Central Electric was Properly Effectuated and is Valid.**

The Defendant HOA Board of Directors has the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Declaration and Article 4, Section II of the Bylaws. Under Bylaws' Article 4, the Board exercises all rights of the Defendant HOA, unless a provision specifically requires a membership vote. Plaintiff stated that his argument that the Defendant HOA improperly transferred the easement to Central Electric is based upon Bylaws, Section 11.1. However, the vote requirement in Article 11 does not apply, because the Defendant HOA did not convey Common Area; it granted an easement over the Common Area owned by the Defendant HOA. Furthermore, condemnation was never threatened; the Board was offered a package of significant value in exchange for the easement, and it granted an easement based on that consideration.

Plaintiff further argued that the Defendant HOA should not have distributed a portion of the monies it received for the easement to members in the Community. Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of passing a benefit to the members. Plaintiff then contended that a portion of the funds for this easement was allocated for the payment of a lawsuit. The Act permits the Defendant HOA to distribute benefits to its members in conformity with its purpose. S.C. Code Ann. § 33-31-140(11)(6). The Defendant HOA had the authority to utilize the funds as it did and therefore there was nothing improper or invalid.

I find that the Defendant HOA properly granted an easement to Central Electric and it properly utilized the funds it received from Central Electric.

**10. The Defendant HOA's Committees and the ARB are Consistent with the Act.**

Plaintiff testified that the Defendant HOA is in violation of the Act, because the Board of Directors does not appoint members of the Board of Directors to serve on committees. S.C. Code Ann. Section 33-31-825 provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."

The ARB is a separate Board of the Defendant HOA created by Article VII of the Declaration. Pursuant to S.C. Code Ann. Section 33-31-801, "[t]he articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors..." Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents, and therefore, Section 33-31-825 does not apply.

Likewise the Defendant HOA's committees are not committees of the board. The committees consist of members of the Defendant HOA. Therefore, Section 33-31-825 also does not apply to Defendant HOA's committees. Furthermore, the committees are not provided separate authority to act and merely make recommendations to the Board of Directors.

I find that the Defendant HOA complied with the Act and the Declaration in establishing its committees and the ARB.

**11. The Architectural Guidelines are valid.**

Plaintiff argued that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores*, the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

Here, the Architectural Guidelines are distinguishable from the rules and regulations in *Arcadian Shores*. The Defendant HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations, to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § 7.2 of the Declaration.[2] The Architectural Guidelines do exactly that, they set specific standards for approval to create uniformity in the application of the covenants and clearly delineate the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the Defendant HOA has the authority to pass the Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Declaration, they are valid. *See Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons

[2] Section 7.2 of the Declaration sets forth: "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder."

will be upheld where the covenant or appropriate authority has provided guidelines for enforcement and expressed the purpose of the restrictive covenant).

Plaintiff also testified that the parking restrictions in ARB Guidelines invalidates the document. However, no parking restrictions are contained in the ARB Guidelines at issue in this case.

I find that the Plaintiff's claims regarding the ARB Guidelines are without merit.

**12. The ARB's denials of Plaintiff's applications for a fence and swing set and the deferral of his application are valid.**

When reviewing the actions of an ARB, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." *Id.* (citing *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an ARB's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894).

a. <u>The ARB has the authority to regulate improvements within the Community</u>.

First, the ARB had the authority to deny Plaintiff's applications for fence and a swing set. Declaration, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk...shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.....this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Section 7.4 of the Declaration specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Plaintiff argued that Sections 7.2 and 7.4 were deleted by the First Amendment to the Declaration. Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified in his deposition that the Declarant deleted Section 3.7 under the First Amendment, but not Sections 7.2 and 7.4. He further testified that the Declarant only intended to waive its rights in a limited way and that the document must be read as a whole. Jeffrey King testified, that in his expert opinion, the Amendment only waived the Declarant's rights with respect to the Villas; the Defendant HOA's rights and therefore the ARB's rights, were unaffected.

Plaintiff argued secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by previously approving various other fences. The Plaintiff pointed to privacy fences but these, if approved, are specifically permitted by the Declaration. Also the President of the Defendant HOA testified that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA. "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388 (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several

years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

Plaintiff primarily relied upon *Arcadian Shores Homeowners Ass'n*, 373 S.C. 292, 644 S.E.2d 778. The case is illustrative of the doctrine of waiver. In *Arcadian Shores*, testimony revealed that some homeowners did not submit plans or specifications for certain projects to the Association and that the Association never consistently enforced the requirement that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.*

The facts here are distinguishable from *Arcadian Shores*. Beckie Abel, the Defendant HOA's property manager, testified that the ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. Not until his applications for a swing set and subsequently the 6 foot fence were denied did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Plaintiff's waiver argument, because either the approved fences are privacy fences as permitted by the Declaration or an existing fence approved by the Developer. Additionally, Mr. Freiboth testified that front yard fences are not permitted in the Community.

As to the swing set, the argument that other swing sets have been approved also does not waive the Defendant ARB's right of denial, because swing sets cannot be built in the side yard, a

rule that has been evenly applied by the ARB. All existing swing sets are actually situated in the backyards. The ARB has consistently rejected applications for swing sets in locations other than the backyard. The South Carolina Human Affairs Commission found the same in its dismissal of the Plaintiff's claim.

b. The ARB acted reasonably and in good faith in denying Plaintiff's applications.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles is not arbitrary or capricious. *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.*

Plaintiff's proposed fence was denied because it was to be situated in the front yard and close to his property line. The swing set was denied because its proposed location was the side yard. The denials of Plaintiff's applications were reasonable and not arbitrary or capricious.

c. The deferral of Plaintiff's application was valid.

On February 27, 2012, Plaintiff submitted an application requesting the approval of two pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred his application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Plaintiff argued that the ARB's knowledge of the outstanding fines is a violation of his privacy. He also contends that the deferral is a breach of the Declaration and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are permitted. He also argued that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction by voting to defer the application and disclosing the fine amount to the other ARB members.

Plaintiff's contentions are without merit. The ARB is the body that determines the fines and their assessment. Further, this information was not disclosed to the ARB through Mr.

Roche, but instead, was provided by K.A. Diehl, the management company. Also, to comply with Plaintiff's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application.

d. The ARB complied with the Bylaws when fining Plaintiff for his violations.

Plaintiff argued that the Defendant HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Declaration, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and given a period of 10 days to remedy the violation without further sanction. If the violation is not abated within 2 months, the Defendant HOA "may" provide the Owner with a hearing. Plaintiff was informed that he could appeal but he specifically chose not to appeal. The South Carolina Affairs Commission also found that Plaintiff did not follow the appeal process with respect to the swing set application.

Additionally, Section 13.3 specifically applies to the Board of Directors, not the ARB. The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Declaration. The $50.00 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines as is the $100.00 monthly fine for Plaintiff's continuing refusal to remove the brick foundation and place sod in that area.

I find that the ARB's denials of Plaintiff's applications are proper, as are the fines and the deferment.

**13. The Glens owners are allowed access to the Amenity Center.**

Plaintiff argued that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the Amenity Center. Section 6.5 of the Declaration states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that are "multi-family" from using amenities is contingent upon the developer having provided separate amenities for that neighborhood under Section 6.5. Furthermore, according to Ms. Sullivan, the Glens homeowners have paid assessments for the Amenity Center and used the Amenity Center since 2005. The Glens do not have separate amenities, and therefore, the Glens homeowners are entitled to access to the Amenity Center.

**14. Capital contributions and initial assessments from Owners were properly collected and managed.**

Plaintiff argued that the capital contributions and initial assessments owed by International Club homeowners to the Defendant HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Third Amendment to the Declaration added the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deleted Section 3.5 of the Declaration in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the

Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the Defendant HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment added the following language: "Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. Separate Accounting for Capital Contributions.

Plaintiff argued that funds paid as capital contributions must be segregated from the operating funds. No provision in the Declaration, Bylaws, or rules and regulations for the Defendant HOA require it to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were collected, they were separately accounted for in the HOA's general ledgers. Therefore, Plaintiff's argument regarding the separation of capital contributions is without merit.

b. Equitable Ownership of Capital Contributions.

Plaintiff asserts that the unit owners equitably own the funds they pay to the Defendant HOA under sections 3.5 and 6.7 of the Declaration. The Declaration does not create equitable ownership in the capital contributions. Once the payment is made to the Defendant HOA, the Defendant owns the funds.

c. Developer's and Defendant HOA's Use of Capital Contributions to construct Infrastructure or Amenities.

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Declaration:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision...and for the improvement, protection,

> replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the Defendant HOA to improve Common Areas and Recreational Amenities. If any Developers controlled the Defendant HOA Board and decided, on behalf of the Defendant HOA, to construct improvements with the Assessments, that action is valid. However, no evidence was presented that the Developer constructed improvements with HOA funds.

d. Assessments from Single Family Owners and Multi-Family Owners.

Plaintiff argued that the capital contributions from single family owners (who can use the Amenity Center) and multi-family owners (who cannot use the Amenity Center) must be separated. The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. Nothing in the Defendant HOA's governing documents prohibits the pooling of funds, even if the use of the assessment is specified in the Fourth Amendment.

e. Collection and Use of Capital Contributions.

Plaintiff contends that the Capital Contributions were not properly collected and used by the Defendant HOA. He asserted that the funds can only be used for the maintenance of the entranceway. Further, he stated that the roads were dedicated to Horry County, and as a result, the entrance area cannot be maintained by the Defendant HOA and the capital contributions are useless. Lastly, he claimed that the contributions were collected by D.R. Horton in 2004 but they were not deposited into the Defendant HOA's account. I find the Plaintiff's claims without

merit. The evidence reflects that the entrance area is approximately 5.42 acres and owned by the Defendant HOA, and as the owner, the HOA shall maintain the property. Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures. Finally, William Freiboth testified that the capital contributions collected from 2004 through 2007 were properly accounted for by Defendant HOA.

f. Validity of the Third Amendment.

Plaintiff contends that the Third Amendment is invalid, because it was not approved by the homeowners. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;

2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;

3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and otherwise may be provided by law; and

5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

*Queen's Grant II Horizontal Property Regime*, 368 S.C. at 350, 628 S.E.2d at 907.

Pursuant to Declaration Section 8.5, the Declarant has the right to amend the Declaration without consent of any owner or mortgagee, provided that the amendment does not materially alter or change the owners' use and enjoyment of their property and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 364-65, 628 S.E.2d at 915-15 ("Sufficient Property Interests" include ownership of right of ways, easements, and land held in trust for the association).

D.R. Horton complied with the Declaration, in that the Third Amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same. 1/6 of the annual assessment is equal to 2 months of assessments. The capital contribution requirement only applies to new Owners. The existing Owners at the time of the Amendment did not have to make any additional contributions.

D.R. Horton provided notice of the amended covenants by filing the Third Amendment in the chain of title of the owners' properties. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at 367-68, at 916-17.

Plaintiff argued that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. However, the Defendant HOA's minutes reflect that counsel for the Defendant HOA advised not to collect a capital contribution in this circumstance. Furthermore, Plaintiff failed to present evidence that contributions were collected upon re-sale of Units. Therefore, I find that the Defendant HOA's enforcement of the Third Amendment was valid.

g. Validity of the Fourth Amendment.

Plaintiff argued that the Fourth Amendment is invalid, because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment. The Declaration sets forth different monetary payments for the single family owners and multi-family owners, because single family owners have access to the Amenity Center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Declaration, the contribution of $150.00 is reasonable and not in violation of public policy. It is also reasonable to conclude the developers of the multi-family parcels damaged the roads as a result of the construction and the additional assessment was to compensate the HOA for this damage.

**15. The Third Amendment's Reference to Developer Contributions is Related to the Developer Agreement.**

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Declaration. The following sentence was also added to Section 7.2:

> Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and 00/100 ($,1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

Plaintiff seeks an order as to whether builders that construct homes within the Community are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a contribution for the construction of amenities and infrastructure within the Community. This is

clear based upon the requirement that the designated builders enter a separate agreement with the Developer. The Developer Agreement is consistent with this interpretation of the Third Amendment, which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

**16. The Defendant HOA's maintenance contracts are proper.**

Plaintiff's claim that the Defendant HOA misspent funds stems from his argument that the Defendant HOA maintains property that it does not own. However, pursuant to Sections 3.1(a) of the Declaration, the Defendant HOA may maintain "all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole." Therefore, the Defendant HOA has the authority to maintain property that it does not own to ensure that the Community as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

**17. The Fairways and Enclave are not subject to the Declaration.**

The Plaintiff argued that the Fairways and Enclave are a part of the PUD and that owners living in these neighborhoods must pay assessments. The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community. These projects also utilize the same entranceway as the other neighborhoods within the International Club and the County dedicated roads. However, I find that the properties that constitute the Fairways HPR and Enclave are not subject to the Declaration, and therefore, the Defendant HOA cannot collect assessments from owners in these neighborhoods.

**18. The Highway 17 Connector Association Covenants are valid and the Defendant HOA is obligated to collect the assessments.**

Plaintiff challenged the validity of the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads. The purpose of the Connector Road Declaration, as stated in its whereas clauses, is to provide landscaping along the connector road and to maintain drainage and provide signage. The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Connector Road Declaration and it includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. Since Plantation A.D., LLC agreed to the Connector Road Declaration and it was the property owner at the time, the property now being the Community is subject to the Connector Road Declaration. Therefore, the Connector Road Declaration is valid.

In the Connector Road Declaration, Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth: "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder." Therefore, the Defendant HOA has the obligation to collect assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

**19. The Plaintiff's Defamation Claim is Without Merit.**

During the trial the Plaintiff represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory. His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, an attached list of cases, and reported decisions. Since Plaintiff testified that there was nothing defamatory in Ms. Golding's letter, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that the letter was defamatory.

a. The Defense of Absolute Privilege Bars Plaintiff's Claims.

Defamatory statements made during the course of a judicial proceeding are absolutely privileged. *See Redfearn v. Pusser,* 276 S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity. *Texas Co. v. C. W. Brewer & Co.,* 180 S. C. 325, 185 S. E. 623 (1936). Moreover, the privilege extends to communication that are preliminary to the judicial proceedings. *Crowell v. Herring,* 301 S. C. 424, 392 S. E. 2d 464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings. *Id.* It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. 325, 185 S.E. 623.

Ms. Golding's letter was prepared as a result of Plaintiff's lawsuit and provided to the Defendant HOA Board of Directors. The letter was disseminated to the Community members to provide information regarding the lawsuit. This communication is an utterance arising out of a

judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

b. The Defendants' statements are privileged.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

The Defendant HOA notified its members regarding Plaintiff's lawsuit and his history of filing litigation pro se. The Defendant HOA had a duty to inform its members that Plaintiff has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not exceed the scope of the privilege nor provide an opinion as to the motives of Plaintiff's litigation.

**20. The Claims Against the Defendant Rosemary Toth are Without Merit.**

The Plaintiff alleged that the Defendant Rosemary Toth, former President of the Defendant HOA, defamed him, invaded his privacy, caused intentional infliction of emotional distress, violated her obligations of good faith and fair dealing, and failed to properly provide to him information. He also alleged that due to the counterclaim asserted by the Defendant HOA, the Defendant Ms. Toth violated the South Carolina Frivolous Proceedings Act.

Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

> All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence.

No evidence was presented that Ms. Toth acted improperly in any way much less acted in a wanton, willful or grossly negligent manner or that she breached any duty to the Defendant HOA or its members.

Plaintiff alleged that Ms. Toth failed to produce documents, that she entered contracts on behalf of International Club HOA that were in violation of the Declaration, she voted in favor of the Central Electric easement, she directed K.A. Diehl to mail a list of lawsuits Plaintiff has been a party to, she made representations about the ownership of the roads and parking lots that were inaccurate, she did not follow the advice of committees, and she failed to disclose the Golf Course Agreement. However, Ms. Toth's actions were consistent with the Declaration and her obligations as a Board member. Ms. Toth did not act individually; instead, all actions were authorized by the Board. The Board had the authority to reject recommendations of committees and to vote in favor of the easement. With respect to the mailing about Plaintiff, Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its intra vires action tested by the business judgment rule. *Dockside Ass'n*, 291 S.C. at 216-17, 352 S.E.2d at 715-16. Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment rule, a court will not

review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith. *Id.*

As long as Ms. Toth acted within her authority under the Declaration and no evidence of bad faith exists, her actions are protected by the business judgment rule. I find that Ms. Toth acted within her authority and in good faith, and therefore, Plaintiff's claims against Ms. Toth are without merit.

**21. The Plaintiff's Invasion of Privacy Claim is Without Merit.**

Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Meetze v. The Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the Community members was regarding public matters, lawsuits Plaintiff filed.[3] There was no exploitation of Plaintiff's personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

**22. Plaintiff's Intentional Infliction of Emotional Distress Claim is Without Merit.**

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so

[3] In fact, Plaintiff's witness Ms. Pizzi testified that the litigation in which Plaintiff was involved could be googled.

severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 160 (Ct.App. 2000).

Plaintiff's outrage claim is based upon the letter that was sent by the Defendant HOA to its members. Courts rarely grant relief under outrage claims. The Defendant HOA communicated that the Plaintiff is a litigious individual, which is true, and a fact that its members had a right to know based upon the multiple claims asserted in this lawsuit. Plaintiff's claim is without merit.

**23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.**

The Plaintiff attacked the Defendant K.A. Diehl on a number of fronts. First he testified that K.A. Diehl obtained monies from capital contributions and these monies are missing. He testified that there were no checks and balances in place to prevent any fraud and it was "more likely than not that K.A. Diehl is responsible . . . ." Then the Plaintiff attacked the practices of K.A. Diehl as a contracting agent for the Defendant HOA. He testified that K.A. Diehl's practices were illegal and in violation of public policy. He pointed to K.A. Diehl having a vendor program. In order to qualify as an approved contractor for any one of the communities managed by K.A. Diehl, the vendor pays a fee for advertising services provided by K.A. Diehl. Plaintiff argued that K.A. Diehl's conduct amounted to a conspiracy to defraud in violation of Section 39-3-140 of the Code of Laws of the State of South Carolina. Aside from the fact that the Plaintiff does not have standing with respect to K.A. Diehl's contracts with third parties, K.A. Diehl's actions in no way constitute a conspiracy to defraud. Nothing in the evidence shows that K.A. Diehl attempted to limit competition in its trade. Furthermore, there was no evidence that the Defendant HOA utilized K.A. Diehl's preferred vendor program.

Plaintiff also testified that K.A. Diehl failed to perform its duty under the Act and the Defendant HOA Bylaws. He testified that when he requested the membership list, K.A. Diehl refused to provide it; however, Plaintiff's request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiff's request was denied due to improperly requesting personal information. Further, she testified that the list was available on the Defendant HOA's website which the Plaintiff could easily access. Lastly, Plaintiff was provided a members' directory on at least one previous occasion.

Plaintiff also testified that he did not receive the Defendant HOA publication known as "Friday Facts". However, the Plaintiff, on cross-examination, admitted that he refused to access the Defendant HOA website for he did not want to disclose his email address and therefore he does not receive Friday Facts. The evidence was abundantly clear that membership lists were available to the Plaintiff on the Defendant HOA website which is a restricted website for the Community members.

**24. Plaintiff is indebted to the Defendant HOA in the amount of $7,326.00.**

Due to the Plaintiff's contesting the enforceability of the Declaration, including the Bylaws, the Defendant HOA paid $5,000.00 to the McNair Law Firm. Declaration Section 13.4, specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred by the Defendant HOA.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Seabrook Island Property Owners Assoc. v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 569, 629

S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 375, 628 S.E.2d at 920.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Menne*, 368 S.C. at 569, 629 S.E.2d at 697.

Clearly, the $5,000.00 that the Defendant HOA seeks to recovery from the Plaintiff is reasonable. This action has lasted over 3 years and much discovery has taken place. The trial lasted 3 full days with court starting each day at 9:00 a.m. and ending each day between 5:00 to 6:00 p.m. The issues raised by the Plaintiff were numerous. I conclude that Plaintiff should pay the Defendant HOA the sum of $5,000.00.

As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

**25. Plaintiff must remove the brick foundation.**

Since the Plaintiff has intentionally disregarded the ARB's directive to remove the brick foundation, he is hereby ordered to remove the brick foundation and replace with sod within fifteen (15) days from the date of this Order.

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED, and DECREED**:

(a) All Plaintiff's claims against the Defendants are dismissed with prejudice;

(b) The Plaintiff is directed to remove, within fifteen (15) days from the date of this Final Order, such date being set forth below, the brick foundation, and all parts thereof, which was directed to be removed by the Architectural Review Board and to cover the ground area with sod;

(c) The Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: _____

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| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc., )<br>Rosemary Toth, )<br>and K.A. Diehl & Associates, Inc. )<br>)<br>Defendants. ) | **FINAL ORDER DISMISSING PLAINTIFF'S CLAIMS AND AWARDING JUDGMENT AGAINST THE PLAINTIFF IN THE AMOUNT OF $7,326.00 AND GRANTING INJUNCTIVE RELIEF** |
| ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc. )<br>)<br>Defendant. ) | |

The above entitled actions were referred to the undersigned, as Special Referee, by Consent Order filed with the Clerk of Court's office on June 15, 2012. The Parties agreed that this referral to the undersigned is a referral with finality with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. The trial was held before the undersigned on August 8, 9, and 10, 2012. In accordance with Rule 52, South Carolina Rules of Civil Procedure, the following are my Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. The Plaintiff became a property owner in the International Club subdivision (hereinafter known as the "Community"), when he purchased a home in the Pebble Creek subdivision by Deed dated October 23, 2006.

2. The Community, since it is located in Horry County, is subject to the Horry County zoning ordinances. From the evidence introduced at trial, it appears that this Community was approved as a planned unit development ("PUD") by Horry County Council in the late 1990's.

3. The Community is a residential community consisting of over 670 single family and multi-family units located off of Highway 707 in Horry County approximately 10 miles south of Myrtle Beach. In addition, situated within the Community is the International Club Golf Course (hereinafter "Golf Course"). This Golf Course is privately owned and open to public play.

4. According to the plats introduced as exhibits and the Declaration of Covenants and Restrictions recorded in Deed Book 2117 Page 1353 in Horry County Registar of Deeds Office on February 8, 1999 (hereinafter "Declaration"), the Community currently encompasses over 300 acres.

5. Initially, this Community was named Murrells Inlet Golf Plantation but its name was changed in the first amendment to the Declaration filed in Deed Book 2258 at Page 1453 in the Horry County Registrar of Deeds Office on May 9, 2000 ("First Amendment").

6. The Declaration and the First Amendment for the Community was recorded by Plantation A.D., LLC, the original Developer and Declarant. The Declaration sets forth the real property subject to the restrictive covenants, additional real property that may be added, criteria

for governance, provisions relating to the creation of a homeowners association and an Architectural Review Board (hereinafter "ARB"), and other related provisions. The Developer attached to the Declaration as Exhibit "C" the Bylaws for the homeowners association. The Bylaws were also incorporated into the Declaration by reference pursuant to Section 1.5 of the Declaration. These are the only Bylaws that the Defendant HOA has utilized since its incorporation.

7. Plantation A.D., LLC, as well as its successors and assigns, were defined as the Declarant in the Declaration. Plantation A.D., LLC added acreage to the Community by way of amendments to the Declaration. In 2003, the developer rights were assigned to D.R. Horton, Inc.

8. The Declaration was amended five times and the following are the amendments:

- First Amendment, May 9, 2000: This Amendment changed the name of the Community to "International Club", added the property that was developed as the Villas Horizontal Property Regime; however no property description was attached to this Amendment. With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration.
- Second Amendment, April 25, 2003: This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community. Thus, as of April 25, 2003, the Developer was D.R. Horton.
- Third Amendment, March 26, 2004: This Amendment added approximately 100 acres for the developments known as The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Declaration regarding capital contributions from purchasers.
- Fourth Amendment, December 23, 2004: This Amendment resolved the mistake in the first amendment by attaching the property description for the Villas Horizontal Property Regime. It also required a $150.00 contribution from each multi-family owner for road maintenance.
- Fifth Amendment, June 20, 2008: This Amendment added 14.10 acres for the development of a multi-family phase. This property was also subjected to the Declaration pursuant to Exhibit "A" of the governing documents. The development has not been constructed.

9. The Defendant homeowners association, the International Club Home Owners Association (hereinafter "Defendant HOA"), was incorporated as a South Carolina nonprofit corporation on March 1, 2001. Its status with the South Carolina Secretary of State has not changed since its incorporation.

10. Until 2007, the Defendant HOA was controlled by the Developer. In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowners. Since September 2007, the Defendant HOA has held annual elections for Directors. According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected.

11. The Defendant HOA contracts for cable television services and garbage collection services for the single family owners in the Community. By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection. The cable television contract is dated October 30, 2003; this contract is a bulk services contract providing cable, at reduced rates, to the Defendant HOA members. According to the testimony of Denise Ambuhl, a sales representative of HTC, some single family homeowners in the International Club contract for video services through other providers including, however they have the option of utilizing HTC's cable services.

12. The streets and the roads in the Community were initially owned by the Developer. D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006. Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are

maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

13. After D.R. Horton assumed the rights of the Declarant and Developer, it entered into a Developer's Agreement on May 16, 2003 with the parties being D.R. Horton and Sunbelt Associates, LLC (hereinafter "Sunbelt Associates"). This agreement sets forth that D.R. Horton agrees to construct an "amenities center" and that "the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..." Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the Agreement with the monies being for the construction of an amenity center (hereinafter "Amenity Center").

14. On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with the parties being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use its turbine pumps and ponds to irrigate the Community's Common Areas. As consideration, Defendant HOA forgave unpaid assessments before December 31, 2003 from the Golf Course owner and discounted future HOA assessments due from the Golf Course owner through 2014.

15. In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community. These properties, as well as other areas in the Community, are landscaped by the Defendant HOA. The Defendant HOA irrigates these Common Areas with water provided by the Golf Course. If the Defendant HOA did not have rights to the Golf

Course water, it would have to construct, and maintain, 2 deep water wells with the necessary pumps and the requisite piping. According to Chris Sullivan, an irrigation contractor, the cost for the installation of the 2 deep water wells is approximately $34,000.00; however, he testified that the cost for the installation of the piping was unknown due to the probable need to install under some of the roads.

16. The Community has an Amenity Center consisting of a clubhouse, swimming pool, and 2 adjacent parking lots. The Amenity Center property and 1 parking lot is owned by the Defendant HOA for it received a Deed from Plantation Golf A.D., LLC recorded on August 22, 2002. The second Amenity Center parking lot, previously owned by the Golf Course, was deeded to the Defendant HOA by deed recorded on August 4, 2004.

17. The Amenity Center is maintained by the Defendant HOA for its members who have a home in a single family subdivision or who live in a multi-family development that does not have separate amenity facilities. According to Section 6.5 of the Declaration, members in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA. As a result, the Defendant HOA does not utilize assessments paid by members living in such a multi-family development for expenses relating to the Amenity Center.

18. One neighborhood in the Community is a development known as the Glens. The Glens is a townhome community. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as paid the assessments for use of the Amenity Center, because the Glens does not have a separate amenity facility.

19. The Plaintiff has utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012.

20. Defendant K.A. Diehl is the manager for the Defendant HOA. Since the early 2000's, it has served the Community in this capacity. It contracts with the Defendant HOA, and since January 1, 2008, this contract has been renewed upon the expiration of the previous contract.

21. Plaintiff filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. Shortly after service of the Complaint on the Defendant HOA, the Defendant HOA's Board of Directors met with the Defendant HOA's attorney, Ms. Golding. According to Maureen Sullivan, a member of the Board of Directors, the Board requested that Ms. Golding prepare a letter regarding the Plaintiff's claims that included information that could be provided to the Community members. On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Defendant HOA's position as to the various claims asserted by the Plaintiff as well as providing information as to Plaintiff's involvement in previous litigation. A list setting forth cases that the Plaintiff was a party to was included, as well as published Court decisions. The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members.

22. Also, after commencement of this legal action, Plaintiff directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency status. This request was denied by the Defendant HOA's attorney due to the Plaintiff seeking email addresses, phone numbers and information regarding a member's

payment of assessment as well as Plaintiff's failure to set forth a good faith basis for requesting the list. Further, the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners.

23. On April 20, 2010, the Defendant Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). As consideration for this easement, the Defendant HOA received $83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation agreement with the Defendant HOA.

24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members, for each member received $75.00. The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010.

25. The Declaration required the formation and existence of an ARB. Beginning in the early 2000's, the ARB members were appointed by the Defendant HOA Board of Directors. The Declaration specifically requires that an ARB exist with the authority to approve or disapprove "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, ... vegetation cover, landscaping, grading, filling, or any other item ... upon any portion ..." of the Community. According to K.A. Diehl's representative Beckie Abel, over the years the Community's ARB has processed hundreds of applications that it has received from Community homeowners.

26. Since 2006, the Plaintiff submitted applications to the ARB for a variety of matters. He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set to be installed on the side of Plaintiff's home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission when it issued its determination of no reasonable cause on December 11, 2009.

27. In the fall of 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/stone addition to his yard along the property line. The Defendant ARB issued a Notice Violation requiring Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. The Defendant ARB approved the request for the flower bed and edging in the County easement near a power box as long as the Plaintiff had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation. The Plaintiff, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess $50.00. He further stated that he disputed the necessity of any appeal.

28. The Plaintiff has refused to remove the brick foundation as required by the Defendant ARB, and as a result, he is being fined $100.00 a month. The Plaintiff has refused to

pay the monthly fine, and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00.

29. In February 2012, the Plaintiff applied to the Defendant ARB for a landscape modification. By letter dated March 16, 2012, the ARB informed Plaintiff that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. The letter further stated that his account balance as of the date of the letter was $1,735.00.

30. The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys' fees to seek Plaintiff's compliance with the Declaration.

## CONCLUSIONS OF LAW

1. **The Defendant HOA is the Proper Homeowners Association to Exercise the Powers in the Declaration.**

The Declaration provides that there should exist a non-profit corporation for the purpose of exercising the functions set forth in the Declaration and the attached Bylaws. The Declaration identified the association as the "Murrells Inlet Golf Plantation, Inc.". This name was changed by the First Amendment, recorded May 9, 2000, with the name change being to the International Club. On March 1, 2001, the Articles of Incorporation for the Defendant HOA were filed with the South Carolina Secretary of State. The evidence at trial established that the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration and the Bylaws. It is the entity that the original Developer, Plantation A.D., LLC, established in accordance with Article 3 of the Declaration. It is the entity that owns the Common Areas in the Community, that collects the assessments and fines, and that contracts with third parties for maintaining and administering the common facilities and providing

common services. Finally, it is the entity that enforces covenants and restrictions in the Declaration.

In the fall of 2010, the Plaintiff established 2 South Carolina non-profit corporations known as Murrells Inlet Golf Plantation Association, Inc. and International Club Association, Inc. According to the Plaintiff's testimony, he intends to utilize one of these non-profit corporations to manage the affairs of the Community in the event that the Defendant HOA is declared to be without the requisite authority to do so.

At trial, the Plaintiff contended that the Defendant HOA is not the entity entitled to manage the affairs of the Community, for the Defendant HOA is not named in the Declaration. I find this claim to be without merit. The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name.

It is basic law that in reading the governing documents of a non-profit organization, including any amendments, they must be read together to determine the intent of the Developer. *Palmetto Dunes Resort v Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985). Having reviewed the Declaration, together with the amendments, as well as the Defendant HOA's Articles of Incorporation, I find that the Defendant HOA is the proper legal entity designated by the Declaration.

**2. The Bylaws are Valid and Binding.**

Plaintiff argued that the Bylaws are invalid because the Bylaws were not signed, not indexed to any homeowners association, not adopted by homeowners association Board, not approved by the homeowners, were recorded a year prior to the establishment of the Defendant HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Home Owners Association". I find that Plaintiff's claims are without merit.

The Defendant HOA came into existence at the time that the Declaration was filed. The Developer, Plantation A.D., LLC, had certain rights under the Declaration with respect to the Defendant HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

The Declaration Recitals, as amended, state:

> "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

Pursuant to Section 3.1 and the Recitals, the Defendant HOA, whether it was incorporated or not, is governed by the Bylaws. According to the testimony of Jeff King, an expert lawyer in real property development, it is common practice in South Carolina to attach Bylaws as an Exhibit to property restrictive covenants, then record the property restrictive covenants with the attached Bylaws. Mr. King also testified that bylaws are often filed with the property restrictive covenants before an association is incorporated. Notably, the Bylaws are also specifically incorporated into the Declaration by Section 1.5.

Pursuant to South Carolina law "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). The Developer, as the incorporator of the Defendant HOA, adopted the Bylaws by attaching the Bylaws to the Declaration and then recording the Declaration.

The Non Profit Corporation Act ("Act") does not mandate that the Bylaws be signed or separately adopted by the members or the Board. Plaintiff relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they conflicted with the recorded Bylaws for the association and were not properly signed, acknowledged, and indexed. The Bylaws in this case are different, because they are attached as an Exhibit to the Declaration, which was properly signed, acknowledged, and recorded with the Horry County Registrar of Deeds Office.

In addition, the Defendant HOA's Bylaws have been utilized for over ten years to govern the Defendant HOA. To declare, at this late stage, that these Bylaws are invalid or ineffective when they have been relied upon by all of the homeowners within the Community would be inequitable. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 393-94, 680 S.E.2d 289, 291-92 (2009) (holding that a homeowners' justified reliance on a restrictive covenant weighs in favor of its enforcement). Plaintiff has not pointed to any provision in the Bylaws which is unreasonable (*See Armstrong v. Ledges Homeowners Association, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006) (holding that unreasonable covenants are unenforceable)), that is indefinite, or violates public policy (*Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 494 S.E.2d 465, 467 (Ct.App. 1998)(covenants are void if they are indefinite or contravene public policy), *see also*, *Palmetto Dunes Resort*, 287 S.C. at 6, 336 S.E.2d at 18).

**3. The Pebble Creek and Meadows' Subdivisions and the Golf Course are Subject to the Declaration.**

The Plaintiff contends that two subdivisions in the Community are not subject to the Declaration. The first is Pebble Creek subdivision where Plaintiff resides. The Pebble Creek subdivision was developed by Sunbelt Associates. Sunbelt Associates purchased the property from Plantation A.D., LLC. The Plaintiff introduced two deeds, Plaintiff's Exhibits 544 and 545,

as being deeds relating to the real property developed as Pebble Creek. The Plaintiff testified that since these two deeds are dated prior to the filing of the Declaration, the Pebble Creek subdivision is not subject to the Declaration. However, both deeds describe the real property being conveyed to Sunbelt Associates as being:

> ... conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration")
> ....

Even though one deed from Plantation A.D., LLC to Sunbelt Associates left blank the particular deed book and page, this does not negate the provision in the property description that real property is subject to the Declaration. Furthermore, the deed Plaintiff received for his property in Pebble Creek clearly states that it is subject to the Declaration.

I find that the Plaintiff's contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiff's contention that the Meadows development in the Community is not subject to the Declaration, this is also without merit. In the Declaration, the Developer specifically provided that additional real properties can be added to the Community and these additional properties were identified in Exhibit "B" attached to the Declaration. The Meadows is part of the real property described in Exhibit "B". The Meadows was added to the Community by the Third Amendment. Therefore, the addition of the Meadows to the Community is proper and, the Meadows is subject to the Declaration.

As to the Golf Course property, this property is subject to the Declaration, for the Golf Course is part of the property described in Exhibit "A" to the Declaration. However, the Golf Course, even though it is subject to the Declaration, is not subject to certain provisions in the Declaration for the Golf Course property is not a "Unit" as defined in Section 1.27 of the Declaration. Therefore the Golf Course owner is not an owner as defined in Section 1.22 of the

Declaration. I find that the Golf Course, even though it is subject to the Declaration, is not subject to all of the covenants in the Declaration since the definitions control the applicability of the specific covenants in the Declaration.

**4. The Golf Course is Current in the Payment of its Assessments.**

On November 20, 2003, the Golf Course entered into an agreement with D.R. Horton, the Declarant/Developer. This Golf Course Agreement provided for a reduction in the actual dollar amount that the Golf Course pays for assessments in exchange for the Defendant HOA receiving certain real properties. One of the properties that the Defendant HOA received was a parking lot for the Amenity Center. The Defendant HOA President testified that this property was needed in order to obtain a permit to construct the swimming pool. In addition, the Defendant HOA received the right to utilize the Golf Course ponds and pumping system for irrigation of the Community's Common Areas. The Defendant HOA's right to use these ponds and the pumping system is a significant consideration; otherwise, the Defendant HOA would have to construct and maintain 2 deep wells. Further, according to Chris Sullivan, an expert irrigation contractor, additional significant costs are likely for the installation of pipes.

Plaintiff argued that the Defendant HOA had the authority to access the Golf Course irrigation system, without permission, under Section 4.17 of the Declaration, and as a result, the Golf Course Agreement is not supported by consideration. Illogically, he also argued that Section 4.17 of the Declaration was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities

> and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, testified that the Defendant HOA ties into the Golf Course's irrigation system through its pump house and that the Defendant HOA could not simply pump water out of the pond to irrigate the Community. The HOA President, William Freiboth, testified that the Golf Course pump house is not located on Common Area. For these reasons, the Defendant HOA does not have the right or ability to access the irrigation system of the Golf Course without the owner's permission.

The Defendant HOA's decision to accept the parking lot property and obtain its needed water from the Golf Course in exchange for a portion of the assessments is a valid exercise of its powers. The Golf Course owner's payment of this consideration was in lieu of assessments. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." *Dockside Ass'n v. Deyton*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).

Plaintiff also contended that the Golf Course Agreement was invalid due to conflicts of interest in that the Golf Course provided membership opportunities to D.R. Horton, the developer, which, at the time, controlled the Defendant HOA. Even though the Plaintiff, not being a property owner in 2003 lacks standing, the Defendant HOA accepted the benefits, the land and the water, from the Golf Course. Furthermore, the transaction was fair to the corporation at the time that it was entered into, as the Defendant HOA received significant benefits from the agreement. If a transaction is fair, it is not voidable pursuant to the Act, SC Code Ann. § 33-31-831.

The Golf Course Agreement was entered into in 2003 and the Defendant HOA and the Golf Course have abided by this Agreement since its inception. Plaintiff became a property

owner in the Community in October 2006 but did not challenge the Golf Course Agreement until April 2009. Aside from the fact that Golf Course is not a party to this lawsuit, the undue delay on the part of the Plaintiff in challenging the validity of the Golf Course Agreement is prejudicial not only to the Golf Course but to the Defendant HOA. I find that the Plaintiff has waived his rights to assert any claims as to the Defendant HOA's compliance with the Golf Course Agreement (*Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)), and that his claims are barred by the doctrine of laches. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583, 598 (Ct.App. 1999). Plaintiff is also estopped from objecting to the agreement regarding assessments pursuant to his failure to object for almost three (3) years. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (holding that the doctrine of estoppel bars a refund of assessments to homeowner who has paid without objection for several years even if assessments were not properly voted upon). The Golf Course Agreement is an obligation of the Defendant HOA that it properly enforces and the Plaintiff's claim that the Defendant HOA does not have the authority to abide by the agreement is without merit.

Plaintiff lastly contends that the Defendant HOA did not collect funds from the Golf Course pursuant to the terms of the Golf Course Agreement. However, William Freiboth testified that the funds were collected in accordance with the agreement. As a result, I find that that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement.

**5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center.**

As set forth in the Findings of Fact, the Defendant HOA owns the real property upon which is situated the Amenity Center. The Plaintiff contends that he is not obligated to pay the assessments for the Amenity Center. This contention is without merit because, as a member of

the Community, he is subject to the Declaration. Whether he uses or does not use the Amenity Center is not a factor in determining his obligation to pay for the assessments. Restatement (Third) of Property (Servitudes) § 6.5 (T.D. No. 7, 1998) (setting forth that homeowner's obligation to pay assessments is unconditional); *see also*, S.C. Code Ann § 27-31-190 ("no co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.").

It appears that Plaintiff believes that because Section 6.5 in the Declaration states that "... both annual and special assessments must be fixed at a uniform rate for all Units ..." the Declaration is being violated by the Defendant HOA since single family owners are assessed for the Amenity Center but multi-family owners who have their own amenities are not. However, this section specifically states that multi-family Unit owners with separate recreational facilities are not assessed for the Amenity Center. I find that the Plaintiff agreed to Section 6.5 by accepting the Deed to his property and that he is obligated to pay assessments for the Amenity Center.

**6. The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable and were Properly Enforced.**

The Defendant HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the Defendant HOA "shall pay to [HTC] for the Service fee set forth in Exhibit 'B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the Community unit owners. Ms. Denise Ambuhl testified that the contract is a bulk billing arrangement. The Defendant HOA pays for the cable services with funds from the assessments. In exchange for the bulk billing arrangement, Community homeowners receive cable services at a significantly discounted rate.

The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the Defendant HOA or upgrading HTC services. In other words, as testified to by Ms. Ambuhl, the HTC contract is not an exclusivity agreement.

The Defendant HOA also entered a contract with Waste Management Industries for the collection of homeowners' garbage on May 31, 2001. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community.

a. The Services "Touch and Concern" the Land.

Plaintiff argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. *21 C.J.S. Covenants § 42.* "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore 'run with the land'." *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 358, 628 S.E.2d at 911. Assessing all owners for cable and garbage collection services lowers the cost of the services for all the units within the Community. Because the assessments have a beneficial effect on the owners' properties, the assessments touch and concern the land and are enforceable.

b. The Defendant HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Plaintiff argues that the HTC Contract is void, therefore, the cable assessment violates public policy. He relies on the following authority:

- *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007);

- *National Cable & Telecommunications Ass'n v. Federal Communications Commission and United States of America*, 567 F.3d 659 (D.C. Cir. 2009); and
- Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).

The Defendant HOA agrees that contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations. However, the HTC Contract does not contain an exclusivity clause; the contract constitutes a system of bulk billing several owners within an MDU.[1] The Community homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the Defendant HOA and by paying the assessments to the Defendant HOA. The FCC specifically addressed this issue *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):

> The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

[1] Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

Pursuant to the FCC's 2010 Order, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, Plaintiff's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is without merit.

c. The Rate Increases and Credit Allocations were Consistent with the HTC Contract.

Plaintiff also testified that the HTC contract increased the rate annually in violation of the terms of the agreement. He also attested that HTC issued credit allocations to the Defendant HOA that were misappropriated by the Board of Directors or K.A. Diehl, however, he did not present evidence that credit allocations were made. In contrast, Ms. Denise Ambuhl testified that the rate increases were consistent with the HTC contract. She also clarified that no credit allocations were made to the Defendant HOA for cable services, because that particular line of business has not been profitable since 2003. Accordingly, I find that the payments made by the Defendant HOA to HTC were proper and that no credit allocations were made to the Defendant HOA.

As noted with the Golf Course Agreement, the cable contract and the contract with Waste Management Industries have been in existence for many years. In fact, Plaintiff was a property owner in the Community for over 2 1/2 years before he challenged the validity of these agreements. Further, it should be noted that neither HTC nor Waste Management were parties in this action.

I find that the Plaintiff's arguments with respect to the HTC Cable Contract and the Waste Management Industries Contract are without merit and the Defendant HOA has the authority to enter into and enforce these Contracts. Furthermore, I find that the Defendant HOA

has the right to assess the Plaintiff and other single family homeowners for the cable services, and the Plaintiff has an obligation to pay the assessments.

7. **The Defendant HOA has the Right to Govern Parking in the Amenity Center Parking Lot and the Streets and Roads Within the Community.**

Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. Street and Amenity Center Parking.

Section 7.25 of the Declaration specifically addresses parking on the streets and Common Areas in the Community. This Section specifically authorizes the Defendant HOA to tow or remove vehicles and enforce parking as it does assessments.

The streets and the parking lots in the Community, with the exception of a small portion of International Club Boulevard and Pickering Drive, are within the property descriptions in the Declaration; therefore, they are subject to the Declaration. Subsequent to the filing of the Declaration, certain Community streets were dedicated to Horry County. Plaintiff argued that the dedication and conveyance precludes the Defendant HOA from enforcing Section 7.25. The dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the referenced plats, shows the portions of International Club Drive. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Declaration.

"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville*, 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated,

whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.*

"The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations, appropriate and specific language must be used." *Id.*, *See also*, *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.*

Additionally, the Horry County Zoning Department has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants.

I find that the streets within the Community were dedicated subject to the Declaration and all amendments thereto.

b. Declaration Section 7.25 was not Deleted.

Plaintiff argued that section 7.25 was deleted by the First Amendment due to the language that the Developer waived the architectural controls in certain provisions. I find that

the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive the applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments.

**8. Plaintiff's Request for Members' Information was Properly Denied.**

Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. In response, Defendant HOA's attorney sent a letter denying his request.

The Act sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose." *See* S.C. Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

Plaintiff failed to state a good faith basis for his request for the voting list as required by the Act. According to his email, he requested the list to "communicate with fellow homeowners" after he filed his complaint in the 2009 Lawsuit. His request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was properly denied.

Finally, the evidence established that the Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.

**9. The Sale of the Easement to Central Electric was Properly Effectuated and is Valid.**

The Defendant HOA Board of Directors has the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Declaration and Article 4, Section II of the Bylaws. Under Bylaws' Article 4, the Board exercises all rights of the Defendant HOA, unless a provision specifically requires a membership vote. Plaintiff stated that his argument that the Defendant HOA improperly transferred the easement to Central Electric is based upon Bylaws, Section 11.1. However, the vote requirement in Article 11 does not apply, because the Defendant HOA did not convey Common Area; it granted an easement over the Common Area owned by the Defendant HOA. Furthermore, condemnation was never threatened; the Board was offered a package of significant value in exchange for the easement, and it granted an easement based on that consideration.

Plaintiff further argued that the Defendant HOA should not have distributed a portion of the monies it received for the easement to members in the Community. Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of passing a benefit to the members. Plaintiff then contended that a portion of the funds for this easement was allocated for the payment of a lawsuit. The Act permits the Defendant HOA to distribute benefits to its members in conformity with its purpose. S.C. Code Ann. § 33-31-140(11)(6). The Defendant HOA had the authority to utilize the funds as it did and therefore there was nothing improper or invalid.

I find that the Defendant HOA properly granted an easement to Central Electric and it properly utilized the funds it received from Central Electric.

**10. The Defendant HOA's Committees and the ARB are Consistent with the Act.**

Plaintiff testified that the Defendant HOA is in violation of the Act, because the Board of Directors does not appoint members of the Board of Directors to serve on committees. S.C. Code Ann. Section 33-31-825 provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."

The ARB is a separate Board of the Defendant HOA created by Article VII of the Declaration. Pursuant to S.C. Code Ann. Section 33-31-801, "[t]he articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors..." Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents, and therefore, Section 33-31-825 does not apply.

Likewise the Defendant HOA's committees are not committees of the board. The committees consist of members of the Defendant HOA. Therefore, Section 33-31-825 also does not apply to Defendant HOA's committees. Furthermore, the committees are not provided separate authority to act and merely make recommendations to the Board of Directors.

I find that the Defendant HOA complied with the Act and the Declaration in establishing its committees and the ARB.

**11. The Architectural Guidelines are valid.**

Plaintiff argued that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores*, the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

Here, the Architectural Guidelines are distinguishable from the rules and regulations in *Arcadian Shores*. The Defendant HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations, to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § 7.2 of the Declaration.[2] The Architectural Guidelines do exactly that, they set specific standards for approval to create uniformity in the application of the covenants and clearly delineate the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the Defendant HOA has the authority to pass the Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Declaration, they are valid. *See Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons

[2] Section 7.2 of the Declaration sets forth: "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder."

will be upheld where the covenant or appropriate authority has provided guidelines for enforcement and expressed the purpose of the restrictive covenant).

Plaintiff also testified that the parking restrictions in ARB Guidelines invalidates the document. However, no parking restrictions are contained in the ARB Guidelines at issue in this case.

I find that the Plaintiff's claims regarding the ARB Guidelines are without merit.

**12. The ARB's denials of Plaintiff's applications for a fence and swing set and the deferral of his application are valid.**

When reviewing the actions of an ARB, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." *Id.* (citing *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an ARB's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894).

a. <u>The ARB has the authority to regulate improvements within the Community</u>.

First, the ARB had the authority to deny Plaintiff's applications for fence and a swing set. Declaration, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk...shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.....this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Section 7.4 of the Declaration specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Plaintiff argued that Sections 7.2 and 7.4 were deleted by the First Amendment to the Declaration. Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified in his deposition that the Declarant deleted Section 3.7 under the First Amendment, but not Sections 7.2 and 7.4. He further testified that the Declarant only intended to waive its rights in a limited way and that the document must be read as a whole. Jeffrey King testified, that in his expert opinion, the Amendment only waived the Declarant's rights with respect to the Villas; the Defendant HOA's rights and therefore the ARB's rights, were unaffected.

Plaintiff argued secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by previously approving various other fences. The Plaintiff pointed to privacy fences but these, if approved, are specifically permitted by the Declaration. Also the President of the Defendant HOA testified that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA. "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388 (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several

years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

Plaintiff primarily relied upon *Arcadian Shores Homeowners Ass'n*, 373 S.C. 292, 644 S.E.2d 778. The case is illustrative of the doctrine of waiver. In *Arcadian Shores*, testimony revealed that some homeowners did not submit plans or specifications for certain projects to the Association and that the Association never consistently enforced the requirement that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.*

The facts here are distinguishable from *Arcadian Shores*. Beckie Abel, the Defendant HOA's property manager, testified that the ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. Not until his applications for a swing set and subsequently the 6 foot fence were denied did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Plaintiff's waiver argument, because either the approved fences are privacy fences as permitted by the Declaration or an existing fence approved by the Developer. Additionally, Mr. Freiboth testified that front yard fences are not permitted in the Community.

As to the swing set, the argument that other swing sets have been approved also does not waive the Defendant ARB's right of denial, because swing sets cannot be built in the side yard, a

rule that has been evenly applied by the ARB. All existing swing sets are actually situated in the backyards. The ARB has consistently rejected applications for swing sets in locations other than the backyard. The South Carolina Human Affairs Commission found the same in its dismissal of the Plaintiff's claim.

b. The ARB acted reasonably and in good faith in denying Plaintiff's applications.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles is not arbitrary or capricious. *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.*

Plaintiff's proposed fence was denied because it was to be situated in the front yard and close to his property line. The swing set was denied because its proposed location was the side yard. The denials of Plaintiff's applications were reasonable and not arbitrary or capricious.

c. The deferral of Plaintiff's application was valid.

On February 27, 2012, Plaintiff submitted an application requesting the approval of two pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred his application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Plaintiff argued that the ARB's knowledge of the outstanding fines is a violation of his privacy. He also contends that the deferral is a breach of the Declaration and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are permitted. He also argued that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction by voting to defer the application and disclosing the fine amount to the other ARB members.

Plaintiff's contentions are without merit. The ARB is the body that determines the fines and their assessment. Further, this information was not disclosed to the ARB through Mr.

Roche, but instead, was provided by K.A. Diehl, the management company. Also, to comply with Plaintiff's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application.

d. The ARB complied with the Bylaws when fining Plaintiff for his violations.

Plaintiff argued that the Defendant HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Declaration, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and given a period of 10 days to remedy the violation without further sanction. If the violation is not abated within 2 months, the Defendant HOA "may" provide the Owner with a hearing. Plaintiff was informed that he could appeal but he specifically chose not to appeal. The South Carolina Affairs Commission also found that Plaintiff did not follow the appeal process with respect to the swing set application.

Additionally, Section 13.3 specifically applies to the Board of Directors, not the ARB. The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Declaration. The $50.00 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines as is the $100.00 monthly fine for Plaintiff's continuing refusal to remove the brick foundation and place sod in that area.

I find that the ARB's denials of Plaintiff's applications are proper, as are the fines and the deferment.

**13. The Glens owners are allowed access to the Amenity Center.**

Plaintiff argued that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the Amenity Center. Section 6.5 of the Declaration states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that are "multi-family" from using amenities is contingent upon the developer having provided separate amenities for that neighborhood under Section 6.5. Furthermore, according to Ms. Sullivan, the Glens homeowners have paid assessments for the Amenity Center and used the Amenity Center since 2005. The Glens do not have separate amenities, and therefore, the Glens homeowners are entitled to access to the Amenity Center.

**14. Capital contributions and initial assessments from Owners were properly collected and managed.**

Plaintiff argued that the capital contributions and initial assessments owed by International Club homeowners to the Defendant HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Third Amendment to the Declaration added the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deleted Section 3.5 of the Declaration in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the

Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the Defendant HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment added the following language: "Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. Separate Accounting for Capital Contributions.

Plaintiff argued that funds paid as capital contributions must be segregated from the operating funds. No provision in the Declaration, Bylaws, or rules and regulations for the Defendant HOA require it to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were collected, they were separately accounted for in the HOA's general ledgers. Therefore, Plaintiff's argument regarding the separation of capital contributions is without merit.

b. Equitable Ownership of Capital Contributions.

Plaintiff asserts that the unit owners equitably own the funds they pay to the Defendant HOA under sections 3.5 and 6.7 of the Declaration. The Declaration does not create equitable ownership in the capital contributions. Once the payment is made to the Defendant HOA, the Defendant owns the funds.

c. Developer's and Defendant HOA's Use of Capital Contributions to construct Infrastructure or Amenities.

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Declaration:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision...and for the improvement, protection,

> replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the Defendant HOA to improve Common Areas and Recreational Amenities. If any Developers controlled the Defendant HOA Board and decided, on behalf of the Defendant HOA, to construct improvements with the Assessments, that action is valid. However, no evidence was presented that the Developer constructed improvements with HOA funds.

d. Assessments from Single Family Owners and Multi-Family Owners.

Plaintiff argued that the capital contributions from single family owners (who can use the Amenity Center) and multi-family owners (who cannot use the Amenity Center) must be separated. The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. Nothing in the Defendant HOA's governing documents prohibits the pooling of funds, even if the use of the assessment is specified in the Fourth Amendment.

e. Collection and Use of Capital Contributions.

Plaintiff contends that the Capital Contributions were not properly collected and used by the Defendant HOA. He asserted that the funds can only be used for the maintenance of the entranceway. Further, he stated that the roads were dedicated to Horry County, and as a result, the entrance area cannot be maintained by the Defendant HOA and the capital contributions are useless. Lastly, he claimed that the contributions were collected by D.R. Horton in 2004 but they were not deposited into the Defendant HOA's account. I find the Plaintiff's claims without

merit. The evidence reflects that the entrance area is approximately 5.42 acres and owned by the Defendant HOA, and as the owner, the HOA shall maintain the property. Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures. Finally, William Freiboth testified that the capital contributions collected from 2004 through 2007 were properly accounted for by Defendant HOA.

f. Validity of the Third Amendment.

Plaintiff contends that the Third Amendment is invalid, because it was not approved by the homeowners. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;

2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;

3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and otherwise may be provided by law; and

5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

*Queen's Grant II Horizontal Property Regime*, 368 S.C. at 350, 628 S.E.2d at 907.

Pursuant to Declaration Section 8.5, the Declarant has the right to amend the Declaration without consent of any owner or mortgagee, provided that the amendment does not materially alter or change the owners' use and enjoyment of their property and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 364-65, 628 S.E.2d at 915-15 ("Sufficient Property Interests" include ownership of right of ways, easements, and land held in trust for the association).

D.R. Horton complied with the Declaration, in that the Third Amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same. 1/6 of the annual assessment is equal to 2 months of assessments. The capital contribution requirement only applies to new Owners. The existing Owners at the time of the Amendment did not have to make any additional contributions.

D.R. Horton provided notice of the amended covenants by filing the Third Amendment in the chain of title of the owners' properties. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at 367-68, at 916-17.

Plaintiff argued that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. However, the Defendant HOA's minutes reflect that counsel for the Defendant HOA advised not to collect a capital contribution in this circumstance. Furthermore, Plaintiff failed to present evidence that contributions were collected upon re-sale of Units. Therefore, I find that the Defendant HOA's enforcement of the Third Amendment was valid.

g. Validity of the Fourth Amendment.

Plaintiff argued that the Fourth Amendment is invalid, because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment. The Declaration sets forth different monetary payments for the single family owners and multi-family owners, because single family owners have access to the Amenity Center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Declaration, the contribution of $150.00 is reasonable and not in violation of public policy. It is also reasonable to conclude the developers of the multi-family parcels damaged the roads as a result of the construction and the additional assessment was to compensate the HOA for this damage.

**15. The Third Amendment's Reference to Developer Contributions is Related to the Developer Agreement.**

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Declaration. The following sentence was also added to Section 7.2:

> Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and 00/100 ($,1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

Plaintiff seeks an order as to whether builders that construct homes within the Community are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a contribution for the construction of amenities and infrastructure within the Community. This is

clear based upon the requirement that the designated builders enter a separate agreement with the Developer. The Developer Agreement is consistent with this interpretation of the Third Amendment, which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

**16. The Defendant HOA's maintenance contracts are proper.**

Plaintiff's claim that the Defendant HOA misspent funds stems from his argument that the Defendant HOA maintains property that it does not own. However, pursuant to Sections 3.1(a) of the Declaration, the Defendant HOA may maintain "all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole." Therefore, the Defendant HOA has the authority to maintain property that it does not own to ensure that the Community as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

**17. The Fairways and Enclave are not subject to the Declaration.**

The Plaintiff argued that the Fairways and Enclave are a part of the PUD and that owners living in these neighborhoods must pay assessments. The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community. These projects also utilize the same entranceway as the other neighborhoods within the International Club and the County dedicated roads. However, I find that the properties that constitute the Fairways HPR and Enclave are not subject to the Declaration, and therefore, the Defendant HOA cannot collect assessments from owners in these neighborhoods.

**18. The Highway 17 Connector Association Covenants are valid and the Defendant HOA is obligated to collect the assessments.**

Plaintiff challenged the validity of the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads. The purpose of the Connector Road Declaration, as stated in its whereas clauses, is to provide landscaping along the connector road and to maintain drainage and provide signage. The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Connector Road Declaration and it includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. Since Plantation A.D., LLC agreed to the Connector Road Declaration and it was the property owner at the time, the property now being the Community is subject to the Connector Road Declaration. Therefore, the Connector Road Declaration is valid.

In the Connector Road Declaration, Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth: "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder." Therefore, the Defendant HOA has the obligation to collect assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

**19. The Plaintiff's Defamation Claim is Without Merit.**

During the trial the Plaintiff represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory. His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, an attached list of cases, and reported decisions. Since Plaintiff testified that there was nothing defamatory in Ms. Golding's letter, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that the letter was defamatory.

a. The Defense of Absolute Privilege Bars Plaintiff's Claims.

Defamatory statements made during the course of a judicial proceeding are absolutely privileged. *See Redfearn v. Pusser,* 276 S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity. *Texas Co. v. C. W. Brewer & Co.,* 180 S. C. 325, 185 S. E. 623 (1936). Moreover, the privilege extends to communication that are preliminary to the judicial proceedings. *Crowell v. Herring,* 301 S. C. 424, 392 S. E. 2d 464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings. *Id.* It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. 325, 185 S.E. 623.

Ms. Golding's letter was prepared as a result of Plaintiff's lawsuit and provided to the Defendant HOA Board of Directors. The letter was disseminated to the Community members to provide information regarding the lawsuit. This communication is an utterance arising out of a

judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

b. The Defendants' statements are privileged.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

The Defendant HOA notified its members regarding Plaintiff's lawsuit and his history of filing litigation pro se. The Defendant HOA had a duty to inform its members that Plaintiff has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not exceed the scope of the privilege nor provide an opinion as to the motives of Plaintiff's litigation.

**20. The Claims Against the Defendant Rosemary Toth are Without Merit.**

The Plaintiff alleged that the Defendant Rosemary Toth, former President of the Defendant HOA, defamed him, invaded his privacy, caused intentional infliction of emotional distress, violated her obligations of good faith and fair dealing, and failed to properly provide to him information. He also alleged that due to the counterclaim asserted by the Defendant HOA, the Defendant Ms. Toth violated the South Carolina Frivolous Proceedings Act.

Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

> All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence.

No evidence was presented that Ms. Toth acted improperly in any way much less acted in a wanton, willful or grossly negligent manner or that she breached any duty to the Defendant HOA or its members.

Plaintiff alleged that Ms. Toth failed to produce documents, that she entered contracts on behalf of International Club HOA that were in violation of the Declaration, she voted in favor of the Central Electric easement, she directed K.A. Diehl to mail a list of lawsuits Plaintiff has been a party to, she made representations about the ownership of the roads and parking lots that were inaccurate, she did not follow the advice of committees, and she failed to disclose the Golf Course Agreement. However, Ms. Toth's actions were consistent with the Declaration and her obligations as a Board member. Ms. Toth did not act individually; instead, all actions were authorized by the Board. The Board had the authority to reject recommendations of committees and to vote in favor of the easement. With respect to the mailing about Plaintiff, Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its intra vires action tested by the business judgment rule. *Dockside Ass'n*, 291 S.C. at 216-17, 352 S.E.2d at 715-16. Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment rule, a court will not

review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith. *Id.*

As long as Ms. Toth acted within her authority under the Declaration and no evidence of bad faith exists, her actions are protected by the business judgment rule. I find that Ms. Toth acted within her authority and in good faith, and therefore, Plaintiff's claims against Ms. Toth are without merit.

**21. The Plaintiff's Invasion of Privacy Claim is Without Merit.**

Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Meetze v. The Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the Community members was regarding public matters, lawsuits Plaintiff filed.[3] There was no exploitation of Plaintiff's personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

**22. Plaintiff's Intentional Infliction of Emotional Distress Claim is Without Merit.**

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so

[3] In fact, Plaintiff's witness Ms. Pizzi testified that the litigation in which Plaintiff was involved could be googled.

severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 160 (Ct.App. 2000).

Plaintiff's outrage claim is based upon the letter that was sent by the Defendant HOA to its members. Courts rarely grant relief under outrage claims. The Defendant HOA communicated that the Plaintiff is a litigious individual, which is true, and a fact that its members had a right to know based upon the multiple claims asserted in this lawsuit. Plaintiff's claim is without merit.

**23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.**

The Plaintiff attacked the Defendant K.A. Diehl on a number of fronts. First he testified that K.A. Diehl obtained monies from capital contributions and these monies are missing. He testified that there were no checks and balances in place to prevent any fraud and it was "more likely than not that K.A. Diehl is responsible . . . ." Then the Plaintiff attacked the practices of K.A. Diehl as a contracting agent for the Defendant HOA. He testified that K.A. Diehl's practices were illegal and in violation of public policy. He pointed to K.A. Diehl having a vendor program. In order to qualify as an approved contractor for any one of the communities managed by K.A. Diehl, the vendor pays a fee for advertising services provided by K.A. Diehl. Plaintiff argued that K.A. Diehl's conduct amounted to a conspiracy to defraud in violation of Section 39-3-140 of the Code of Laws of the State of South Carolina. Aside from the fact that the Plaintiff does not have standing with respect to K.A. Diehl's contracts with third parties, K.A. Diehl's actions in no way constitute a conspiracy to defraud. Nothing in the evidence shows that K.A. Diehl attempted to limit competition in its trade. Furthermore, there was no evidence that the Defendant HOA utilized K.A. Diehl's preferred vendor program.

Plaintiff also testified that K.A. Diehl failed to perform its duty under the Act and the Defendant HOA Bylaws. He testified that when he requested the membership list, K.A. Diehl refused to provide it; however, Plaintiff's request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiff's request was denied due to improperly requesting personal information. Further, she testified that the list was available on the Defendant HOA's website which the Plaintiff could easily access. Lastly, Plaintiff was provided a members' directory on at least one previous occasion.

Plaintiff also testified that he did not receive the Defendant HOA publication known as "Friday Facts". However, the Plaintiff, on cross-examination, admitted that he refused to access the Defendant HOA website for he did not want to disclose his email address and therefore he does not receive Friday Facts. The evidence was abundantly clear that membership lists were available to the Plaintiff on the Defendant HOA website which is a restricted website for the Community members.

**24. Plaintiff is indebted to the Defendant HOA in the amount of $7,326.00.**

Due to the Plaintiff's contesting the enforceability of the Declaration, including the Bylaws, the Defendant HOA paid $5,000.00 to the McNair Law Firm. Declaration Section 13.4, specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred by the Defendant HOA.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Seabrook Island Property Owners Assoc. v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 569, 629

S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 375, 628 S.E.2d at 920.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Menne*, 368 S.C. at 569, 629 S.E.2d at 697.

Clearly, the $5,000.00 that the Defendant HOA seeks to recovery from the Plaintiff is reasonable. This action has lasted over 3 years and much discovery has taken place. The trial lasted 3 full days with court starting each day at 9:00 a.m. and ending each day between 5:00 to 6:00 p.m. The issues raised by the Plaintiff were numerous. I conclude that Plaintiff should pay the Defendant HOA the sum of $5,000.00.

As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

**25. Plaintiff must remove the brick foundation.**

Since the Plaintiff has intentionally disregarded the ARB's directive to remove the brick foundation, he is hereby ordered to remove the brick foundation and replace with sod within fifteen (15) days from the date of this Order.

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED, and DECREED**:

(a) All Plaintiff's claims against the Defendants are dismissed with prejudice;

(b) The Plaintiff is directed to remove, within fifteen (15) days from the date of this Final Order, such date being set forth below, the brick foundation, and all parts thereof, which was directed to be removed by the Architectural Review Board and to cover the ground area with sod;

(c) The Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: _____

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| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Ronald Jarmuth,<br>Plaintiff<br>vs.<br>The International Club<br>Homeowners Association, Inc..<br>et al<br>Defendants | ) | NO. 2009-CP-26-3596<br>CONSOLIDATED FOR TRIAL WITH<br>BELOW CASE |
| Ronald Jarmuth<br>Plaintiff<br>vs<br>The International Club<br>Homeowners Association, Inc.<br>Defendant | ) | NO. 2010-26-11320<br><br>PLAINTIFF'S CONSOLIDATED<br>POST-TRIAL MOTION<br>RULE 50, RULE 52, RULE 59, RULE 60 |

**PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION:**

**RULE 50 FOR JUDGMENT NOT WITHSTANDING THE VERDICT / JUDGMENT AS A MATTER OF LAW**
**RULE 52 FOR AMENDMENT OF FINDINGS BY THE COURT**
**RULE 59 FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT**
**RULE 60 FOR RELIEF FROM JUDGMENT**

1. Plaintiff Ronald Jarmuth, pro se, moves this court for an Order or Orders relating to this Court's Order of September 10, 2012 following a prematurely terminated trial:

   a. Granting a Judgment Not Withstanding the Verdict / Judgment as a Matter of Law (JAML) per Rule 50;

   b. Amending the Findings and Making Additional Findings of Fact and Conclusions of Law per Rule 52;

   c. Granting a New Trial or Amending Judgment per Rule 59;

   d. Granting Relief from Judgment per Rule 60.

**Major Grounds**

2. The most significant justifications for this are:

   a. Ignored Declaratory Judgment Demand – Trial is incomplete. The Court chose to refuse to make findings of fact and conclusions of law on almost every question before it for Declaratory Judgment, including refusing to interpret certain specific statutes put before it.

b. Unconstitutional preventing Plaintiff from putting on full case. The Court arbitrarily limited Plaintiff's trial presentation to two – and – one half days, of which half a day was then given to the Defense to call two of it's witnesses out of sequence in violation of the "ground rules" [1] set by Hon Chief Judge Steven John at a hearing on January 17, 2012, The Special Referee arbitrarily ordered at trial that, despite the fact that Plaintiff was not presenting inadmissible, or superfluous material or wasting the court's time in any way, he must complete his case by noon the third day. Arrangements had been made with the Clerk of Court for the court room to be available on Saturday and Sunday, with court officers present, and the Special Referee had agreed to hold court Saturday and Sunday if necessary. The Special Referee's explanation was that he had made arrangement for personal activities which he intended to keep. The judicial officer put his personal agenda ahead of his judicial duties. The Court's June 13, 2012 Order of Reference stated that the trial "shall continue until concluded" and did not limit the length of trial. As a result Plaintiff was unable to call Defendant Rosemary Toth, who was in the courtroom and who had been subpoenaed to testify at trial, and Plaintiff's subpoenaed witness Charles Ferrera. It also meant that Plaintiff had to exclude from his presentation entire counts of this Complaints. Plaintiff was thus limited to two days of trial instead of the five days he consistently told the court were needed.

c. Depending on fraudulent material presented by Defense Counsel outside the record of proceedings. The Court allowed Defense Counsel to put before it post - trial arguments, citations to law, references to evidence not in the record, hearsay purported statements, and entirely new topics never placed before the Court in a complaint and more importantly, not in trial testimony. This included allowing Defense counsel to provide it, outside the record and post – trial, arguments against the case presented by Plaintiff in the courtroom at trial. These post – trial , off the record supplementations by Defense Counsel were adopted by the Court in it's order "word for word" from the first word of the 49 page document to the last, and this deprived Plaintiff of his constitutional right to due process, to confront and counter purported "evidence", witnesses, and case law, and to impeach anything presented by Defense Counsel. When Plaintiff learned that this was going on he went "on the record" and filed (with the Clerk of Court) and served the special referee a

[1] All parties agreed to Hon. Judge John's direction that no party would be allowed any variance of accommodation if a witness was not available for testimony at trial in the

**letter (on August 21, 2912) which alerted the Special Referee that much of the material submitted by Defense Counsel was blatantly fraudulent and grossly mis-stated the evidence, testimony, case law, and even the nature of the complaint. The Court was alerted that the Defense material was not just a restatement of that side's case presentation but an entirely new presentation, outside the proceedings, off the record of proceedings, and that this violated Plaintiff's constitutional rights.**

**d. Bias by the Court. The Court's final order creates an extreme impression of judicial bias, gross errors creating the impression of judicial incompetence and the impression that the Court advocated for the Defense. The order is filled with legal arguments on behalf of Defendants Defense Counsel did not make at trial, case citations favorable to Defendant Defense Counsel did not cite to at trial, allegations of fact never placed before the court by Defense counsel at trial, and outright unfavorable mis-quotes of the actual text of covenants, case citations, and testimony. In one instance, concerning roads, the Court quoted a snip of a document's text omitting the following sentences which were unfavorable to the Court's decision – which read that Horry County's Attorney was not offering any legal opinion and the IHOA should consult an attorney (the Court's Order writing that the Horry County Attorney had written that the covenants could be enforced on the roads, which could be taken as a fraudulent mis-representation of the evidence by the author of that paragraph of the order) and omitted the associated letter from Horry County (Engineering and Planning) which said that the roads ARE owned by Horry County. The order further included topics which never came before the court at trial which topics are clearly advantageous to Defendants, and was totally silent on topics placed before the court by Plaintiff for which large quantities of evidence were presented with supporting testimony sufficient to meet the burden of "more likely than not". In addition, the Order in multiple places and topics fraudulently asserted that "no evidence" was presented by Plaintiff on various topics when the list of evidence and the record of proceedings is that for each, at least several uncontested exhibits and in some, dozens of exhibits were presented. In the topic of assessment payments by the Golf Course the Court Order says that the Golf Course has always been current in assessments, ignoring the**

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**normal order of business.**

IHOA's general ledgers which showed [2] that there has never been a year that the Golf Course paid even half it's assessments due, and ignoring the admission by IHOA current president William Freiboth that the IHOA sued the Golf Course in this very courthouse, alleging that in 2010 the Golf Course paid only one month's assessments and none at all for 2011 and 2012 -- this being a clearly fraudulent mis-representation of the uncontroverted (at trial) evidentiary record. While these frauds all originated with Defense Attorney, who wrote 100 percent of the final order, the judicial officer is 100 percent accountable for the text of any order he signs and is obligated to have done "due diligence". Plaintiff's August 21, 2012 letter alerted the judicial officer to the need for due diligence, which creates the impression that the fraudulent content of the order and its other infirmities are not errors but intentional.

e. Adapting findings contrary to the Order's own internal controlling findings of fact and of law. Perhaps eighty percent (80%) of the causes of action depends on the answer to "What HOA did Amendment #1 to the Covenants name as "The Association" defined in the Covenants" with rights and obligations under the covenants. Because the covenants affect title to the land and restrict the use of the land, this area of law is subject to the principle that the interpretation must arise from explicit and unambiguous text of the contract or deed. "Usage" does not overcome this requirement that contracts and deeds to land be subject to a stricter rule of construction than ordinary contracts. Whatever Association is not named as "The Association" lacks standing to context any further interpretation of the Covenants nor to seek to compel compliance with the Covenants. The case opened with one hour of testimony, argument, and presentation of evidence by Plaintiff on this question and it was brought to the Court's attention that this was first because it controls almost everything else. The alternatives were the "Murrells Inlet Golf Plantation Inc", a non-profit which exists chartered under SC Code 33-31-xx; the "International Club Association, Inc", likewise existing and so chartered, the "International Club, LLC" which is the 'for profit" golf course corporation, and the "International Club Home Owners Association, Inc" which is likewise extent and so chartered – the Defendant IHOA. All parties agreed that the interpretation of Amendment #1's change to the name controls this matter. On page 12 of it's order the

[2] Comparing golf course assessment payments to the putative golf course agreement, which requires much less in assessments than the covenants.

Court made a controlling finding of fact and conclusion of law which reads:

> "The Declaration Recitals, as amended, state: "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C"." "

The Court having declared that "The International Club Association Inc" (ICA) is "The Association for all purposes under the covenants then ignored this controlling decision. This controlling finding mandates revision of the rest of the order and renders a judgment against Plaintiff for alleged rule violations inconsistent because Plaintiff thus owes no duty or obligation towards the defendant and the defendant has no rights under the covenants which it may enforce. The Court also held that the Architectural Review Board is not a sub-entity of the Defendant, yet the Court's Order reads as if the ARB is a party, enforcing a non-party's purported cause of action for violation of the non-party's ARB rules, and an another inconsistency which flaws the order, awarding judgment for the damages to the HOA party defendant for a "fine" it did not impose, according to the same order.

f. Depending on an irrelevant and inapplicable statute. Plaintiff had argued that since the IHOA is chartered under 33-31-xx of the code (Non Profit Corporation Act) homeowners can not be compelled to be members no matter what any covenant or contract might provide. Plaintiff had cited 33-31-601 Admission which provides that "(b) No person may be admitted as a member without his consent.". Page 4246 of the April 12, 1994 SC House Journal states the intent of the legislature as being that it

> *"prevents corporations from admitting people as members unless they consent to becoming members. ... Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(21)."*

And subparagraph *"(a) A member may resign at any time."* which the legislative journal reported as intending that

> "A nonprofit organization cannot force a person to belong to it ... This provision had no counterpart in former statutory law.."

The Court's Order held that Plaintiff is required to be a member of the IHOA and to also be a member of the Amenity Center (owned by the IHOA) whether or not he uses it. In doing so the Court's Order stated that the controlling South Carolina statute is § 27-31-190 and that this is further supported by the "Restatement (Third) of Property (Servitudes) §

**6.5". These arguments and citations were not raised by Defendant at trial and appear for the first time in the Court's Order. They are also clear errors of law and raise the appearance of bias or fraudulent intent by the judicial officer.**

**(1) Title 27 is the Horizontal Property Act and applies to apartment houses which are condominiums, specifically those where (per 27-31-30)**

> **"a lessee, sole owner, or the co-owners of property expressly declare, through the recordation of a master deed or lease, which shall set forth the particulars enumerated in Section 27-31-100,"**

**(2) The IHOA is incorporated under 33-31-xx of the code (an exhibit in evidence). There is no proper way that an unbiased judicial officer could cite to 27-31-190, because it reads:**

> **SECTION 27-31-190. Expenses shall be shared. The co-owners *of the apartments* are bound to contribute pro rata in the percentages *computed according to Section 27-31-60* ...**

**g. The award of attorneys fees is contrary to the rule of "strict construction" which awards such fees only when there is a clear, applicable, and unmistakable contractual provision, and where the fees have been expended for the purposes cited in the contract. The Court's Order itself recognizes this requirement. The Court's order said:**

> **"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."** *Seabrook Island Property Owners Assoc. v. Berger,* 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n,* 368 S.C. *557,* 569, 629 S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime,* 368 S.C. at 375, 628 S.E.2d at 920.

**In one of the cases, 2010-CP-26-11320, the IHOA's $2,500 was spent asking the court to dismiss that case, when it originated in Magistrate Court. There was no counter-claim at the time and the IHOA's Answer did not allege any violation of covenants or rules. The IHOA did not pay a single penny for anything that happened thereafter in that case, even when it added (two years later) a counter – claim for violation of ARB rules. In the 2009-CP-26-3596 case the exact circumstances exist, $2,500 spent defending against a suit for Declaratory Judgment with no Answer containing a counter-claim for violation of covenants or rules until three years later, and no IHOA money spent to support that contention. This was admitted in testimony at trial by IHOA President William Freiboth**

who admitted this about each $ 2,500.

h. Lack of subject matter jurisdiction over the 2010-CP-26-11320 case.

When the 11320 case was filed the Defendant's $ 2,500 was filed ONLY to ask the magistrate court – where it originated – to dismiss that case as it was then captioned. It was not spent to "enforce" anything or even to prosecute the case.

In the case originating in magistrate court (11320) there was no counter – complaint for almost two years. In Magistrate Court Defense counsel's November 9, 2010 Motion to Dismiss alleged that Plaintiff's claim exceeded the magistrate's subject matter jurisdiction. Neither party asked for a transfer to the Court of Common Pleas. The magistrate did so on his own. The record is that immediately thereafter, in the docket of the 11320 case, Plaintiff filed a "precipe" on December 14, 2012 alerting the court that this was procedurally defective.. The document was titled "Plaintiff's Precipe of Objections to Order Transferring" and began with the phrase

> "Plaintiff, Ronald Jarmuth, pro se, perpetuates his objections to certain content in the order of the Magistrate Court entered November 30, 2010, transferring this case to this Court."

In Frierson v In-Town Suites, No. 2007-UP-549 Filed December 14, 2007 the Court of Appeals observed that the power to transfer a case to Circuit Court when the statutory limit is exceeded occurs only when there is a counter – claim whose amount, when added to the claim, exceeds the statutory limit. There was no counter – claim here so the limited authority of the magistrate court to transfer the 11320 case was not applicable. The appellate court wrote:

> "The jurisdiction of the magistrates' court is statutorily limited by South Carolina Code section22-3-10 (2007). Although we note there are limited circumstances where the legislature has allowed magistrates to transfer a case to the circuit court, such as when a counterclaim is filed pursuant to South Carolina Code section 22-3-30 (2007), we believe the legislature intentionally limited the scope of a magistrate's power to transfer cases to the circuit court. In addition to Rainey, we find the statutory guidelines that govern magistrates' court support this view by not expressly authorizing magistrates to transfer any type of case to the circuit court."

This conclusion of law was repeated by the Court of Appeals in the controlling case of Mosseri, Mosseri, Castro v Austin's at the Beach, Inc. and Paris, Inc., Opinion No. 4215 Filed March 12, 2007 which was an appeal from Horry County (this court) with further explanation. The Court wrote that

> "In cases that do not fall under Section 22-3-10 (12) of the South Carolina Code [w]hen a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22"

A case exceeding the jurisdictional threshold must be dismissed if the case does not involve the ownership of land. In such an instance the case still will not be transferred but will be retained in the Magistrate Court.

A Circuit Court can not obtain subject matter jurisdiction by the consent of the parties; it is statutory. The 11320 case required dismissal per the insistence of Defendant as a matter of law. The magistrate court transfer was without authority. No judgment may be entered as to a case in which the Circuit Court lacks subject matter jurisdiction, thus the $2,500 award of attorneys fees is further contrary to the law.

i. Adjudicating a claim by a non-party and awarding a judgment on the non-party's claim; awarding that judgment to a party which did not allege it had a claim to the judgment. The Court's Order stated that the ARB is not a creation or entity of the IHOA, that the ARB imposed a $ 100 a month fine, that the ARB as being separate from the IHOA is not subject to the Bylaws of the IHOA which prohibit any fine or sanction until after a hearing per the provisions of Section 13.3 of the Bylaws, and that the ARB's fine will be supported. The Court then entered judgment in favor of the IHOA for the ARB's claim, to which the IHOA has no equitable claim based on anything in the record and to which the IHOA is not entitled per the language of the Court's order. The Court's Order made the following Conclusion of Law:

> The ARB is a separate Board ... created by Article VII of the Declaration.[3] ... Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents ...

And in paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to party IHOA:

> "As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to

[3] The "Declaration" is "The Covenants". "The Articles" is the form provided by the South Carolina Secretary of State to be used when incorporating non-profit corporations. The "Covenants" are NOT "The Articles". The "Bylaws" are neither covenants nor articles. Neither the Bylaws nor the Articles mention the ARB – only the Covenants.

assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00."

No party may sue for injury or debt associated with another party or entity and no party may have judgment for a debt arising from such a non-party. The Court's

Additional Issues Mandating New Trial or Amendment or Relief from Judgment

3. Procedural Irregularities Violating Plaintiff's Constitutional Due Process Rights.

Allowing Defense to Present It's Witnesses Prior to Plaintiff's Case.

Since this involved the questioning of witnesses, presentation of related argument, and submittal of evidence this had the effect of allowing Defense to present it's case prior to Plaintiff. Their testimony had nothing to do with Defendant's counter – claim and had the effect of introducing areas of testimony not put before the court by Plaintiff. Because the judicial officer did not allow the trial to proceed to the "natural" end of evidence, testimony, argument and the presentation of all issues, but instead well into the trial set an absolute time limit on the trial which was contrary to the order of reference, this "out of order" witness presentation further reduced the time the judicial officer allowed Plaintiff. It was also contrary to the ground rules set by the Chief Judge.

a. On January 25, 2012 Hon Chief Judge Steven John entered an Order which provided for the use of transcripts of depositions at trial in lieu of taking the testimony of such a witness at trial. As a consequence the depositions several witnesses were taken including:

(1) R Scott Pyle, President of Plantation AD and the signer of the Covenants and of Amendment #1 (no other witness was alleged to have personal knowledge of the circumstances of the creation and signing of the Covenants, of the creation of the bylaws, and of the filing of the bylaws);

(2) Rosemary Toth, defendant and former president of the IHOA.

(3) Julie Case, an employee of co-defendant KA Diehl.

(4) William ("Bill") Freiboth, current President of the IHOA.

b. Prior to the commencement of trial, Plaintiff had asserted (since as far back as December, 2011, in filings of record) that he would require five (5) trial days so that all his witnesses could be heard and evidence addressed.

Limiting the Trial to Three Days Irrespective of the Conduct of the Trial

c. The Order of reference was signed by Hon. Chief Judge Steven John on June

15, 2012. It included the provision that "The trial shall commence on Wednesday, August 8, 2012 at 9:00 A.M. at the Horry County Government and Judicial Center and shall continue until concluded." At the beginning of the trial Plaintiff again asserted his need for five (5) days and had been told that the trial would continue on Saturday August 13th and Sunday August 14th, 2012. Plaintiff, of course, has no control over how much time would be used by the Defendants to argue their case nor how much time he would need for impeachment. On Thursday August 11, 2012, based on the pace of trial, the Special Referee stated that he needed to have Saturday and Sunday for himself and asked if the parties could accommodate that. Based on the pace of trial Plaintiff observed that IF the transcripts were read by the Special Referee in their entirety as if at trial using the same standard of admissibility, Plaintiff would try to finish his case by Friday August 12th. However, later on Thursday August 11th Defense Counsel introduced Defense witnesses "out of turn" by Order of the Court and Plaintiff observed that he would need an extra day for rebuttal and impeachment, which was refused, thus Plaintiff presented an abbreviated case on Friday August 12, 2012.

Not Permitting Summation / Court Depending on Off The Record Post Trial Defense Material

d. The Court did not allow any Summation by the Parties but instead directed that "briefs" be filed within ten (10) days with proposed orders. The Court did not ask the Parties to consent to this. The trial was declared "over" at nearly Six PM (6:00 PM) on Friday based on the Judicial Officer's schedule and not based on the finishing of presenting cases. The lack of a summation is a procedural error. There would be no opportunity to rebut opposing briefs and, as is the rule for summation, no additional evidence or argument may be made. One "sums up" what is already argued and supported by the evidence. No new cases may be mentioned or relied on. No new theories or explanations presented. While this is so, the lack of a verbal Defense "summation" in the presence of the Plaintiff deprived Plaintiff of opportunities to object to material being more than just summation – new evidence, theories, explanations – which are procedural errors. Plaintiff cites this as a prejudicial error meriting a new trial. The Court specifically directed that these "briefs" reflect the order and material that was presented at trial and stated that the Court would also rely on the transcripts. Plaintiff was the only party to hold depositions and to file transcripts. Clearly the testimony adduced would be unfavorable to Defendants and thus not relied on in the Defense Counsel's "brief". No length was set. Plaintiff filed a

brief as directed and a proposed order. The Defense Counsel did not file a brief but instead filed a proposed Memorandum Order which the court adopted in it's entirety, from "word one" through "word last", including errors in the text. The spacing of the words is such that the text was not even retyped.

Ignoring that Part of the Record Favorable to Plaintiff

e. Defense Counsel did not relate to any material from the depositions and thus the Order adopted by the Court has ignored all of the testimony AND EXHIBITS from the depositions – particularly the testimony of R. Scott Pyle, THE ONLY WITNESS with actual knowledge of the circumstances of the Covenants. All testimony relating to this subject from any other witness is speculative and not evidence. The statements of Freiboth and King (an "expert witness") referred to in the final order relating to the covenants are not hearsay because they do not attempt to quote Pyle – they are simply not evidence.

Permitting Defense Evidence At Trial Never Previously Provided Plaintiff in Discovery

f. At the beginning of the Trial Defense Counsel presented a set of evidence never given Plaintiff in the form submitted to the Court as evidence. Plaintiff discovered and complained to the Court that twenty (20) out of Defendants' one hundred four (104) exhibits were never given to Plaintiff in Discovery nor were they listed on any evidence list submitted by Defense Counsel (Rule 16) prior to the day of trial. They were placed by Defense Counsel on the Plaintiff desk in court minutes before the trial began. Plaintiff protested this was "Trial By Ambush" and the Court did not address the issue, instead admitting them all into evidence because the Order did not address evidence admissibility. The same situation applies to two of the ten "Plats" Defense Counsel submitted for evidence, both of which Defense Counsel actually used at trial.

Court's Mis-Characterization of the Defense and Counter – Claim put on By Defense Counsel at Trial

g. If a person were to envision the case put on by Defense Counsel based on the Court's Order, to the extent that it purports to represent the arguments, evidence, cases, and testimony Defense Counsel put on at trial, one would envision an active defense and counter – claim, with brilliant citations to evidence and cases. In point of fact this is 100 percent fraudulent, as Defense Counsel failed to put on a counter – claim presentation at all – not one word – and in almost the entire case sat mute through Plaintiff's presentation of his case. Through the entire trial Defense Counsel made only one citation to a case. The only time Defense Counsel left the seating posture was when she jumped up waving two

documents and fraudulently stated that Plaintiff had two copies of the Pebble Creek Deed to Sunbelt Developer, one with a citation to the Covenants and one blank, when in fact the one with the citation was the Golf Course Deed – thus she defrauded the court (to which she did not show the deed in her hand). This is a critical point because the one without the citations – the only deed in evidence – was critical to the point that the Covenants did not exist until two days after Pebble Creek had been sold thus the Declarant, Plantation AD, had now equitable interest / horizontal privity in Pebble Creek such as to subject them to the Covenants. The Court's Order depends on this fraud by Defense Counsel.

Exclusion of Plaintiff's Evidence From Consideration

h. At trial Defense Counsel did NOT CONTROVERT a single document actually introduced as evidence used by Plaintiff. Before trial Defense controverted certain pieces of evidence – most of which were not used at trial – but the Court never ruled on the record as to the admissibility or use of any of the over 700 exhibits presented by Plaintiff, thus presumably all were admissible – but to read the Order Plaintiff presented no evidence in many matters, which is untrue, indicates the court ignored Plaintiff's evidence, and merits a new trial. Examples are "intentional infliction of emotional distress" which was never argued and "Federal Communications Commission" regulations, statutory law, and case decisions of which NOT ONE WORD was said nor one exhibit referred to. This is more than prejudicial, because the inclusion of and reliance on the new material to support a decision deprived Plaintiff of an opportunity for rebuttal, argument, exhibits, testimony. It is more than prejudicial, however, because it presents the appearance of bias by the judicial officer which is even worse because the case was tried by the Court without a jury.

Ignoring the Record of the Case Taken By The Court

i. At Court there was the appearance that the Court was taking close notes relating to testimony and evidence, and this is supported by the Court's direction to make the summation "briefs" follow the order of presentation and refer to the exhibits and testimony offered at trial (and in depositions). Thus the Court exercising appropriate attention to the testimony and evidence did or should have been aware of the introduction of material which was "foreign" to the proceeding, no matter how relevant, admissible, or controlling it might be in retrospect. It simply is the Court's duty to police the introduction of testimony and evidence and the burden is on the party, not the court, to advocate for a

party. In adopting argument, evidence, and cases "foreign" to the trial the Court stepped over the line – a prejudicial material error of law.

Conclusion

4. Plaintiff attaches a marked up copy of the Order of September 10, 2012 (Exhibit A); the two letters from Horry County referred to by the Order of Court, one dated April 16, 2009 and the other dated August 24, 2009, both in evidence at trial (Exhibit B). the IHOA November 17, 2010 Answer to Magistrate Court Case 2010CV-26-1072943, Jarmuth v IHOA, (Exhibit C); the IHOA's November 9, 2010 Motion to Dismiss the Magistrate Case (Exhibit D), the November 20, 2010 Transfer Order (Exhibit E), and Plaintiff's August 21, 2012 Letter to the Court filed with the Clerk (Exhibit F).

It is concluded that there are sufficient irregularities, instances of fraud by defense counsel, violations of constitutional due process, internal contradictions, appearance of bias by the court, and conclusions of law and findings of fact unsupported by any evidence, the failure of the court to address all issues before it, and personal and subject matter jurisdiction issues to merit a new trial, amendment of the order, and relief from judgment.

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, Sc 29576
843-314-4355

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|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | CASE NO. 2010-CP-26-11320 |
| ) | |
| Ronald Jarmuth, ) | CONSOLIDATED WITH |
| Plaintiff ) | |
| ) | CASE NO> 2009-CP-26-3596 |
| vs ) | |
| ) | |
| The International Club Homeowners ) | AFFIDAVIT OF |
| Association, Inc., Et Al, ) | SERVICE OF |
| Defendants ) | MOTION |
| ) | |

CERTIFICATE OF SERVICE OF "PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION:

I certify that on September 19, 2012, I served a copy of the attached "Plaintiff's Consolidated Post Trial Motion" upon:

(1) Defendant by mailing same to Defendant's attorney, Henrietta U. Golding McNair Law Firm, P.A., 2411 Oak Street; Suite 206, Myrtle Beach, SC 29577-3164 by United States Mail with first class postage prepaid.

(2) The Judicial Officer, Hon. Robert Stroman, by serving a copy upon him in the chambers of the Master in Equity at the Courthouse, which he uses to perform his duties as Special Referee for the Master in Equity; and by mailing a copy to him at his office, that being "Ralph P. Stroman, Attorney; 8 Red Squirrel Ln.; Pawleys Island, SC 29585-5239.

Ronald Jarmuth, Plaintiff Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
September 19, 2012

# EXHIBIT A – Mark Up of September 10 2012 Order

**Notes:**

**Text which is bolded and underlined is material in order referred to by adjacent "Plaintiff's Notes"**

**Material in Order is double spaced unless a quote contained in order, then single spaced and indented.**

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth, | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| | ) | FINAL ORDER DISMISSING |
| The International Club Homeowners | ) | PLAINTIFF'S CLAIMS AND |
| Association, Inc., | ) | AWARDING JUDGMENT AGAINST |
| Rosemary Toth, | ) | THE PLAINTIFF IN THE AMOUNT |
| and K.A. Diehl & Associates, Inc. | ) | OF $7,326.00 AND GRANTING |
| Defendants. | ) | |
| | ) | INJUNCTIVE RELIEF |
| | ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| The International Club Homeowners | ) | |
| Association, Inc. | ) | |
| Defendant. | ) | |

The above entitled actions were referred to the undersigned, as Special Referee, by Consent Order filed with the Clerk of Court's office on June 15, 2012. The Parties agreed that this referral to the undersigned is a referral with finality with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. The trial was held before the undersigned on August 8, 9, and 10, 2012.

In accordance with Rule 52, South Carolina Rules of Civil Procedure, the following are my Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. The Plaintiff became a property owner in the International Club subdivision (hereinafter known as the "Community"), when he purchased a home in the Pebble Creek subdivision by Deed dated October 23, 2006.

2. The Community, since it is located in Horry County, is subject to the Horry County zoning ordinances. From the evidence introduced at trial, it appears that this Community was approved as a planned unit development ("PUD") by Horry County Council in the late 1990's.

3. The Community is a residential community consisting of over 670 single family and multi-family units located off of Highway 707 in Horry County approximately 10 miles south of Myrtle Beach. In addition, situated within the Community is the International Club Golf Course

(hereinafter "Golf Course"). This Golf Course is privately owned and open to public play.

4. According to the plats introduced as exhibits and the Declaration of Covenants and Restrictions recorded in Deed Book 2117 Page 1353 in Horry County Registrar of Deeds Office on February 8, 1999 (hereinafter "Declaration"), the Community currently encompasses over 300 acres.

5. Initially, this Community was named Murrells Inlet Golf Plantation but its name was changed in the first amendment to the Declaration filed in Deed Book 2258 at Page 1453 in the Horry County Registrar of Deeds Office on May 9, 2000 ("First Amendment").

6. The Declaration and the First Amendment for the Community was recorded by Plantation A.D., LLC, the original Developer and Declarant. The Declaration sets forth the real property subject to the restrictive covenants, additional real property that may be added, criteria for governance, provisions relating to the creation of a homeowners association and an Architectural Review Board (hereinafter "ARB"), and other related provisions. The Developer attached to the Declaration as Exhibit "C" the Bylaws for the homeowners association. The Bylaws were also incorporated into the Declaration by reference pursuant to Section 1.5 of the Declaration. These are the only Bylaws that the Defendant HOA has utilized since its incorporation.

7. Plantation A.D., LLC, as well as its successors and assigns, were defined as the Declarant in the Declaration. Plantation A.D., LLC added acreage to the Community by way of amendments to the Declaration. In 2003, the developer rights were assigned to D.R. Horton, Inc.

8. The Declaration was amended five times and the following are the amendments:

- First Amendment, May 9, 2000: This Amendment changed the name of the Community to "International Club", added the property that was developed as the Villas Horizontal Property Regime; however no property description was attached to this Amendment. **With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration**.

- Second Amendment, April 25, 2003: **This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community.**

Thus, as of April 25, 2003, the Developer was D.R. Horton.

**Plaintiff's Notes: (1) R Scott Pyle who signed the covenants (the Declarant) and President of Plantation AD, the original developer, in his deposition testified that he had no such intention and knew nothing of this "limited applicability" argument. Pyle testified that he**

**wanted to change the PUD name and that developers and master builders, such as the Villas developer was, were exempt from the start from restrictions and did not need any "waiver" on their behalf.**
**(2) There is a major contradiction not raised at trial because if Plantation continued to own the roads and streets, how could Horton "dedicate" them to Horry County. The observation was not made at trial. However, Defense Counsel says that no use restriction applies to land not within a "Unit" (applying this to the golf course) but this also applies to the streets which clearly belong to Plantation who is NOT the developer and which are NOT UNITS thus there are no restrictions on use of the private roads.**

- Third Amendment, March 26, 2004: This Amendment added approximately 100 acres for the developments known as The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Declaration regarding capital contributions from purchasers.
- Fourth Amendment, December 23, 2004: This Amendment resolved the mistake in the first amendment by attaching the property description for the Villas Horizontal Property Regime. It also required a $150.00 contribution from each multi-family owner for road maintenance.
- Fifth Amendment, June 20, 2008: This Amendment added 14.10 acres for the development of a multi-family phase. This property was also subjected to the Declaration pursuant to Exhibit "A" of the governing documents. The development has not been constructed.

9. The Defendant homeowners association, the International Club Home Owners Association (hereinafter "Defendant HOA"), was incorporated as a South Carolina nonprofit corporation on March 1, 2001. Its status with the South Carolina Secretary of State has not changed since its incorporation.

10. Until 2007, the Defendant HOA was controlled by the Developer. **In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowners.** Since September 2007, the Defendant HOA has held annual elections for Directors. **According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected.**

11. The Defendant HOA contracts for cable television services and garbage collection services for the single family owners in the Community. **By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection.** The cable

television contract is dated October 30, 2003; this contract is a bulk services contract providing cable, at reduced rates, to the Defendant HOA members. According to the testimony of Denise Ambuhl, a sales representative of HTC, some single family homeowners in the International Club contract for video services through other providers including, however they have the option of utilizing HTC's cable services.

12. The streets and the roads in the Community were initially owned by the Developer. **D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006.** Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are

**Plaintiff's Notes: (1) The transition committee was not addressed at trial and no evidence was referred to relating to it.**
**(2) Whether or not Plaintiff "ran for election" was not reflected in one word of testimony nor was any reference made to any evidence about this. This "fact" was never raised or depended on at trial. If not material why mention it. Mentioned, it is procedurally erroneous.**
**(3) At trial Plaintiff cited that per the 2003 BoD Minutes there was never an approval to contract with Waste Management which voids any such decision (see SC 33-31-821 Pl #232 Action without meeting. The testimony in depositions is that there is no formal Waste Management Contract.**
**(4) If Amendment #2 retained ownership of roads in Plantation AD how could Horton convey anything related to the roads to Horry County. There is an material and controlling internal contradiction here justifying revisiting the whole subject.**

maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

13. After D.R. Horton assumed the rights of the Declarant and Developer, it entered into a Developer's Agreement on May 16, 2003 with the parties being D.R. Horton and Sunbelt Associates, LLC (hereinafter "Sunbelt Associates"). This agreement sets forth that D.R. Horton agrees to construct an "amenities center" and that **"the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..."** Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the Agreement with the monies being for the construction of an amenity center (hereinafter "Amenity Center").

14. On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with the parties

being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use its turbine pumps and ponds to irrigate the Community's Common Areas. As consideration, Defendant HOA forgave unpaid assessments before December 31, 2003 from the Golf Course owner and discounted future HOA assessments due from the Golf Course owner through 2014.

15. **In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community.** These properties, as well as other areas in the Community, are landscaped by the Defendant HOA. **The Defendant HOA irrigates these Common Areas with water provided by the Golf Course**. If the Defendant HOA did not have rights to the Golf

**[Plaintiff Note: June 18, 2009 NOT in October, 2003. This is a materially fraudulent representation falsely giving the impression that Horton provided additional value – which it did not at the time of the golf course agreement, the subject of the paragraph.**
**Also, the paragraph gives the fraudulent impression that the HOA only maintained HOA owned land, and fraudulently omits that through 2009 the Horton owned front entrance was maintained at HOA expense.**
**Also, since Amendment #1 did not void Riparian Rights, it is a material omission to leave out that the HOA owns the water in the ponds and is paying for water it owns.**
**This is a materially controlling matter of evidence and testimony at trial which is contrary to the Order.]**

Course water, it would have to construct, and maintain, 2 deep water wells with the necessary pumps and the requisite piping. According to Chris Sullivan, an irrigation contractor, the cost for the installation of the 2 deep water wells is approximately $34,000.00; however, he testified that the cost for the installation of the piping was unknown due to the probable need to install under some of the roads.

16. The Community has an Amenity Center consisting ' of a clubhouse, swimming pool, and 2 adjacent parking lots. The Amenity Center property and 1 parking lot is owned by the Defendant HOA for it received a Deed from Plantation Golf A.D., LLC recorded on August 22, 2002. The second Amenity Center parking lot, previously owned by the Golf Course, was deeded to the Defendant HOA by deed recorded on August 4, 2004.

17. The Amenity Center is maintained by the Defendant HOA for its members who have a home in a single family subdivision **or who live in a multi-family development that does not have separate amenity facilities**. **According to Section 6.5 of the Declaration, members**

**in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA**. As a result, the Defendant HOA does not utilize assessments paid by members living in such a multi-family development for expenses relating to the Amenity Center.

18. One neighborhood in the Community is a development known as the Glens. The Glens is a **townhome community**. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as paid the assessments for use of the Amenity Center, **because the Glens does not have a separate amenity facility**.

**[Plaintiff's Notes:**
**(1) Amendment #1 paragraph 5 reads "*The owners of Dwelling Units within the Multifamily Parcel shall not have the right to use any Recreational Amenities, if any, owned by the International Club Homeowners Association, Inc.*" which supersedes the ambiguity in the original covenants relating to presence or absence of separate amenities which Defense Counsel and the Court depend on. The revision is absolute and unqualified.**
**(2) The testimony at trial by William Freiboth and Maureen Sullivan and in depositions by Rosemary Toth was that The Glens are single family homes called "town homes". The first mention of "or which do not have their own amenities" is in Henrietta Golding's Draft Order, introducing an entirely new line of argument and new "facts". This is a prejudicial error entitling a new trial, because Plaintiff had no opportunity to rebut this and it was neither in evidence nor argued at trial. The court has adopted, in it's order, material outside the proceedings which is absolutely forbidden. This argument also is invalid because it ignores the absolute limiting qualification of Amendment #1**
**(3) The evidence in the Planning Commission documents referred to The Glens and it's site as "MULTI-FAMILY" and never used the phrase "townhome". Any statement by Sullivan is "argument" and not evidence. No objection was raised to the description of The Glens at trial as "multi-family". Throughout this Henrietta Golding was silent.**

19. **The Plaintiff has utilized the Amenity Center since his purchase in October 2006.** His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. **He also attended Board of Directors meetings since 2007 held in the Amenity Center** and took depositions there in 2012.

20. Defendant K.A. Diehl is the manager for the Defendant HOA. **Since the early 2000's, it has served the Community in this capacity**. It contracts with the Defendant HOA, and **since January 1, 2008, this contract has been renewed upon the expiration of the previous contract.**

21. Plaintiff filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. Shortly after service of the Complaint on the Defendant HOA, the Defendant HOA's Board of Directors met with the Defendant HOA's attorney, Ms. Golding. According to Maureen Sullivan, a member of the Board of Directors, the Board requested that Ms. Golding prepare a letter regarding the Plaintiffs claims that included information that could be provided to the Community members. On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Defendant HOA's position as to the various claims asserted by the Plaintiff as well as providing information as to Plaintiffs involvement in previous litigation. A list setting forth cases that the Plaintiff was a party to was included, as well as published Court decisions. The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members.

22. Also, after commencement of this legal action, Plaintiff directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency status. This request was denied by the Defendant HOA's attorney due to the Plaintiff seeking email addresses, phone numbers and information regarding a member's

**[Plaintiff's Note:**
**There was no mention of 2006. Maureen Sullivan testified that she saw one occasion in 2010, and there was no evidence or even opinion offered whether Plaintiff was a guest of another homeowner, which is allowed. There was no mention of attendance at board meetings, certainly not with a date positive "2007" attached. This is a creative addition by Defense Counsel in the Court's final order engendered by blindly adopting a self-serving and fraudulent draft order provided by Defense Counsel. A date positive has to be supported by evidence.**

payment of assessment as well as Plaintiff's failure to set forth a good faith basis for requesting the list. Further, the Defendant HOA maintains a website for its members, and **the members list is readily available to Plaintiff;** however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. **Plaintiff has also received the membership list in the past** and has accessed the Defendant HOA's website through other Community homeowners.

23. On April 20, 2010, the Defendant Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). As consideration for this easement, the Defendant HOA received $83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation

agreement with the Defendant HOA.

24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members, for each member received $75.00. The Defendant HOA shared the proceeds with its members **to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010**.

25. The Declaration required the formation and existence of an ARB. Beginning in the early 2000's, the ARB members were appointed by the Defendant HOA Board of Directors. The Declaration specifically requires that an ARB exist with the authority to approve or disapprove "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, ... vegetation cover, landscaping, grading, filling, or any other item ... upon any portion ..." of the Community. According to K.A. Diehl's representative Beckie Abel, over the years the Community's ARB has processed hundreds of applications that it has received from Community homeowners.

**Plaintiff's Note:**

**The testimony and evidence at trial was that the web site was a partial list of homeowners, omitted many owners, included renters, and had unverified addresses and that it was what homeowners chose to put on the web site, and was NOT the list of names, addresses, and numbers of votes which might be case which is used by the IHOA for voting purposes.. The testimony of William Freiboth was that the IHOA had once provided the web list, not the homeowner "voter" list as described in the statute.**

**"Unbudgeted Revenue" was never in anyone's testimony at trial nor in any document – those being the minutes of the special meeting and the announcement of the special meeting, both of which merely stated they were giving homeowners $ 75.00 each. At trial Maureen Sullivan was unable to state what the $ 75.00 was for. The "unbudgeted revenue" is a creative addition by Defense Counsel unsupported by evidence or testimony.**

26. Since 2006, the Plaintiff submitted applications to the ARB for a variety of matters. He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set to be installed on the side of Plaintiffs home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission **when it issued its determination of no reasonable cause on December 11,**

2009.

27. In the fall of 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/**stone** addition to his yard along the property line. **The Defendant ARB issued a Notice Violation** requiring Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. The Defendant ARB approved the request for the flower bed and edging in the County easement near a power box as long as the Plaintiff had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. **Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation.** The Plaintiff, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess $50.00. He further stated that he disputed the necessity of any appeal.

28. The Plaintiff has **refused to** remove the brick foundation as required by the Defendant ARB, and as a result, he is being fined $100.00 a month. The Plaintiff has **refused to**

**Plaintiff's Note: Toth's 11/8/2009 Pl #603 statement in evidence to the Commission is that the IHOA NEVER allows a swing set on the side of a house. Testimony of Pete Pizzi at trial and photographs show his daughter's house is the same model as Plaintiff's and that they have a swing set at the exact side location that Plaintiff requested – meaning that Toth lied to the Commission to obtain their decision. Her Commission statement included that there are no covenant restrictions on swing sets and the ARB guidelines only require to securely anchor a play set against high winds. The Commission had no reason to think they had been lied do.**

**9/27/2010 "ARB Letter" – Fraudulent mis-statement by Defense Counsel of material fact. The letter was from the IHOA which imposed the fine and NOT from the ARB. Plaintiff's Exhibit #627. The evidence is that the IHOA Diehl employee identifies "violations" and the IHOA enforces it. The ARB does not get involved in enforcement, only applications.**

pay the monthly fine, and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00.

29. In February 2012, the Plaintiff applied to the Defendant ARB for a landscape modification. By letter dated March 16, 2012, the ARB informed Plaintiff that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. The letter further stated that his account balance as of the date of the letter was $1,735.00.

30. **The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys' fees**

to seek Plaintiffs compliance with the Declaration.

## CONCLUSIONS OF LAW

**1. The Defendant HOA is the Proper Homeowners Association to Exercise the Powers in the Declaration.**

The Declaration provides that there should exist a non-profit corporation for the purpose of exercising the functions set forth in the Declaration and the attached Bylaws. The Declaration identified the association as the "Murrells Inlet Golf Plantation, Inc.". This name was changed by the First Amendment, recorded May 9, 2000, with the name change being to the International Club. On March 1, 2001, the Articles of Incorporation for the Defendant HOA were filed with the South Carolina Secretary of State. The evidence at trial established that the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration and the Bylaws. It is the entity that the original Developer, Plantation A.D., LLC, established in accordance with Article 3 of the Declaration. It is the entity that owns the Common Areas in the Community, that collects the assessments and fines, and that contracts with third parties for maintaining and administering the common facilities and providing

**Plaintiff's Note:**

**"Refused" is an actual act a conclusion not supported by testimony or evidence. The evidence is that Plaintiff ignored the demands and through three (3) separate letters each demanded the appeal hearing provided by Bylaws Section 13.3. All correspondence was between the IHOA and Plaintiff. The only "ARB" letter was the October 8 2010 "Approval" and "Disapproval" letters.**

**Attorneys Fees. The testimony of Freiboth at trial is the HOA paid two $ 2,500 deductibles when they were required to answer the two complaints and at that time they had no claim to enforce any covenants. When they added the counter – claim there was no additional cost to them so it has cost the IHOA nothing to attempt to enforce the covenants.**

common services. Finally, it is the entity that enforces covenants and restrictions in the Declaration. In the fall of 2010, the Plaintiff established 2 South Carolina non-profit corporations known as Murrells Inlet Golf Plantation Association, Inc. and International Club Association, Inc. According to the Plaintiff's testimony, he intends to utilize one of these non-profit corporations to manage the affairs of the Community in the event that the Defendant HOA is declared to be without the requisite authority to do so.

At trial, the Plaintiff contended that the Defendant HOA is not the entity entitled to manage the affairs of the Community, for the Defendant HOA is not named in the Declaration. I fmd this

claim to be without merit. **The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer**, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name. **It is basic law that in reading the governing documents of a non-profit organization, including any amendments, they must be read together to determine the intent of the Developer. Palmetto Dunes Resort v Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985).** Having reviewed the Declaration, together with the amendments, as well as the Defendant **HOA's Articles of Incorporation**, I find that the Defendant HOA is the proper legal entity designated by the Declaration.

2. The Bylaws are Valid and Binding.

Plaintiff argued that the Bylaws are invalid because the Bylaws were not signed, not indexed to any homeowners association, not adopted by homeowners association Board, not approved by the homeowners, were recorded a year prior to the establishment of the Defendant HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Home Owners Association". **I find that Plaintiffs claims are without merit**.

**Plaintiff Notes: R Scott Pyle / Plantation AD signed the Covenants on January 30 1999. Pyle's deposition testimony and the evidence, Pl #552 is that on March 1, 2001 two years later Ken Grover, a person Pyle did not acknowledge knowing, incorporated the IHOA. That the developer incorporated the IHOA is a prejudicial material fraud contrary to the evidence and the testimony of Plaintiff and Pyle – entitling retrial or Amendment.**

**The citation was not offered at trial or in evidence by anyone and was added post-trial in violation of rules of procedure. The Articles merely say IHOA and are irrelevant to the name change.**

**The Order as written by Defense Counsel omits the requirement of the Non-Profit Corporation act 33-31-206 PL#214 uncontroverted at trial which requires the Incorporator or the Board to adopt the Bylaws – with no exceptions. Defense counsel was silent when this argument was made.**

**The Defendant HOA came into existence at the time that the Declaration was filed.**

The Developer, Plantation A.D., LLC, had certain rights under the Declaration with respect to the Defendant HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the

> Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

**The Declaration Recitals, as amended, state**:

> "The Developer has or will cause to be incorporated under South Carolina law **"International Club Association, Inc**." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

**Plaintiff's note: (1) In this portion of the Order the Court has made a finding of fact and conclusion of law that the effect of Amendment #1 is that the non-profit corporation with rights and obligations under the covenants is NOT the defendant International Club Home Owners Association, Inc, but the "International Club Association, Inc" which also exists.**

**(2) The original text read:**

> **The Developer has or will cause to be incorporated under South Carolina law "Murrells Inlet Golf Plantation Association, Inc." ("the Association")**

**(3) The finding of fact that Amendment #1 makes the "International Club Association, Inc" the "the Association" renders every single finding of fact and conclusion of law following void, for it means the Defendant IHOA has no rights or obligations under the covenants – although it continues to own the property deeded to it.**
**(4) As a result Plaintiff is entitled to JAML on every count.**

Pursuant to Section 3.1 and the Recitals, the Defendant HOA, whether it was incorporated or not, **is governed by the Bylaws**. According to **the testimony of Jeff King**, an expert lawyer in real property development, it is common practice in South Carolina to attach Bylaws as an Exhibit to property restrictive covenants, then record the property restrictive covenants with the attached Bylaws. Mr. King also testified that bylaws are often filed with the property restrictive covenants before an association is incorporated. Notably, the Bylaws are also specifically incorporated into the Declaration by Section 1.5.

Pursuant to South Carolina law "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). **The Developer, as the incorporator of the Defendant HOA,** adopted the Bylaws by attaching the Bylaws to the Declaration and then recording the Declaration.

**Pl Note: A corporation "comes into existence" when Articles filed with Sec of State. SC 33-31-203 Pl#211 in evidence and uncontroverted at trail. Pl entitled to Judgment as a matter of law on the matter. Judgment clearly contrary to the evidence. Covenants pre-empted by law. See also 333-31-206 Pl#213 Corp governed only by properly adopted bylaws.**
**King admitted under oath that the practice of Developer stating Bylaws is pre-empted by**

**and prohibited by the SC Non-Profit Corporation Act and admitted it is done only because developers get away with it.**

**The evidence and testimony of the developer Pyle who signed the Covenants, is the Developer DID NOT the incorporate the IHOA – prejudicial fraudulent material mis-statement of facts by Defense Counsel .**

The Non Profit Corporation Act ("Act") **does not mandate that the Bylaws be signed or separately adopted by the members or the Board**. Plaintiff relies upon *Arcadian Shores Homeowners Ass 'n v. Cromer,* 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they conflicted with the recorded Bylaws for the association and were **not properly signed, acknowledged, and indexed**. The Bylaws in this case are different, because they are attached as an Exhibit to the Declaration, which was properly **signed, acknowledged, and recorded with the Horry County Registrar of Deeds Office**. In addition, the Defendant HOA's Bylaws have been utilized for over ten years to govern the Defendant HOA. **To declare, at this late stage, that these Bylaws are invalid or ineffective when they have been relied upon by all of the homeowners within the Community would be inequitable. Buffington v. T O.E. Enterprises, 383 S.C. 388, 393-94, 680 S.E.2d 289, 291-92 (2009) (holding that a homeowners' justified reliance on a restrictive covenant weighs in favor of its enforcement). Plaintiff has not pointed to any provision in the Bylaws which is unreasonable (See Armstrong v. Ledges Homeowners Association, Inc., 360 N.C. 547, 633 S.E.2d 78 (2006) (holding that unreasonable covenants are unenforceable)), that is indefinite, or violates public policy (Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 494 S.E.2d 465, 467 (Ct.App. 1998) (covenants are void if they are indefinite or contravene public policy), see also, Palmetto Dunes Resort, 287 S.C. at 6, 336 S.E.2d at 18).**

**3. The Pebble Creek and Meadows' Subdivisions and the Golf Course are Subject to the Declaration.**

The Plaintiff contends that two subdivisions in the Community are not subject to the Declaration. The first is Pebble Creek subdivision where Plaintiff resides. The Pebble Creek subdivision was developed by Sunbelt Associates. Sunbelt Associates purchased the property from Plantation

**Plaintiff's Note: "SECTION 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation." "Shall" has NO DISCRETION. The Court's Order mis-states a material and controlling statute. Defense**

**Counsel did not make the "discretion" argument at trial – it was added post-trial and entitles Plaintiff to a JAML or new trial.**
**"Properly signed, recorded, indexed" argument not made at trial – Golding was silent on this. The evidence, testimony and law is against this. See SC 30-07-10 & -20 Pl#209 & 262 uncontroverted at trial. Entitles Plaintiff to JAML**
**Case citations not raised at trial so Plaintiff denied opportunity to challenge it.**

A.D., LLC. The **Plaintiff introduced two deeds, Plaintiffs Exhibits 544 and 545, as being deeds relating to the real property developed as Pebble Creek. The Plaintiff testified that since these two deeds are dated prior to the filing of the Declaration, the Pebble Creek subdivision is not subject to the Declaration.** However, **both deeds describe the real property being conveyed to Sunbelt Associates** as being conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration"). **Even though one deed from Plantation A.D., LLC to Sunbelt Associates left blank the particular deed book and page,** this does not negate the provision in the property description that real property is subject to the Declaration. **Furthermore, the deed Plaintiff received for his property in Pebble Creek clearly states that it is subject to the Declaration.** I find that the Plaintiffs contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiffs contention that the Meadows development in the Community is not subject to the Declaration, this is also without merit. In the Declaration, the Developer specifically provided that additional real properties can be added to the Community and these additional properties were identified in Exhibit "B" attached to the Declaration. The Meadows is part of the real property described in Exhibit "B". The Meadows was added to the Community by the Third Amendment. Therefore, the addition of the Meadows to the Community is proper and, the Meadows is subject to the Declaration.

**Plaintiff's Note: Plaintiff introduced the January 29, 1999 Pl#545 Sunbelt / Pebble Creek deed which was signed two days prior to the date the covenants were signed and ten days prior to the covenants being recorded. This deed had a blank for Covenant books / page and the Covenants did not exist when Plantation sold to Sunbelt – the uncontroverted evidence and testimony. At trial Defense Counsel Golding rushed up to Plaintiff in a frenzy and waived Pl #544 which was the GOLF COURSE Deed and had nothing to do with Pebble Creek. Plaintiff testified if someone wrote in a book page on the golf course deed it was fraudulent because a document signed on January 29, 1999 couldn't have a book page which was assigned on February 8, 1999. The key was that when Plantation AD declared covenants on February 8, 1999 he had no property interest in Pebble Creek – no horizontal privity which was uncontroverted. Defense Counsel WAS SILENT through this.**

**Plaintiff's Deed: Upon cross examination by Golding Plaintiff testified that the seller to him lacked vertical privity from one with horizontal privity to assert the covenants. Plantation AD lacked privity in Pebble Creek when he declared the Covenants February 8, 1999. Sunbelt never declared the covenants and thus the line of owners from sunbelt lacked vertical privity with someone who was a party to the declaration of covenants. This was UNCONTROVERTED at trial by Defense Counsel. Plaintiff is entitled to JAML. At the minimum it is a prejudicial and fraudulent mis-statement by Golding adopted by the Court perhaps unwilling to believe that Defense Counsel would behave so unethically.**

As to the Golf Course property, this property is subject to the Declaration, for the Golf Course is part of the property described in Exhibit "A" to the Declaration. However, the Golf Course, even though it is subject to the Declaration, is not subject to certain provisions in the Declaration for the Golf Course property is not a "Unit" as defined in Section 1.27 of the Declaration. Therefore the Golf Course owner is not an owner as defined in Section 1.22 of the Declaration. I find that the Golf Course, even though it is subject to the Declaration, is not subject to all of the covenants in the Declaration since the definitions control the applicability of the specific covenants in the Declaration.

**4. The Golf Course is Current in the Payment of its Assessments.**

On November 20, 2003, the Golf Course entered into an agreement with D.R. Horton, the Declarant / Developer. This Golf Course Agreement provided for a reduction in the actual dollar amount that the Golf Course pays for assessments in exchange for the Defendant HOA receiving certain real properties. One of the properties that the Defendant HOA received was a parking lot for the Amenity Center. **The Defendant HOA President testified that this property was needed in order to obtain a permit to construct the swimming pool.** In addition, the Defendant HOA received the **right to utilize the Golf Course ponds** and pumping system for irrigation of the Community's Common Areas. The Defendant HOA's **right to use these ponds** and the pumping system is a significant consideration; otherwise, the Defendant HOA would have to construct and maintain 2 deep wells. Further, according to Chris Sullivan, an expert irrigation contractor, additional significant costs are likely for the installation of pipes. Plaintiff argued that the Defendant HOA had the authority to access the Golf Course **irrigation system**, without permission, under Section 4.17 of the Declaration, and as a result, the Golf Course Agreement is not supported by consideration. Illogically, he also argued that Section 4.17 of the Declaration was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities

**Plaintiff's Notes: Freiboth had no actual knowledge of what went on in 2003. Horry County Ordinances 18-0004 Pl #254 in evidence required more parking than Horton had provided. The swimming pool already existed and the photos and testimony are that it is in the originally deeded area. The 5/16/2003 Developer's Agreement in evidence Pl #557 is that Horton not the IHOA had to buy the parking at Horton's expense. Defense counsel was silent when it was argued with supporting evidence that Horton not the IHOA was obligated to buy / provide the added parking lot.**

**Plaintiff argued that the HOA holds riparian rights if Section 4,17 was not deleted AND the Court ruled it was not deleted. Plaintiff NEVER stated the HOA could use the Golf Course's irrigation system – in cross examining Chris Sullivan the issue was what would it cost the HOA to build it's own water distribution system sourcing the ponds for the IHOA's exclusive use. This is a material mis-statement by Defense Counsel of the testimony and evidence.**

and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, testified that the Defendant HOA ties into the Golf Course's irrigation system through its pump house and that the Defendant HOA could not simply pump water out of the pond to irrigate the Community. The HOA President, William Freiboth, testified that the Golf Course pump house is not located on Common Area. For these reasons, the Defendant HOA does not have the right or ability to access the irrigation system of the Golf Course without the owner's permission.

The Defendant HOA's decision to accept the parking lot property and **obtain its needed water from the Golf Course in exchange for a portion of the assessments** is a valid exercise of its powers. **The Golf Course owner's payment of this consideration was in lieu of assessments. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." Dockside Assn v. Deyton, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).**

Plaintiff also contended that the Golf Course Agreement was invalid due to conflicts of interest in that the Golf Course provided membership opportunities to D.R. Horton, the developer, which, at the time, controlled the Defendant HOA. Even though the Plaintiff, not being a property owner in 2003 lacks standing, the Defendant HOA accepted the benefits, the land and the water, from the Golf Course. Furthermore, the transaction was fair to the corporation at the time that it was entered into, as the Defendant HOA received significant benefits from the agreement. If a transaction is fair, it is not voidable pursuant to the Act, SC Code Ann. § 33-31-831.

The Golf Course Agreement was entered into in *2003* and the Defendant HOA and **the Golf Course have abided by** this Agreement since its inception. Plaintiff became a property **owner in the Community in October 2006 but did not challenge the Golf Course Agreement until April 2009.** Aside from the fact that Golf Course is not a party to this lawsuit, the **undue delay on the part of the Plaintiff in challenging the validity of the Golf Course Agreement is prejudicial not only to the Golf Course but to the Defendant HOA**. I find that the Plaintiff has waived his rights to assert any claims as to the Defendant HOA's compliance with the Golf Course Agreement **(Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992)), and that his claims are barred by the doctrine of laches. See Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583, 598 (Ct.App. 1999). Plaintiff is also estopped from objecting to the agreement regarding assessments pursuant to his failure to object for almost three (3) years. Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (holding that the doctrine of estoppel bars a refund of assessments to homeowner who has paid without objection for several years even if assessments were not properly voted upon).** The Golf Course Agreement is **an obligation of the Defendant HOA** that it properly enforces and the **Plaintiff's claim that the Defendant HOA does not have the authority to abide by the agreement** is without merit.

**Plaintiff Notes: (1) Omits evidence and testimony that the Minutes of the BoD in 2003 agreed only to waive three months of assessments and arrears through December 2003 – that the agreement was entered into by a Horton employee without board approval. Also, SC 33-31-830 & 831 Pl #235 & 236 absolutely bar transactions where a director has a direct or indirect (through an employer interest in the transaction and voids it as a matter of law unless the minutes record recognizing the conflict and approvals – which they do not. Minutes from 2003 Pl #302 & 303. The argument and case citations were not made at**

**trial. Defense counsel was silent through this all. Materially prejudicial mis-statements by Defense Counsel adopted by Court entitling new trial, amendment, or JAML.**

Plaintiff lastly contends that the Defendant HOA did not collect funds from the Golf Course pursuant to the terms of the Golf Course Agreement. However, **William Freiboth testified that the funds were collected in accordance with the agreement**. As a result, I find that that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement.

**Plaintiff's Notes: (1) Defense Counsel never argued waiver or laches at trial or otherwise relating to the Golf Course Agreement. (2) The testimony and evidence is that the Golf Course Agreement because known to Plaintiff in 2009, was not recorded, and was not even in the BoD Minutes. This was uncontroverted at trial and is raised post-trial by Defense Counsel outside the proceedings. Same for the citations. Limitations only runs from when something hidden is discovered and Plaintiff sued within 60 days of discovering this. (3) Plaintiff testified and it was uncontroverted, and sample checks were in evidence that he has paid "under protest" and even made a motion in 2009 mentioned at trial to pay under protest into the Clerk of Court. This is contrary to the text of the order which has material prejudicial errors of fact. (3) Freiboth never testified at trial that the Golf Course had always been current and admitted that the Golf Course paid nothing in 2011 and 2012 and almost nothing in 2010. Confronted by IHOA General Ledgers from 2003 on he admitted that at no time has the Golf Course ever paid even half what it owes under the agreement and has "breached" the contract – why it should not be honored. Also he admitted at trial that the IHOA has sued the Golf Course for at least $ 45,000. Clearly erroneous order as to these issues.**

**5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center.**

As set forth in the Findings of Fact, the Defendant HOA owns the real property upon which is situated the Amenity Center. **The Plaintiff contends that he is not obligated to pay the assessments for the Amenity Center**. This contention is without merit because, as a member of the Community, he is subject to the Declaration. **Whether he uses or does not use the Amenity Center is not a factor** in determining his obligation to pay for the assessments. **Restatement (Third) of Property (Servitudes) § 6.5 (T.D. No. 7, 1998) (setting forth that homeowner's obligation to pay assessments is unconditional); see also, S.C. Code Ann. § 27-31-190 ("no coowner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.")**.

**It appears that Plaintiff believes that because Section 6.5 in the Declaration states that "...**

**both annual and special assessments must be fixed at a uniform rate for all Units ..." the Declaration is being violated by the Defendant HOA since single family owners are assessed for the Amenity Center but multi-family owners who have their own amenities are not**. However, this section specifically states that multi-family Unit owners with separate recreational facilities are not assessed for the Amenity Center. **I find that the Plaintiff agreed to Section 6.5 by accepting the Deed to his property** and that he is obligated to pay assessments for the Amenity Center.

**Plaintiff Notes: (1) Plaintiff's contention at trial was that payments for country club type facilities are personal service contracts which expire on sale of property and not proper covenants touching and running with the land. Plaintiff cited case law to support this. It was UNCONTROVERTED. Plaintiff did not base this on uses of the facility.**
**(2) The citations and arguments were not raised by Defense counsel at trial or otherwise.**
**(3) Plaintiff never argued that Section 6.5 had anything to do with payments for the Amenity Center. Relating to capital contributions Plaintiff argued and testified and cited cases that the contribution amendment imposed an unequal burden between single family and multi-family homes. The assertion to the contrary constitutes unmitigated fraud.**
**(4) Section 6.5 has nothing to do with whether compulsory membership in a country club / amenity center is a proper covenant or instead a personal services contract.**
**5) SC 27-31-190 never mentioned by anyone and is inapplicable since it is not from the SC Non-Profit Corporation Act 33-31 et seq BUT is from the Horizontal Property Act limited to condominiums and is a fraudulently cited statute. Defense Counsel in relying on this commits a fraud on the Court and the Court in depending on it has made a prejudicial error of law.**

**6. The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable and were Properly Enforced.**

The Defendant HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the Defendant HOA "shall pay to [HTC] for the Service fee set forth in Exhibit `B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the Community unit owners. Ms. Denise Ambuhl testified that the contract is a bulk billing arrangement. The Defendant HOA pays for the cable services with funds from the assessments. In exchange for the bulk billing arrangement, Community homeowners **receive cable services at a significantly discounted rate.**

**Plaintiff's Notes: On cross examination Ambuhl admitted that the IHOA is a "reseller" of services and can charge up to the non-contract individual customer rate; that homeowners**

**are NOT customers of HTC and that the IHOA is THE customer and that homeowners have no obligation to HTC or HTC to homeowners under the contract. Ambuhl admitted that when Dish TV service is compared to HTC's service including the set top boxes Dish TV is far cheaper to Homeowners than HTC and thus homeowners get no economic benefit from the contract. She admitted that the IHOA is reselling services and that resellers must have a franchise from Horry County – from whom HTC is franchised. Freiboth admitted under oath that the IHOA does not hold a franchise to resell cable tv services to end users. Further, Freiboth admitted under oath that the golf course, The Vistas homes, and The Cambridge homes are not required to buy these cable services although they are "under the covenants" and "within the PUD" and within the area described by the contract: " every Unit located on the Premises".. Thus the enforcement was shown at trial to be selectively and unevenly applied. Plaintiff cited case law which voids such enforcement and the citations and argument were unrefuted. Defense counsel sat silent through this – as through most of the trial.**

**This is clearly an example why there is the appearance of bias on the part of the judicial officer, whether or not it exists, because of the extreme disconnect between what went on at trial, including arguments and evidence, and the alternative reality depicted in the final order written 100 percent from word one to word last by defense counsel. The over – whelming appearance of bias is sufficient for a new trial.**

The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the Defendant HOA or upgrading HTC services. In other words, as testified to by Ms. Ambuhl, **the HTC contract is not an exclusivity agreement.** The Defendant HOA also entered a contract with **Waste Management Industries for the collection** of homeowners' garbage on **May 31, 2001**. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community.

6a. The Services "Touch and Concern" the Land.

Plaintiff argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. **As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. 21 CJ.S. Covenants § 42. "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore `run with the land'." Queen's Grant II Horizontal Property Regime, 368 S.C. at 358, 628 S.E.2d at 911.** Assessing all owners for cable and garbage collection services lowers the cost of the services for all the units within the Community. Because the assessments have a **beneficial effect on the owners' properties, the assessments touch and concern the**

land and are enforceable.

**Plaintiff's Notes: (1) Whether the HTC contract is an "exclusivity" contract and it's effect on enforcement was never argued by Plaintiff and no evidence was cited relating to this. It is a mystery why the Court would even comment on this. The issues are (a) who is the contracting party because the IHOA's name is not on the Contract, something the Court has chosen to ignore because it is an inconvenient controlling FACT as is the SC Code's 33-31-821 prohibition on the validity of acts outside of meetings not recorded in the minutes. The first board meeting per the minutes was on September 10, 2002, Pl #300 and there has never been an approval of the Waste Management Contract in the minutes which was the unrefuted testimony at trial. Plaintiff believes the 2001 date was first mentioned in the Court's order as written by Defense Counsel unsupported by a single piece of evidence or the testimony of anyone with personal knowledge (not rumor) of the matter. The 2001 date is worse than hearsay.**
**(2) 21 CJ.S. Covenants § 42 was never mentioned at trial and may not be raised post trial, denying Plaintiff an opportunity to refute, a prejudicial procedural error. (3) The actual cases that were cited and never controverted hold that services are personal services contracts and do not "touch and run with the land". The Queens Grant case did not deal with services. The uncontroverted testimony at trial is that true covenants deal with obligations ON one's land and RIGHTS OFF one's land; and obligations OFF one's land are personal service contracts. This is the established case law and there was nothing at trial to the contrary. Defense Counsel sat silent through it all. Her draft order attempts a "another bite at the apple".**

b. The Defendant HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Plaintiff argues that the HTC Contract is void, **therefore, the cable assessment violates public policy. He relies on the following authority**: **In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007); National Cable & Telecommunications Assn v. Federal Communications Commission and United States of America, 567 F.3d 659 (D.C. Cir. 2009); and Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).**

The Defendant HOA agrees that **contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations.** However, the **HTC Contract does not contain an exclusivity clause**; the contract constitutes a system of bulk billing several owners within an MDU. Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does

not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

**Plaintiff's Notes: (1) It is obvious that Defense Counsel wrote her draft order before the trial based on what she expected the argument to be. Not one word relating to FTC matters or federal regulatory cases was raised at trial – not one case mentioned. Plaintiff did not cite to one regulation nor one case. Yet Defense Counsel's Order supposedly reflects what was argued and the evidence depended on at trial. The fact that the Court adopted this which included material totally absent from trial raises serious questions about the appearance of bias on the part of the Court and about undue influence. Accidental inclusion based on a honest belief that Defense Counsel would not "play dirty" and fraudulently slip in material not at trial raises questions about the competence of the Judge and whether he paid any attention to anything. Such appearance is further supported by the adoption of every word in Defense Counsel's proposed order. There is a constitutional issue of whether due process and a fair trial occurred. It is the appearance not the fact, which will never be known, which is important to protect the sanctity of the judicial process and to preserve respect for the judiciary.**
**(2) The phrase "exclusivity" was never argued at trial. Plaintiff argued (a) the IHOA did not actually contract with HTC because the IHOA's name is not on the contract; (b) Doug Brown, a Horton employee and putative HOA board member, didn't have the authority to enter into the contract since it was not approved by the board in the minutes; (c) a cable contract a personal services contract instead of a real covenant that touches and runs with the land. Cases were presented which support the later. This was uncontroverted and nothing was offered in opposition. Defense Counsel Golding sat silent. (3) Plaintiff never argued that the HTC contract violates public policy.**

The Community homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the Defendant HOA and by paying the assessments to the Defendant HOA. **The FCC specifically addressed this issue In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):**

The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to **every resident of an MDU**, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. **The record**

**before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.**

**Plaintiff's Notes: (1)The FCC case was never referred to at trial. There was no "record before us". Denise Ambuhl, on cross examination, admitted that the true cost to a homeowner with multiple televisions far exceeds the same services obtained from Dish TV who offers better service because Dish TV is 100 percent digital high – def, and HTC is not, requiring a set top box on every tv at additional cost. The total cost of Dish TV was uncontroverted at $ 19.99 and the HTC cost for four televisions was admitted by Anbhul to be far more than $ 40.00 – no consumer benefit.**
**(2) The Court was never asked to prohibit "bulk billing". Defense Counsel "snuck this one in" after trial because it was a winnable but non-existent argument. The final order is suspect because it adopted Defense Counsel's post-trial argument and issue never made at trial, and this is supportive of a new trial.**

Pursuant to the **FCC's 2010 Order**, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, **Plaintiff's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is without merit**.

c. The Rate Increases and Credit Allocations were Consistent with the HTC Contract.

**Plaintiff also testified that the HTC contract increased the rate annually in violation of the terms of the agreement.** He also attested that HTC issued credit allocations to the Defendant HOA that were **misappropriated by the Board of Directors** or K.A. Diehl, however, he did not present evidence that credit allocations were made. **In contrast, Ms. Denise Ambuhl testified that the rate increases were consistent with the HTC contract**. She also clarified that **no credit allocations were made to the Defendant HOA for cable services, because that particular line of business has not been profitable since 2003**. Accordingly, I find that the p**ayments made by the Defendant HOA to HTC** were proper and that no credit allocations were made to the Defendant HOA.

**Plaintiff's Notes: (1) Plaintiff never argued that the HOA's assessments violate public policy; Plaintiff never depended at trial on any FTC Order.**
**(2) Defense counsel fraudulently invented what was testified to and the Court blindly adopted this. Plaintiff filed a letter with the Court immediately after receiving Defense Counsel's draft order suggesting that the Court order the transcript since almost every material alleged fact or purported testimony was from an "alternate universe" and didn't reflect what went on in the Courtroom. The Court was put on notice to exercise due**

**diligence because of problems of truth and procedure – including raising arguments and cases after trial to which Plaintiff could not respond.**
**(3) Plaintiff raised the issue that the HOA raised rates January 1 of each year while HTC raised rates in April of each year, which Ambuhl admitted was inconsistent and not a "pass through". She testified that the contract does not link what the HOA charges homeowners to what HTC charges the HOA – just a maximum price cap for the HOA to charge homeowners. She admitted the contract is not bulk billing because the homeowners are NOT customers of HTC.**
**(4) Ambuhl admitted that the HOA receives and is billed for telephone service and should have received capital credits for that the evidence presented was that these were never on the HOA's general ledgers. After Ambuhl recited her "line of business" routine, Ambuhl to admitted on cross to intimate knowledge of HTC's bylaws and the governing statutes which she was required to read aloud and which relate capital credits to how much a customer spends relative to all HTC's sales and requires dividing up capital credits based on percentage of total purchases, and that the statute and HTC's bylaws do not provide an alternative of dividing income and profits into arbitrary "lines of business". Her credibility was diminished because at the end she had contradicted herself.**
**(5) Plaintiff never accused the HOA of misappropriation; it was shown that credits should be present at least for telephone service and that Diehl is "responsible" to make up the deficit, however it occurred.**

As noted with the **Golf Course Agreement, the cable contract and the contract with Waste Management Industries have been in existence for many years.** In fact, Plaintiff was a property owner in the Community for over 2 1/2 years before he challenged the validity of these agreements. **Further, it should be noted that neither HTC nor Waste Management were parties in this action.**

I find that the Plaintiffs arguments with respect to the HTC Cable Contract and the Waste Management Industries Contract are without merit and the **Defendant HOA has the authority to enter into** and enforce these Contracts. Furthermore, I find that the Defendant HOA has the right to assess the Plaintiff and other single family homeowners for the cable services, and the Plaintiff has an obligation to pay the assessments.

**Plaintiff Notes: (1) Golf Course Agreement / Cable contract / Waste Management contract were not known to homeowners and there was no clue in the BoD Minutes that these existed and were found only when Plaintiff discovered discrepancies in the budget and demanded to examine the files.**
**(2) Plaintiff at trial explicitly stated he did not seek to void the contracts. The issue was the enforceability by the IHOA against homeowners which left intact any obligation by the IHOA through it's contracts.**
**(3) At trial Freiboth admitted that the cable contract and waste management contract are selectively enforced as The Villas and The Cambridge are not subjected to these contracts. The Court never addressed this anomaly of selective enforcement and case law was**

**presented that covenants must be uniformly enforced.**

**7. The Defendant HOA has the Right to Govern Parking in the Amenity Center Parking Lot and the Streets and Roads Within the Community.**

Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. Street and Amenity Center Parking.

Section 7.25 of the Declaration specifically addresses parking on the streets and Common Areas in the Community. This Section specifically authorizes the Defendant HOA to tow or remove vehicles and enforce parking as it does assessments.

The streets and the parking lots in the Community, with the exception of a small portion of International Club Boulevard and Pickering Drive, are within the property descriptions in the Declaration; therefore, they are subject to the Declaration. Subsequent to the filing of the Declaration, certain Community streets were dedicated to Horry County. Plaintiff argued that the dedication and conveyance precludes the Defendant HOA from enforcing Section 7.25. The dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the referenced plats, shows the portions of International Club Drive. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Declaration.

> **"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville,* 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.***
>
> **"The party dedicating land.. .may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations,**

> **appropriate and specific language must be used." *Id., See also, Olde Severna Park Improvement Ass 'n v. Gunby,* 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.***

**Plaintiff Note: (1) The above citations first appeared in Defendant's post-trial draft order and these assertions were not made at trial.**
**(2) Plaintiff made the uncontroverted assertion that Horry County has pre-empted towing on private property, HCC Code 12-5-123 which prohibits arbitrary towing and imposition of charges by private property owners. The Court's order is silent on this matter which bans the imposition of any charge. Further Freiboth at trial admitted that a homeowner as a member of the general public is not subject to the restrictions but when viewed as a homeowner a different standard is applied for the same conduct, a contradiction of rights which the court has not addressed.**

Additionally, the Horry County Zoning Department **has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter,** the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants.

**I find that the streets within the Community were dedicated subject to the Declaration** and all amendments thereto.

**Plaintiff's Notes: (1) The Carter letter is dated April 16, 2009 and was not in Plaintiff's nor Defendants' evidence set. It was never used at trial which is probably why Defense Counsel never gave the date in her draft order. The actual letter, attached, states exactly OPPOSITE what Defense Counsel Golding wrote and there is thus a fraud upon the court. The actual text reads in part:**

> **"I have not reviewed the covenants and restrictions for your subdivision and express no opinion as to what rights, if any, the HOA may have in this regard. You would have to consult with a private attorney if you have any questions of that nature."**

**(2) Defense Counsel put another letter into evidence, Defense #61, from the Horry County Infrastructure and Regulation Division which makes a definite statement and which contradicts the Court's dependence on Carter's non-existent statement. #61 reads in part:**

> **"I am writing this letter to clarify some issues raised by residents ... many of the questions brought forth to you originated from differences of opinion between individual property owners and the Homeowners Association (HOA) ... Pickering Drive and International Club Blvd are both owned and maintained by the county. ... Taxes are not paid by the HOA for the land within these platted public rights of way."**

**Since the conclusion of the court is directly tied to correspondence from the County, the**

**Order is not supported by the evidence and the Order with respect to the roads should be Amended. Further, the Order was procured by fraud.**

b. Declaration Section 7.25 was not Deleted.

Plaintiff argued that section 7.25 was deleted by the First Amendment due to the language that the Developer waived the architectural controls in certain provisions. I find that the Developer's waiver of certain rights was **solely with respect to the Villas Horizontal Property Regime** and did not waive the applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. **It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments.**

**Plaintiff Notes: (1) Consistent use of word "delete" in Amendments not argued by Defense Counsel at trial. Not supported by the evidence. Amendment #1 paragraph 12 "waives" Developer's right under Covenant Section 7.37(c) to enter into and maintain golf course property which acts as a deletion AND has nothing to do with The Villas.**
**(2) There are two developers, R Scott Pyle of Plantation AD who authored Amendment #1 and DR Horton who authored all later Amendments.**
**(3) Paragraph 1 of Amendment 1 changed the PUD name which clearly is not a change directed only at The Villas thus the argument that everything in Amendment 1 pertains to The Villas is speculative. Paragraph 8, an addition relating to Reserve Funds, applied to single family units as well.**

**8. Plaintiff's Request for Members' Information was Properly Denied.**

Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. In response, Defendant HOA's attorney sent a letter denying his request.

The Act sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose." *See S.C.* Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

Plaintiff failed to state a good faith basis for his request for the voting list as required by the Act. According to his email, he requested the list to "communicate with fellow

homeowners" after he filed his complaint in the 2009 Lawsuit. His request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was properly denied.

Finally, the evidence established that the **Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.**

**Plaintiff's Notes: (1) The web list is not the "membership list" as defined in the statute.**
**(2) The statute does not require ownership of a computer and internet access as a precursor to obtaining the membership list.**
**(3) The statute does not require waiver of privacy rights as a precondition to obtaining the membership list.**
**(4) At trial it was not controverted that the web list is not prepared as required by 33-31-720 and does not consistently show the property address and never shows the number of votes an owner can cast thus the web list can never be the "voter list"**
**(5) 33-31-720 does not have a "good purpose" provision but states without qualification or limitation: "*(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting*" which is the statute Plaintiff put into evidence at trial #226 and to which he testified. The Order is silent about the statute at issue and Plaintiff is entitled to JAML on this matter as a matter of law.**
**(6) 33-31-1605 which relates to records of the corporation was NOT in evidence nor was it cited by Plaintiff. Subsection 1605 has the qualification but Section -720 is the one at issue.**

**9. The Sale of the Easement to Central Electric was Properly Effectuated and is Valid.**

he Defendant HOA Board of Directors has the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Declaration and Article 4, Section II of the Bylaws. Under Bylaws' Article 4, the Board exercises all rights of the Defendant HOA, unless a provision specifically requires a membership vote. Plaintiff stated that his argument that the Defendant HOA **improperly transferred the easement to Central Electric is based upon Bylaws, Section 11.1.** However, the vote requirement in Article 11 does not apply, because the Defendant HOA did not convey Common Area; it granted an easement over the Common Area owned by the Defendant HOA. Furthermore, condemnation was never threatened; the Board was offered a package of significant value in exchange for the easement, and it granted an easement based on that consideration.

**Plaintiff's Notes: (1) Plaintiff relied on Section 4.10 of the Covenants which read in part "*all utility lines and facilities serving the Subdivision and located therein shall be located underground*" and section 7.23 which reads in part "*Exclusion of Above Ground Utilities. All electrical service, wires, pipes, lines, telephone, cable television (CATV) lines, security system lines and utility services of any type shall be placed in appropriate conduit***

***underground and no outside electrical lines shall be placed overhead."*** **which Plaintiff argued makes allowing above ground utilities an ultra – vires act. The applicability of Section 4.10 and Section 7.23, read to witness / Board Member Maureen Sullivan, was uncontroverted.**
**(2) Plaintiff never challenged granting an easement.**
**(3) Plaintiff cited Pre-emptive South Carolina Law, SC 33-31-1301, Prohibited Distributions, which bars ANY distribution: " *a corporation may not make any distributions.*" The $75 checks are distributions and Plaintiff is entitled to JAML on the issue. The exception of Section -1302 pertains to dissolution of a corporation or the "repurchase of memberships".**
**(4) The issue before the court is what the IHOA Board did with the money. Plaintiff cited and testified as to 33-31-813 "Liability for Unlawful Distributions" and Defense Counsel was silent and did not controvert that every Board Member including Defendant Toth was liable for the total sum distributed. The Court did not addressed how the prohibition on any distribution makes the $58,000 or so distribution legal and how the BoD is not subject to liability under 813. There is a clearly erroneous application of law and fact meriting new trial or Amendment.**

Plaintiff further argued that the Defendant HOA should not have **distributed** a portion of the monies it received for the easement to members in the Community. Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of **passing a benefit to the members**.

**Plaintiff Note: Freiboth was unable to state how this is not a distribution. During Freiboth's testimony Plaintiff caught Defense Counsel signaling answers to Freiboth and brought this to the Court's attention – on the record.**

Plaintiff then contended that a portion of the funds for this easement was allocated for the payment of a lawsuit. The Act permits the Defendant HOA **to distribute benefits** to its members in conformity with its purpose. S.C. Code Ann. **§ 33-31-140(11)(6)**. The Defendant HOA had the authority to utilize the funds as it did and therefore there was nothing improper or invalid.

**Plaintiff's Notes: Section 33-31-140(11 invoked by the Court defines "distribution" as ""Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The Court's conclusion of law is contrary to the very law cited by the Court!. Section 33-31-1401 (11)(b) states that "distribution" does not include "conferring benefits on its members in conformity with its purposes". An assertion that a transfer of income is a "benefit" and not a distribution under the law is a fraud and an error of law and fact not supported by evidence or law. To make such an argument Defense Counsel committed a fraud on the court. It is obvious that "benefit" is along the lines of services. Also – Defense Counsel did not argue "benefits" at trial; Freiboth testified that the Board decided to allow the homeowners to share in the income.**

I find that the Defendant HOA properly granted an easement to Central Electric and it **properly utilized the funds** it received from Central Electric.

**Plaintiff Note: Conclusion not supported by the evidence or the law.**

**10. The Defendant HOA's Committees and the ARB are Consistent with the Act.**

Plaintiff testified that the Defendant HOA is in violation of the Act, because the Board of Directors does not appoint members of the Board of Directors to serve **on committees**. S.C. Code Ann. Section 33-31-825 provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."

**Plaintiff's Note: Plaintiff's assertion applied to EVERY committee. The minutes of Board Meetings in evidence is that no committee has a single Board Member as a committee member – uncontroverted. Freiboth testified that board members attend committee meetings as "observers". The Court was asked to make a declaratory judgment on the matter and failed to do so as to the numerous committees other than the ARB.**

The ARB is a separate Board **of the Defendant HOA** created by Article VII **of the Declaration**. Pursuant to S.C. Code Ann. **Section 33-31-801**, "**[t]he articles** may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors..."

**Plaintiff's Note: (1) The statute recognizes only two sets of documents relating to non-profit corporations those being (a) Articles of Incorporation, which was in evidence as Pl #552 (March 1, 2001) and which had none of the optional text; and (b) Bylaws. It does not recognize "covenants" as having any legal bearing on a corporation. SC 33-31-140 (2) defines "Articles as "Articles of incorporation" or "articles" include amended and restated articles of incorporation and articles of merger." The Articles of Incorporation do not authorize anything outside the default provisions of law.**

Article VII establishes the ARB and grants it with the authority to **review and approve applications for improvements** on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant **HOA's governing documents**, and therefore, Section 33-31-825 does not

apply.

**Plaintiff's Notes: (1) Neither Section 7.2 of the Covenants which creates the ARB nor Section 7.3 (Objectives) provide the ARB the power to impose any fines or to enforce the covenants. Section 8.3, Enforcement limits the enforcement power to "*The Developer, the Association, and any Owner*". Plaintiff argued this, uncontroverted, at trial, invoking Section 13.3 of the Bylaws (Procedures) which apply to The Association. The Court has made the same conclusion that the ARB's power is merely "review and approve applications". This is inconsistent with enforcing a fine supposedly imposed by the ARB which is NOT part of the HOA but payable through a claim asserted by the HOA on behalf of the ARB which is not a component of the HOA. The HOA has no equitable or legal claim to demand money to satisfy something "owed" to somebody else (the ARB). Either the ARB is a committee subject to Bylaws 13.3 or the HOA has no standing to enforce an ARB fine and the Court has made an error of law in ordering Plaintiff to satisfy a "fine" not imposed by the HOA which is prohibited from imposing a fine or restricting rights until the Board, of it's own volition and without the application of a supposed violator, holds a hearing on the record – which it did not and which Plaintiff demanded in three letters of record in this case. Freiboth was required to read the first line of the first document which read "Appeal".**
**(2) As stated, the ARB is not created by the HOA's articles of incorporation or by it's bylaws thus it is not a "separate board established by the Defendant HOA's governing documents". This is an error of fact and of law requiring Amendment of the Order.**

Likewise the **Defendant HOA's committees are not committees of the board**. The committees consist of members of the Defendant HOA. Therefore, Section 33-31-825 also does not apply to Defendant HOA's committees. Furthermore, the committees are not provided separate authority to act and merely make recommendations to the Board of Directors.
I find that the Defendant HOA complied with the Act and the Declaration in establishing its committees and the ARB.

**Plaintiff's Notes: It is in the record of proceedings: That Section 3 e (v) of the Bylaws provides that committee reports shall be made at the annual meetings. The minutes of each annual meeting, which are in evidence, relates the "reports" of each of these "no-committees" and they are the only committees making reports. Likewise the minutes of each board of directors meeting, for which scores are in evidence, relate "reports" of these same numerous "non-committees". In addition, there is nothing to preclude the Board from creating a committee called the ARB and since the ARB gives it's reports just like all these other "non-committees" and obtains it's financial support from the HOA in the same manner, it is more likely than not, which is the standard, that the ARB has become a committee of the HOA and is thus subject to procedural requirements of Section 13.3 (hearings without need of appeal). This was also uncontroverted at trial. Order is unsupported by the proceedings.**

**11. The Architectural Guidelines are valid.**

Plaintiff argued that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass 'n v. Cromer, 373 S.C.* 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores,* the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

**Plaintiff's Notes: (1) The covenants for Arcadian Shores and for the IHOA both provide for the creation of rules and regulations. However, the Court stated that rules and regulations can not impose or extend any restriction not explicitly already in the covenants – that such an extension requires an amendment of the covenants. Thus the rule making provisions in covenants were held irrelevant. Swing Sets are NOT RESTRICTED or even mentioned in any way in the Covenants. Any restriction by rule of any sort is an additional burden. Plaintiff read from the applicable portion and Defense Counsel did not controvert this. At trial Defense counsel did not assert the "rule making" argument. This came post-trial.**

**(2) The Court in Arcadian Shores wrote (this was read by Plaintiff into the record at trial): "<u>if the grantor had wanted to restrict mobile homes, he could have done so." *Id.* at 5, 498 S.E.2d at 86"</u> [Swing Sets existed in 1999 ipso facto the failure to restrict their use means they are allowed under the covenants and any restriction is an additional burden requiring amendment of the covenants – and not reachable through a rule]**

**"We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners." [Any change mentioning swing sets is a change to the 1999 restrictions and requires amendment]**

**"... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. " [The attempt to restrict swing sets by imposing an "aesthetic standard" is a subterfuge and an illegal extension of the restrictions in the covenants]**

**And as to the irregular enforcement, Plaintiff put into the record numerous photos of fences and swing sets in every conceivable location and called the testimony of Pete Pizzi as to the side yard location of his daughter's swing set (which location was neither in the "rules" nor the covenants.) The Court held:**

**"<u>However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts.</u>"**

**"<u>Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures.</u>" Upheld that the Association thus waived its right to review / approve.**

**At trial Plaintiff put into the record 17 swing sets listed in the Response to Interrogatories Pl 604 Pl 605 which included that of Pizzi's daughter.**
**(3) The standard is "more likely than not" and Plaintiff met that standard in showing that no swing set restrictions exist and that fence and swing set controls are inconsistently applied. He also met his burden of "more likely than not" in proving that his edgers are "not a wall" but landscaping edging despite how it may have been intended. Facts on the ground and not speculative intentions are the only things a court is supposed to consider.**

Here, the Architectural Guidelines are **distinguishable from the rules and regulations in Arcadian Shores. The Defendant HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations,** to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § *7.2* of the Declaration.[2] The Architectural Guidelines do exactly that, they set specific standards for approval to create uniformity in the application of the covenants and clearly delineate the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the Defendant HOA has the authority to pass the Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Declaration, they are valid. *See Sea Pines Plantation Company v. Wells, 294* S.C. 266, 271, *363* S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons

[2] Section 7.2 of the Declaration sets *forth:* "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers thereunder."

**Plaintiff's Notes: (1) Per Arcadian Shores, the only use restrictions are the ones explicitly stated in the covenants, and Arcadian Shores had the same authority as the IHOA to make rules. The part of Arcadian which is germane is "motor homes" because an attempt was made to enlarge or restrict which was not, but could have been, in explicit use restrictions in the covenants. Any argument to the contrary is an error of law. Plaintiff is entitled to JAML on these issues.**

will be upheld where the **covenant or appropriate authority has provided guidelines** for enforcement and expressed the purpose of the restrictive covenant).

**Plaintiff's Notes: This is not the language of the Supreme Court in Arcadian. The court**

**excluded guidelines in their entirety from a controlling role: "We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions ... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written In adopting the language of Defense Counsel the Court has made a clearly erroneous error of law.**

Plaintiff also testified that the parking restrictions in ARB Guidelines invalidates the document. However, no parking restrictions are contained in the ARB Guidelines at issue in this case.

**Plaintiff's note: Did not make this argument at trial. The argument was directed strictly at (1) waiver of the covenant provisions and (2) county ownership of roads.**

I find that the Plaintiffs claims regarding the ARB Guidelines are without merit.

**Plaintiff's note: The challenge was to enlarging restrictions through "guidelines". The defendants testified through Freiboth that the "guidelines" are "general guides", and can't even be precisely relied on, and can be interpretatively enforced which is contrary, as a matter of law, to the Supreme Court's decision in Arcadian. The Order is clearly erroneous as a matter of law.**

**12. The ARB's denials of Plaintiffs applications for a fence and swing set and the deferral of his application are valid.**

When reviewing the actions of an ARB, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." Id. (citing River Hills Prop. Owners Assn, Inc. v. Amato, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an ARB's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is

**not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co., 294* S.C. at 271, 363 S.E.2d at 894).**

**Plaintiff's note: None of this was raised at trial and there was no dependency on any of these cases. Plaintiff was denied due process opportunity to rebut or bring opposing evidence.**

a. The ARB has the authority to regulate improvements within the Community.

First, the ARB **had the authority to deny** Plaintiff's applications for fence and a swing set. Declaration, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk ... shall be commenced ... nor shall any exterior addition or change be made until the plans and specifications ... shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

**Plaintiff's Note: Per Arcadian, the ARB may not deny a fence which is not a patio privacy fence if there are fences in the sought location. The Arcadian decision stated:**

> **""Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures. Upheld that the Association thus waived its right to review / approve."**

**At trial Plaintiff showed the Court and filed pictures of fences for at least two houses running all the way around houses: left side to rear and up the right side and connecting to the house siding: 1112 Worcester Court and 276 Pickering Drive. A house on Pickering drive was shown to run a fence parallel to the street all the way to the left property line with no patio behind it or near it. Another one at 184 Seville went along the street front from the front house edge and back to the rear property line: more visible than Plaintiff's plan. All told it is more likely than not that fences are permitted which are more than patio privacy fences – the applicable standard. In addition, since Plaintiff's patio is at the rear of the house, the side fence IS a "Privacy Patio Fence" for at least two thirds it's length. The Order is clearly erroneous as to facts and to the law per Arcadian.**

Section 7.4 of the Declaration specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Plaintiff argued that Sections 7.2 and 7.4 were deleted by the First Amendment to the Declaration.

Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified in his deposition that the

Declarant deleted Section 3.7 under the First Amendment, but not Sections 7.2 and 7.4. He further testified that the Declarant only intended to waive its rights in a limited way and that the document must be read as a whole.

**Plaintiff's Note: At his deposition Pyle was unable to say for what purpose he "waived" use restrictions. Pyle SIGNED the covenant and amendment despite what he testified to which lends doubt to his credibility. He testified as follows:**

> **Q. What do you mean when you use the word waived?**
> **A. Waive, to not apply in this situation. How about that, yeah, to not apply in this situation? ...**
> **A. But again, you're asking me about a document that I did not sign, that I was a part of in conversation.**
> **Q. Fine. I'm glad you clarified that.**
> **Q. Did you have a hand in drafting up amendments two or three to the covenants?**
> **A. Our attorneys would draft documents. Sometimes I was involved, and sometimes I was not.**

**Despite several minutes of questioning Pyle (who signed the Covenants and Amendment #1) never identified "this situation".**

Jeffrey King testified, that **in his expert opinion**, the Amendment only waived the **Declarant's rights with respect to the Villas**; the Defendant HOA's rights and therefore the ARB's rights, were unaffected.

**Plaintiff's note: King testified he had not even read the covenants or the amendment at issue and had no particular knowledge of the facts. He testified that his "expertise" consists only in doing the work. King was unable to explain why a "waiver for the Villas" would be needed when he admitted that other provisions already in the Covenants, which he had not bothered to read, already exempted builders – including the Villas builder, from any use restriction. He also admitted that "waive" is functionally the same as "delete" and that he was unable to find any actual text in Amendment #1, which was handed to him, tying the waivers to The Villas. He admitted that the existing general language in the original Covenants exempting all builders from use restrictions is similar to what he has used, and which did not need later amending. This constitutes "ambiguity" and the cases Plaintiff cited all agree that ambiguities are resolved in favor of the "free use of property". Those case citations were not controverted at trial and have been ignored by the Court in it's final order.**
**Cases cited at trial but ignored by Defense Counsel's draft order: "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009 "A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all**

**doubts resolved in favor of the free use of property.". Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980): The applicable "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902 "Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).**
**The use of the phrase "waive" creates an ambiguity, particularly since the waivers are in a document with sections of general application (reserve fund and name change) to the entire development. It is more likely than not that sufficient ambiguity exists to require resolving the ambiguity in favor of the free use of property as the appellate courts require – especially given Pyle's confusion as to the circumstances.**

Plaintiff argued secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by previously approving various other fences. The Plaintiff **pointed to privacy fences** but these, if approved, are specifically permitted by the Declaration. Also the President of the Defendant HOA testified **that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA**.

**Plaintiff's Note: The Order admits that there are several fences which are not privacy fences. That they were erected while the developer controlled the ARB does not change the fact that the same covenants and same ARB were in place. The court decisions have never "aged" variations but see them as a whole and the IHOA president admitted to the variations, which the Court now chooses to ignore. The Order as to fences is not supported by facts and law. Also, Plaintiff showed pictures of many "non-privacy fences" and about a dozen where it was ambiguous whether they were "privacy" fences since they were adjacent to the road or the cul de sac.**

> "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik,* 307 S.C. at 344, 415 S.E.2d at 388 (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

**Plaintiff's Note: Above citation not raised at trial. However, all of the fence "exceptions" are in plain view and were photographed from the roads.**

Plaintiff primarily relied upon *Arcadian Shores Homeowners Ass 'n, 373* S.C. 292, 644 S.E.2d *778.* The case is illustrative of the doctrine of waiver. In *Arcadian Shores,* testimony revealed that some homeowners did not submit plans or specifications for certain projects to the

Association and that **the Association never consistently enforced the requirement** that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.* The facts here are distinguishable from *Arcadian Shores.* **Beckie Abel,** the Defendant HOA's property manager, testified that the **ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. Not until his applications for a swing set and subsequently the 6 foot fence were denied** did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Plaintiff's waiver argument, **because either the approved fences are privacy fences** as permitted by the Declaration or **an existing fence approved by the Developer.**

**Plaintiff's Notes: (1) The order cites Freiboth as having admitted that there are non-privacy fences. Freiboth never testified that the developer had previously approved the fences. At trial Plaintiff read into the record IHOA answers to interrogatories which matched pictures of "non-privacy fences" to fences on the list approved by the post – developer HOA, so the "excuse" is a fiction contrary to the evidence.**
**(2) The age of the ARB is irrelevant.**
**(3) While Abel testified that Plaintiff had received approval for certain improvements her testimony never was that approvals were granted and the process acceded to (by Plaintiff) until the Swing Set denial. In point of fact whoever set out the sequence stated LIED and committed a fraud upon the court and thus the order is based on a falsehood and is contradicted by the evidence. All three of Plaintiff's applications are in evidence. THE FIRST was the swing set on July 21, 2009.**

Additionally, Mr. Freiboth testified that **front yard fences are not permitted in the Community**. As to the swing set, the argument that other **swing sets have been approved** also does not waive the Defendant ARB's right of denial, **because swing sets cannot be built in the side yard, a rule that has been evenly applied by the ARB. All existing swing sets are actually situated in the backyards.** The ARB has consistently rejected applications for swing sets in locations other than the backyard. **The South Carolina Human Affairs Commission found the same in its dismissal of the Plaintiff's claim**.

**Plaintiff Notes: (1) At trial Freiboth admitted that the Covenants do not contain the words "front yard fences" and when shown photos (in evidence) admitted that three houses have fences on the left, rear, and right of the houses and that another on Pickering Drive runs**

**from the front of the house approximately 40 feet to the left property line – none of them near any patio and none limited to the rear. Elsewhere in this Order copied from a post – trial brief not in evidence the Court excused this because prior ARB's allowed it.**
**(2) Swing sets: At trial Freiboth admitted that there is NO restriction on swing sets in the Covenants and that the ARB guidelines only say to secure them against high winds. The Court's conclusion is contrary to the facts through the evidence. "All ... are ... in the backyards" is contrary to the testimony of Pete Pizzi and photos and the admission of Freiboth that a swing set was allowed in the exact same side yard of the exact same house model – in the unit belonging to Sobczyk at 1212 Harrogate. The word "all" is in the Order. The statement of fact is fraudulent – because the Court heard Pizzi's testimony and saw two photos of same. The inclusion of this Defense Counsel written fraudulent conclusion is evidence of the appearance of bias by the Court. The side yard fact was repeated several times by Plaintiff in testimony and was NOT controverted by Defense Counsel. The "no side yard" "rule" is also fraudulent because Freiboth was shown the covenants and ARB rules and admittedly could not find such a "rule" or "restriction". As to the Human Affairs Commission, Toth signed a document stating that the "no side yard placement" was in the Covenants – which was a lie – and that no side yard placements are ever allowed – which is a lie when looking at the Harrogate photo. Notably – at trial Defense Counsel never made this argument and if they had the speaker would have been impeached by Plaintiff. The actual document was never addressed – except post trial by Defense Counsel which is outside the trial proceeding and not in the record of the trial.**

b. The ARB acted reasonably and in good faith in denying Plaintiffs applications.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles **is not arbitrary** or capricious. *Sea Pines Plantation Co., 294* S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.*

**Plaintiff's Note: (1) Defendant never argued this at trial – it is not in the record.**
**(2) The Sea Pines decision had a dependent phrase which this Order has omitted: "but bears a sufficient relation to the subdivision's general plan of development". Defense never plead nor argued that restrictions on side yard use is in the "general plan of development". To the contrary, documents are in evidence that the general plan had no such thought: (a) The covenants which speak only of observing side yard set backs; (b) the ARB guidelines which omit such a restriction when addressing swing sets; (c) the plans submitted to Horry County which address storage and utility buildings related to units and likewise only cite setbacks.**
**(3) "Arbitrary or capricious" is when the same exact thing is approved for one unit and denied for another. The Court's order ignored that Sea Pines also ruled that "In interpreting restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them." The Supreme Court interpreted Sea Pines in Cedar Cove Homeowners Association, Inc., v. Rudy DiPietro and Margaret L. DiPietro, 368 S.C. 254; 628 S.E.2d 284, cited by Plaintiff at trial, which stated, when Cedar Grove delayed suing for a year, that Sea Pines is inapplicable because, through the delay, *"We are then left with the provision that compliance with the restrictive covenants "shall be presumed . . . [if] no suit to enjoin construction is***

***commenced prior to substantial completion thereof. ... are entitled to the presumption of compliance"*** **and in THIS case Defendants waited a year before suing for compliance. Per Cedar Grove citing Sea Pines Plaintiff was in compliance because of the delay and the IHOA waived it's right to enforce any provision, if any, that existed. This explanation is unnecessary because Defendant's argument WAS NOT RAISED AT TRIAL.**

Plaintiffs proposed fence was denied because it was to be **situated in the front yard** and **close to his property line**. The swing set was denied because its proposed location was the side yard. The denials of Plaintiffs applications were reasonable and not arbitrary or capricious.

**Plaintiff's Notes: (1) The "close to his property line" argument was never raised at trial or in any pleading. It is contrary to the evidence even of the "Patio Privacy Fences" because dozens of them are ON the rear property line and contrary to the law because there isn't a single document in evidence which has such a restriction. Such an argument is a fraud and justifies amendment or new trial. Since the assertion was added post – trial in the order it has the presumption of judicial bias.**
**(2) "Situated in the front yard" is a factual conclusion contrary to the evidence. The rear end of the fence is against the rear property line – per photos and survey plat in evidence. The front end of the fence begins approximately 40 feet rear ward from the front edge of Plaintiff's house. Defense Counsel apparently was so blatantly confident that she could write anything, true or not, that she didn't even try to write "some of it was in the front yard". And photos of three houses are in evidence of fences running from the Front edge of houses along the street to the left or right property lines. This was a fraudulent representation by Defense Counsel in her "draft order" which is not part of the record of the trial and it's adoption by the court give the appearance of bias by the Court since the Court saw the photos and plats at trial.**

c. The deferral of Plaintiffs application was valid.

On February 27, 2012, Plaintiff submitted an application requesting the approval of two Pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred his application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Plaintiff argued that the ARB's knowledge of the outstanding fines is a violation of his privacy. He also contends that the deferral is a **breach of the Declaration** and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are permitted. He also **argued that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction** by voting to defer the application and disclosing the fine amount to the other ARB members.

Plaintiffs contentions are without merit. The **ARB is the body that determines the fines and their assessment**. Further, this information was not disclosed to the ARB through Mr.

Roche, but instead, was provided by K.A. Diehl, the management company. Also, to comply with Plaintiffs request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application.

**Plaintiff's Notes: (1) Plaintiff argued at trial that Diehl not Roche was the source of the financial information – obvious because Toth wasn't on the IHOA board in 2012. The Court's finding of fact supports Plaintiff's allegation and the Order should be amended to grant the invasion of privacy allegation. At trial Defendants never argued that Plaintiff did not have an expectation of privacy in his account balances.**
**(2) The Order as written by Defense Counsel fraudulently mis – states Plaintiff's at trial basis for the cause of actions: (a) Plaintiff read into evidence (the document itself was in evidence) from the ARB application that the ARB's stated procedures excluded "deferral". Also read into evidence was the Bylaws 13.3 Procedures which state that no fine may be imposed nor right interfered with until the IHOA Board holds a hearing it must schedule whether or not an appeal is filed.**
**(3) Defense Counsel's text in the Order's statement that the "ARB Body ... determines the fines and their assessment" is a fraud by Defense Counsel. Sections 7,2 and 7.3 of the Covenants are in evidence and Freiboth was unable to find one word in the Covenants (Objectives and Prior Review) that had the word "enforce" or "fine" in it. The Covenants exclusively gives that authority to the IHOA Board and the IHOA Bylaws, 13.3, in evidence says they can't impose fines prior to the IHOA Board hearing. Section V b of the ARB Guidelines, in evidence, explicitly has the IHOA Board in control of the fines. If the ARB is "independent" than the Board can not "waive" ARB fines. At trial no explanation was given as to where the "fine" money goes – since the evidence is that checks are written to the IHOA and the ledgers, in evidence, is that the money goes in the IHOA accounts, not an ARB account.**
**(4) "ARB ... determines fines ... and their assessment". The evidence is that the ARB has never met to and never made a decision on imposing a fine. Contrary to the evidence.**
**(a) The violation letter Pl # 627 was "for" the IHOA, not the ARB. It did not cite the ARB Guidelines but instead the Procedures (Section 13) of the IHOA's bylaws and said the IHOA Board was the one to impose fines. (b) The October 14, 2010 Diehl letter "for the IHOA Board" cited the dispute route was with the IHOA Board, stated that the ARB merely makes the approval / disapproval decisions, and stated that the IHOA Board is the fining authority. At trial this was not controverted and no evidence or testimony disputed this.**
**(5) Per the SC Non-Profit Corporation Act, Roche had a clear conflict of interest and was not allowed to vote or even participate. The Court has admitted that no proper quorum was present. How it got to this is a mystery because there was no testimony or evidence cited at trial about how many ARB members were present or about quorum issues. There also is no evidence or testimony that the two other ARB members voted as Roche voted. "All ambiguities should be resolved in favor of the free use of property" and it is just as possible that there was a tie vote without Roche. For a court order to say that the explicit provisions of the Non-Profit Corporation act regarding conflicts of interest should be**

**violated to allow the violator to vote so that there would be a quorum where he could illegally vote is a travesty of justice, clearly contrary to the law, and merits a new trial or at least amendment of the order. The Order as crafted by Defense Counsel depends on things not in evidence and not in the record of the proceedings, and the Court's adoption of this presents the appearance of bias sufficient to merit a new trial. If also could be interpreted that the Court ignored the record and relied entirely on fraudulent material from the Defendant – meriting a new trial.**

d. The ARB complied with the Bylaws when fining Plaintiff for his violations.

Plaintiff argued that the Defendant HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Declaration, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and **given a period of 10 days to remedy the violation without further sanction**. If the violation is not abated within 2 months, the Defendant HOA **"may" provide the Owner with a hearing**. Plaintiff was informed that he could- appeal but he specifically chose not to appeal. The South Carolina Affairs Commission also found that Plaintiff did not follow the appeal process with respect to the swing set application.

**Plaintiff's Notes: (1) The omission of a controlling dependent phrase in a controlling rule is a fraud when the Court depends on it. The rule of "notice" has such a clause: "13.3.1.3 ...m ay result in the imposition of sanctions after notice and hearing." The imposition of sanctions requires both "notice and hearing" NOT JUST NOTICE. The entire section was read into evidence by Plaintiff at trial. Freiboth was led through this word by word and agreed that no fine could be imposed until after notice and hearing. The judicial officer was observed to be taking notes at the time and listening closely to this. (2) The imposition of a fine and sanction by the IHOA is not mandatory. "May" in this context is that the IHOA "may" proceed to provide the mandatory hearing required by the aforesaid "notice and hearing". This is a technical point but it IS the one raised at trial and technical points are the ones the Court is supposed to depend on in contract matters. (3) Plaintiff had Freiboth read the hearing section which says that no sanction is effective until after a hearing recorded in the minutes of the board is held. The text in evidence and testimony reads:**
***"13.3.3 The hearing shall be held in executive session of the Board of Directors pursuant to the notice and shall afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting."***
**At trial Freiboth was asked why the procedure was not followed and Freiboth testified that if Plaintiff had written to the Board asking for an appeal, they would have followed the procedure. He never alleged that there was a "may" in the rules. This material cited in the Order is outside the proceedings and CONTRARY TO THE EVIDENCE: At trial Freiboth was forced to read from Plaintiff's October 11, 2010 Pl # 633 whose FIRST**

**SENTENCE / Title included the phrase *"Appeal" of October 8, 2010 Disapproval of Fence / Approval of Flower Bed in "County Easement".* At first Freiboth testified under oath that the IHOA Board expected Plaintiff to "appeal" but that Plaintiff did not. In impeachment, which destroys Freiboth's credibility, Freiboth admitted that Plaintiff used the word "Appeal" but said that the IHOA Board deliberately ignored the appeal because in paragraph #4 of the letter Plaintiff stated he was "disputing the necessity of an Appeal" with the words before it saying this was stated to avoid "waiver and estoppel" if it went to trial.**
**The direct and unambiguous testimony of Freiboth before he was presented with the letter was that if Plaintiff had presented a letter titled "appeal" the IUHOA would have been required to hold such an appeal per Section 13.3 of the Bylaws. The "may" is contrary to the evidence and testimony and merits Amendment to conform to the law and the facts.**

Additionally, Section 13.3 specifically applies to the Board of Directors, not the ARB. **The ARB is granted the right** to promulgate rules and regulations **and to enforce those regulations under Section 7.2 of the Declaration**. The $50.00 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines as is the $100.00 monthly fine for Plaintiffs continuing refusal to remove the brick foundation and place sod in that area.

**Plaintiff's Notes: (1) Section 7.2 is in evidence and was read at trial as well. There is not a single word in the section about "enforcement".**
**(2) Section 8.1 Enforcement of the covenants exclusively grant the IHOA the authority to impose fines and is silent about the ARB or any committee:**

> **Section 8.1. Enforcement. The Developer, the Association, and any Owner shall have the right to enforce ... all of the restrictions, conditions, covenants, easements, reservation, liens and charges now or hereafter imposed by the provisions of this Declaration, or of any rules or regulations .... The Developer and the Association, as the case may be, shall have the right to establish, assess and collect reasonable *fines and penalties* for violations of this Declaration... "**

**Any assertion that the Covenants gives the ARB the right to impose any sanction or penalty is contrary to the evidence and merits Amendment. The assertion that this is to be found in Section 7.2 is a fraud written by Defense Counsel and the omission of Section 8.1, which is controlling, creates the impression of bias by the Court because this is supposedly the conclusions of fact and of law by the Court, not by Defense Counsel. At trial there was no testimony or evidence that the ARB had any sanctioning authority under the covenants. This is a post – trial creation, outside the record, meriting a new trial.**

I find that the ARB's denials of Plaintiff's applications are proper, as are the fines and the deferment.

**Plaintiff's Note: Not supported by the evidence or testimony.**

**13. The Glens owners are allowed access to the Amenity Center.**

Plaintiff argued that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the Amenity Center. Section 6.5 of the Declaration states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that arc "multi-family" from using amenities **is contingent upon the developer having provided separate amenities for that neighborhood** under Section 6.5. **Furthermore, according to Ms. Sullivan, the Glens homeowners have paid assessments for the Amenity Center and used the Amenity Center since 2005**. The Glens do not have separate amenities, and **therefore, the Glens homeowners are entitled to access to the Amenity Center**.

**Plaintiff's Note: (1) The "doesn't have amenities of their own" argument was NOT raised at trial and is not in the record of proceedings. It is an inadmissible post-trial statement first appearing in Defense Counsel's draft order which is not of record and to which Plaintiff has a constitutional due process right to rebut, which entitles Plaintiff to new trial.**
**(2) Paying assessments and using the facilities does not alter the covenants and is irrelevant.**
**(3) Section 6.5 is "Rate of Assessments". Any ambiguity as to the multi-family units and the Amenity Center was resolved by Amendment #4, December 28, 2004, in evidence as Pl#561 which explicitly modified the covenants and all prior amendments as follows and which excludes all multi-family areas from the Amenity Center.:**

> PROVISIONS IN THE DECLARATION
> 1. It is hereby agreed that the aforesaid **Declaration, including all previous amendments thereto, shah be and the same is hereby ratified, confirmed and adopted in ail respects and all particulars as to each and every provision thereof except as to those provisions expressly amended as set forth herein and shall be, and hereby are, binding upon all present and future Owners** ...
> **3. Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of certain recreational amenities located on Common Areas within the International Club Subdivision and *the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities*.**

**Amendment #5 June 20, 208 Pl#563 in evidence said exactly the same thing with an unconditional prohibition of multi-family areas without any reference to whether or not they have separate amenities. This IS OF RECORD AT TRIAL.**

**AMENDMENTS**

**2. Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of recreational amenities located on Common Areas within the International Club Subdivision and *the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities.***

**The Order is contrary to the evidence of record and must be amended. The inclusion of material not in the proceedings merits a new trial because of the appearance of bias.**

**14. Capital contributions and initial assessments from Owners were properly collected and managed.**

Plaintiff argued that the capital contributions and initial assessments owed by International Club homeowners to the Defendant HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Third Amendment to the Declaration added the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deleted Section 3.5 of the Declaration in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the Defendant HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment added the following language: "Owners of Units in the Multifamily Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. Separate Accounting for Capital Contributions.

Plaintiff argued that funds paid as capital contributions must be segregated from the operating funds. No provision in the Declaration, Bylaws, or rules and regulations for the Defendant HOA require it to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were

collected, they were separately accounted for in the HOA's general ledgers. Therefore, Plaintiffs argument regarding the separation of capital contributions is without merit.

**Plaintiff's Note: (1) Plaintiff's argument is that Capital Contributions are properly dedicated / segregated to Capital Expenses of the HOA. Section 6.3 of the Covenants, in evidence, limits the purpose of such collections to "*the cost of any construction, reconstruction, repair or replacement of an improvement* within the Common Area, and/or the Recreational Amenities including fixtures and personal property related thereto".**
**(2) Plaintiff testified at trial that since this restriction is in the covenants using the money in violation of same is "ultra-vires" and beyond the authority of the IHOA Board. At trial Plaintiff's uncontroverted testimony was that the developer controlled board had used this money in part to pay for the Amenity Center which was a 100% developer financial obligation – including paving the Amenity Center original parking lot.**
**(3) Plaintiff introduced ledgers from DR Horton and for the same time period from the IHOA's Ledgers which showed that Horton had paid thousands of dollars in capital contributions to the IHOA and that the IHOA ledgers "booked" thousands of dollars less than Horton's books stated were paid. The Horton ledgers were produced subject to subpoena enforced by Order of Hon. Chief Judge Steven John almost three years after the subpoenas were served. At trial Plaintiff testified that it was more likely than not that the Horton money was paid and it was uncontroverted that the Horton amounts were paid. At trial it was uncontroverted that the HOA Ledgers produced by Order of Hon Judge Steven John were also correct. It was uncontroverted that the process was that the money was received by defendant KA Diehl which then solely and exclusively "booked" deposits. Plaintiff alleged that since the money was paid for the IHOA to Diehl but never booked, that Diehl is liable for the disappearance of the money. KA Diehl was present at trial through counsel and made to attempt to explain the discrepancy and made no allegation that the missing money was not the responsibility of Diehl to make up.**

**The portion of the Order relating to Capital Contributions is contrary to the evidence and failed to address the issue of Diehl's liability for the missing money. Amendment or a new trial is appropriate. Since the testimony of Jarmuth and introduction of associated ledgers took much of an hour, that this is missing from the order as written by Defense Counsel, gives the appearance of judicial bias and merits a new trial.**

b. Equitable Ownership of Capital Contributions.

Plaintiff asserts that the unit owners equitably own the funds they pay to the Defendant HOA under sections 3.5 and 6.7 of the Declaration. The Declaration does not create equitable ownership in the capital contributions. Once the payment is made to the Defendant HOA, the Defendant owns the funds.

**Plaintiff Note. Plaintiff never made this allegation in the Complaint or at trial. This is a "bogus" issue. It is a mystery where it came from. In discovery there was a question about equitable ownership of the Amenity Center which never got as far as trial. The order must be amended because the issue was not before the court.**

c. Developer's and Defendant HOA's Use of Capital Contributions to construct

Infrastructure or Amenities.

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Declaration:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision... and for the improvement, protection, replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the Defendant HOA to improve Common Areas and Recreational Amenities. **If any Developers controlled the Defendant HOA Board and decided, on behalf of the Defendant HOA, to construct improvements with the Assessments, that action is valid. However, no evidence was presented that the Developer constructed improvements with HOA funds**.

**Plaintiff's Notes: (1) Plaintiff did not argue this at trial and it is a mystery why the Court would be making findings of fact and conclusions of law on an which is outside the proceedings, merely because Defense Counsel snuck it into the draft order.**
**(2) That the Court blindly adopted it is evidence that the Court did not grant a fair trial because the Order thus did not depend on the evidence and testimony.**
**(3) The Court has argued this entire matter for the defendant: "if .. then". As a matter of law the Order is procedurally in error because it was not properly before the court and as the Court stated, "no evidence was presented" because NO ARGUMENT WAS MADE. An amendment is merited.**

d. Assessments from Single Family Owners and Multi-Family Owners.

**Plaintiff argued that the capital contributions from single family owners (who can use the Amenity Center) and multi-family owners (who cannot use the Amenity Center) must be separated.** The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. **Nothing in the Defendant HOA's governing documents prohibits the pooling of funds**, even if the use of the assessment is specified in the Fourth Amendment.

**Plaintiff's Notes: (1) Plaintiff argued that the amendment which imposed the burden of paying this on the homeowners, at first and at resale, instead of the builder, once at original sale, was contrary to the covenants and illegal per the Non-Profit Corporation Act and per case law. The author of the text deliberately changed the entire context substituting a**

**straw man not argued for one which was not controverted by the defense counsel.**
**(2) As a matter of law, it was settled and ordered in The Villas v IHOA, a separate case in this Court filed a week before Plaintiff's, that the accounts must be segregated. Plaintiff read into the record the case caption and read into the record selections from the final order.**
**(3) The issue as was argued at trial also includes the inequity imposed since the text now requires that**

> *The Association shall also collect a Capital Contribution equal to two (2) month's assessments for each such Unit* ***from each new Owner*** *of a Unit upon the transfer of such Unit either from the Developer or from another Owner.* **March 29 2004 Amendment 3 also December 28, 2004 Amendment 4.**

**The Non Profit Corporation Act provides that a change in the method of computing assessments must be put to the owners for amendment, which was not done. Plaintiff also argued at trial and cited cases that this is inequitable because a "unit" will unevenly contribute, since a unit sold many times will generate many times the assessment and one that is not resold does not pay the same. Also the amount of the payment for the same event will vary because it is tied to the unknown future current rate of regular assessments, so a unit sold one year will pay less than the same kind of unit sold a later year.**

**This was uncontroverted. Defense Counsel substituted a different issue never argued which is more favorable to it. As the Court adopted this and made findings of facts and law, a new trial is merited because no order was entered on the true issue and the issue it entered an order on is not supported by the trial proceedings.**

e. Collection and Use of Capital Contributions.

Plaintiff contends that the **Capital Contributions were not properly collected and used by the Defendant HOA**. He asserted that the **funds can only be used for the maintenance of the entranceway**. Further, he stated that the roads were dedicated to Horry County, and **as a result, the entrance area cannot be maintained by the Defendant HOA** and the **capital contributions are useless**. Lastly, he claimed that the contributions were **collected by D.R. Horton in 2004 but they were not deposited into the Defendant HOA's** account. I find the Plaintiffs claims without

**Plaintiff's Note: (1) This is Defense Counsel's fraudulent representation in it's entirety of what Plaintiff argued and of the trial proceedings. In debate this is called a "straw man" – when you can't win the issue you substitute an alternative that you can win and argue it. This is clearly one obvious reason why Plaintiff advised the court, in a letter filed August 21, 2012 with the clerk of court – which made it "of record" – that the draft order from defense counsel on which the court blindly relied was bogus from front to back, and that the court should obtain the transcript and rely on it and the sets of evidence so as to have an undistorted record of the actual testimony, argument and evidence.**
**(2) Plaintiff submitted evidence that the capital contributions ("CC") WERE properly PAID by Horton – and not one word was said about "collection".**

(3) Plaintiff never said a single word not made any allegation about the use of the capital contributions. Plaintiff did collect evidence he had received from discovery that Horton used HOA money to build the Amenity Center – actual HOA checks which Horton's appointed board wrote for expenses which, per the Developer's Agreement, was the Developer not the HOA obligation. But this was not mentioned at trial, because the Court cut Plaintiff off at noon on Friday, leaving him two and one half days instead of five, and did not permit Plaintiff to argue this area,
(4) Plaintiff never plead nor argued that capital contributions were useless. Rather, he cited to the covenants and argued that they were to be used for "capital" expenses, not ordinary ones, and thus should be segregated so as to permit auditing of their proper use. But this was argued relating to the validity of a change in the covenants which shifted the assessment from the developer at original sale to the purchaser at original sale and at each resale.
(5) Use for front entrance: This is 100 percent the opposite of what Plaintiff argued. Plaintiff cited to the covenants which said that assessments could only be used for the common area which the covenants defined as within Exhibit A and B of the plat referred to in the original covenants, which excludes the "front entrance". Plaintiff also argued that prior to mid 2010 Horton owned the front entrance, which thus was neither in the PUD, subject to the covenants, not a common area, and not HOA property.
(6) Plaintiff argued that the front entrance at the time of the lawsuit in 2009 should not have been maintained by the HOA for the reasons in "(5) above which have nothing to do with which HOA account the money comes from.
(7) Plaintiff never argued that "capital contributions are useless". Plaintiff cited the elements which are in the reserve study as areas typical of capital expenditures. Defense Counsel represents KA Diehl as well as the HOA and Defense Counsel, speaking jointly for Diehl, which witness Becky Abel argued has training, expertise, and years of experience, which means that the only a defense counsel with fraudulent intent would have advised the court that capital fund can be used for ordinary expenses (i.e., capital is to purchase "hard" items with a life expectancy of several years, specifically those items the IRS permits having a depreciation schedule for. Neither side said a single word about the intended or actual use of capital contributions.
(8) Re "collected by D.R. Horton ... not deposited into the Defendant HOA's account" The court's conclusion as to "not deposited" is contrary to the evidence. At Plaintiff's #704 was a spread sheet which was derived from Defendant's evidence, their "Bates" numbers 4480 to 4489, Pl # 703. Also in evidence and a source of the spreadsheet was Horton's accounting of capital contributions, Pl # 701. Defense Counsel did not submit or refer to any exhibits – not even Plaintiff's. The only thing defense offered on the matter was that Golding asked her witness, Diehl Employee Abel, did Diehl steal the money, which Abel said no. This, of course, is not evidence and Abel was not positioned to know anything about this anyway – and Plaintiff objects to the Court's apparent consideration of Abel's worse than hearsay / speculation as being the weight of evidence. Weight of evidence because Plaintiff was uncontroverted in going through the numbers to show that for sixteen months, beginning January 1, 2005 – NOT 2004, an error of fact by the Court (actually, Defense counsel who wrote the Court's order) Diehl "booked" $ 16,063 less than Horton's attorney, per order of Hon. Chief Judge Steven John, provided evidence of giving Diehl. Plaintiff did not argue that no collections were deposited, but that it is more likely than not

**that a lot of the money never made it into the books AND that Diehl was "responsible" for the missing money, however it came not to have made it into the HOA books.**
**(9) The order as written for the Court is fraudulent. It has premises and statements (or overlooking) of the evidence, and the conclusions written by Defense Counsel are worse than not supported by the evidence, they are CONTRARY to the evidence and supportive of the appearance of bias or fraud by the author (Defense Counsel) meriting new trial.**

merit. The evidence reflects that the entrance area is approximately 5.42 acres and owned by the Defendant HOA, and as the owner, the HOA shall maintain the property. Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures. Finally, William Freiboth testified that the capital contributions collected from 2004 through 2007 were properly accounted for by Defendant HOA.

f. Validity of the Third Amendment.

Plaintiff contends that **the Third Amendment is invalid**, **because it was not approved by the homeowners**. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;

2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;

3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4) **the developer must provide notice of amended or new covenants** in strict accordance with the declaration of covenants and otherwise may be provided by law; and

5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

*Queen's Grant II Horizontal Property Regime, 368* S.C. at 350, 628 S.E.2d at 907.

**Plaintiff's note: (1) Defense counsel never argued any of the above. Defense counsel was mute while and after Plaintiff presented his argument. Defense counsel did not present any evidence. Defense witness "King" was not asked about this and at cross examination admitted he had not even read the amendments or the original covenant and had no actual knowledge of the circumstances (or content) of Amendment #3.**
**(2) Amendment #3 was in evidence as Pl# 559 3/20/2004. Plaintiff's witnesses Pete Pizzi,**

**Mike Butryn, and Louis Astorino testified that they owned property at that time and had never been told of the intent to "make" amendment #3 and that the first they learned of it was in 2009 – from Plaintiff, who testified that he found it by doing a search in the Recorder of Deeds and that Plaintiff provided the HOA a copy of Amendments #2 through #5, none of which the HOA BoD were aware of prior to that. Thus the evidence is that element #4 of the Court's citation was not satisfied thus the Court's line of reasoning is contrary to the evidence.**

**(3) Plaintiff argued that the capital contribution is in fact an assessment, because per the covenants all collections are either annual or special assessments, and SC 33-31-1021 Amendments Changing Assessment specifically requires, as a matter of law, the approval of the substance of Amendment #4 by 75 percent of the homeowners – and no vote was taken. Further, Plaintiff noted that the Covenants state that any amendment which impairs the use and enjoyment of property requires an amendment by the homeowners and case law relating to voting rights and installation of satellite dishes categorizes any enlarged procedure or added charges as an impairment. At trial Plaintiff made the uncontroverted assertion that federal law prohibits the imposition of collections at a sale of a house of money which goes to any third party, and that federal lending authorities if aware of this are not allowed to provide mortgages to sales with such a burden.**

Pursuant to Declaration Section 8.5, the Declarant has the right to amend the Declaration without consent of any owner or mortgagee, **provided that the amendment does not materially alter or change the owners' use and enjoyment of their property** and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

**At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development.** ***See Queen's Grant II Horizontal Property Regime, 368*** **S.C. at** ***364-65, 628*** **S.E.2d at** ***915-15*** **("Sufficient Property Interests" include ownership of right of ways, easements, and land held in trust for the association).**

**Plaintiff's note: The above was never argued by Defense counsel at trial. Defense counsel was mute about the whole area. Queens Grant was never cited by Defense Counsel in this area of the case. Horton's ownership interest was never at issue.**

D.R. Horton complied with the Declaration, in that the **Third Amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same**. *1/6* of the annual assessment is equal to 2 months of assessments. The

capital contribution requirement **only applies to new Owners**. The existing Owners at the time of the Amendment did not have to make any additional contributions.

**Plaintiff's Note: The original text, in evidence and read into the record by Plaintiff from the witness stand, had the phrase "by the developer" and amendment #3 substituted "from each new owner of a unit upon the transfer of such unit either from the Developer or from another owner". The original covenants had the text "at the closing of the initial sale". Plaintiff testified – and it was uncontroverted – that this meant that some "units" over their life contributed different amounts depending on how often the "units" were resold, and that since the payment is tied to the current assessment rate, the "1/6" would be a different sum depending on the year of sale or resale. The referenced text of the Order has the Court advocating for the Defendant and introducing new arguments on the Defendant's behalf never made at trial which arguments are outright misrepresentations and, when ascribed to Defendants – frauds and mis-representation of the evidence.**

D.R. Horton provided notice of the amended covenants by filing the Third Amendment **in the chain of title of the owners' properties**. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at *367-68,* at *916-17.*

**Plaintiff's Note: (1) It is not in the chain of title of existing homes whose titles would refer only to the original covenants and amendment #1.**
**(2) Section 8.5 Amendment contains the following text relating to an amendment affecting assessments: *"such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby;"***
**(3) The Court cited to element #3 of Queens Harbor; the order writes: "*3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants*; The amendment procedure in the covenants, pert of the record of this case, includes the requirement that "*Any amendment made pursuant to this Section 8.5(a) shall be certified by Developer as having been duly approved by Developer and by such Owners* ".**
**AMENDMENT #3 DOES NOT CONTAIN THE REQUIRED CERTIFICATION AND IS THUS INVALID AS A MATTER OF FACT AND OF LAW and the Court's conclusion is contrary to the evidence and the law – as a minimum, amendment of the order is required.**

Plaintiff argued that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. **However, the Defendant HOA's minutes reflect that counsel for the Defendant HOA advised not to collect a capital contribution in this circumstance. Furthermore, Plaintiff failed to present evidence that contributions were collected upon re-sale of Units**. Therefore, I find that the Defendant **HOA's enforcement of the Third Amendment was valid**.

**Plaintiff's Note: (1) Once again a bogus argument by Defense Counsel. Plaintiff NEVER argued that "enforcement" was valid or invalid.**

**(2) The issue before the court, for a declaratory judgment, was is the amendment itself valid for failure to follow the procedures stated in the covenants for amendment and for violating the requirements of SC 33-31-1021. The Court has never ruled on the issue of the enforceability of the amendment !!! Having skipped an issue before the Court, amendment of the order is mandated. Having included and ruled on a matter not before the court, amendment deleting that conclusion is mandated.**

g. Validity of the Fourth Amendment.

Plaintiff argued that the Fourth Amendment is invalid, **because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment.** The Declaration sets forth different monetary payments for the single family owners and multi-family owners, because single family owners have access to the Amenity Center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Declaration, the contribution of $150.00 is reasonable and not in violation of public policy. It is also reasonable to conclude the developers of the multi-family parcels damaged the roads as a result of the construction and the additional assessment was to compensate the HOA for this damage.

**Plaintiff's Note: The arguments against Amendment #3 are the same as against #4. Defense Counsel misrepresented the effect of the amendment. Paragraph #4 of the amendment says that the multi-family owners are subject to the same capital contribution requirements as single family owners, "as amended" with all the notice and failure to follow procedure infirmities as Amendment #3. So the representation of the arguments and evidence are contrary to the record and the conclusion unsupported by the evidence.**

15. **The Third Amendment's Reference to Developer Contributions** is **Related** to **the Developer Agreement.**

**Plaintiff's note: The trial proceedings never mentioned the "Developer Agreement" in the context of or in any way connected to Amendment #3. The Developer Agreement itself, while in evidence, was not before the court to make any declaration about it nor was there any declaration requested about it's connection to the covenants in an way. Any recitation of this matter in the final order arises outside the proceedings and the record and mandates deletion of this area. The Court was never asked to make any conclusions or findings as to this area.**

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Declaration. The following sentence was also added to Section 7.2:

Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and

00/100 ($,1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

**Plaintiff seeks an order as to whether builders that construct homes within the Community are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.**

**Plaintiff's Note: Plaintiff's draft order and "brief" does not contain that request. The record of the proceedings does not reflect this being before the court at all.**

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a contribution for the construction of amenities and infrastructure within the Community. This is clear based upon the requirement that the designated builders enter a separate agreement with the Developer. **The Developer Agreement is consistent with this interpretation of the Third Amendment,** which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

**16. The Defendant HOA's maintenance contracts are proper.**

Plaintiff's claim that the Defendant HOA misspent funds stems from his argument that **the Defendant HOA maintains property that it does not own**. However, pursuant to Sections 3.1 (a) of the Declaration, the Defendant HOA may maintain

> **"all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole."**

**Plaintiff's Note: (1) This line of argument was never made by Defense counsel at trial. When Plaintiff's witness Mike Butryn and later Pete Pizzi testified about the IHOA spending 80 percent (or so) of it's grounds maintenance budget on private property – mostly the golf course – Defense Counsel was mute. No contrary argument or evidence was presented. The Court is not allowed to find and state, post – trial, arguments on behalf of the Defendant. Doing so casts the impression of bias and this merits a new trial. (2) The question before the Court was could the HOA involuntarily require homeowners, on the basis of the covenants, to pay assessments to maintain land which was not HOA property, not declared to be common area, not subject to the covenants, outside the development. No one questioned the HOA spending OTHER money from some other source – but the only HOA source of money is assessments through the covenants. What was uncontroverted at trial is that the Covenant for the Maintenance Assessment give**

**authority to the HOA to assess ONLY to maintain or construct HOA owned common property. The only semblance to an answer IN THE RECORD was Freiboth's assertion that sloppy looking private property hurt property values and he and other witnesses asserted that the covenants requiring good property maintenance do not apply to the golf course where 80 percent of the HOA grounds maintenance budget went. The "Final Order" itself says that the golf course is not subject to the covenant's land appearance requirements – thus the Order contradicts itself and mandates amendment to conform to the evidence and to be internally consistent.**

Therefore, the Defendant HOA has the authority to maintain property that it does not own to ensure that the Community as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

**17. The Fairways and Enclave are not subject to the Declaration.**

The Plaintiff argued that the Fairways and Enclave are a part of the PUD and that owners living in these neighborhoods must pay assessments. **The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community.** These projects also **utilize the same entranceway as the other neighborhoods** within the International Club and the County dedicated roads. However, I find that **the properties that constitute the Fairways HPR and Enclave are not subject to the Declaration**, and therefore, the Defendant HOA cannot collect assessments from owners in these neighborhoods.

**Plaintiff's Note: The question before the Court was what limits does the requirement to seek Horry County approval of PUDs have on a developer's expansion of a PUD beyond the boundaries of the approved PUD without county approval, and does a county approval of a PUD requiring the entire storm water retention pond system in the PUD to be maintained by the same HOA require the properties in the PUD to all at least contribute to the HOA's maintenance of that pond system. At trial the Plats submitted to the Planning Commission by the developer with the conditions of approval were in evidence as well as the Horry County development management ordinance. It was undisputed that the developer wrote covenants bringing in one area, The Meadows, beyond what the commission approved and failed to state in the covenants that the Enclaves and Meadows were subject to the covenants. It was not controverted at trial that "the community" is defined by the Planning Commission documents. The Court overlooked that the last revision to the Planning Commission's approval, the Plat titled "International Club PUD" in evidence, excluded Pebble Creek where Plaintiff lives from the PUD.**
**The Court's Order never answered these declaratory judgment questions but came up with a factual conclusion without declaring what the controlling law is – and thus the Order requires amendment to explain the impact of the Planning Commission approvals and Horry County Ordinances on the matter.**

**18. The Highway 17 Connector Association Covenants are valid and the Defendant HOA is**

**obligated to collect the assessments.**

Plaintiff challenged the **validity of the Declaration of Special Covenants for Highway 17 Connector Road** Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the **developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads**. The purpose of the Connector Road Declaration, as stated in its whereas clauses, i**s to provide landscaping along the connector road and to maintain drainage and provide signage.** The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Connector Road Declaration and it includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. Since Plantation A.D., LLC agreed to the Connector Road Declaration and it was the property owner at the time, the property now being the Community is subject to the Connector Road Declaration. Therefore, the Connector Road Declaration is valid.

**Plaintiff's Notes: (1) Plaintiff did not challenge the Highway 17 Covenant per se – the text of the Order does not reflect the proceedings. The above text is alien to the actual proceedings – it could have, but was not, argued at trial.**
**(2) The questions before the court are: (a) Is it a proper covenant touching and running with the land to obligate a land owner to pay money to perform a service far from his land – or is this a personal services contract not running with the land. The Court never answered this question. (b) Did Plantation AD have horizontal privity with the Highway 17 property, which those covenants actually relate to, when they were signed? The uncontroverted evidence supported by deeds and plats was NO – Plantation AD did not own any land even touching the Highway 17 property, and had no property interest in it. Further, uncontroverted testimony was offered that for several years the PUD did not even have access to the Highway 17 connector road so it had no benefit.**
**(3) The deposition testimony of Defendant Toth (who is also a Highway 17 officer) which the Court agreed would be as if offered at trial was that the County does the landscaping, drainage, signage, in fact everything. She admitted that the County OWNS that road, and that most of the Highway 17 money goes to pay the management company. At trial Plaintiff argued "changed circumstances" as a ground to eliminate any PUD obligation to pay for that purpose, if such obligation exists. The Court's "order" ignores that issue and it was required to rule on everything put before it for Declaratory Judgment.**

In the Connector Road Declaration, Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth:

> "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder."

Therefore, **the Defendant HOA has the obligation to collect** assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

**Plaintiff's Note: Plaintiff put into evidence that when the Highway 17 covenant was signed the IHOA did not exist (for several years) and did not own any property, and that the Highway 17 covenants exempts property owned by a HOA thus defendant does not own property subject to the Highway 17 covenant. It was also uncontroverted that no officer of the HOA ever agreed to this "collect for someone else" requirement and has not signed any related contract. It was uncontroverted that the Highway 17 covenant is not indexed to the PUD property. The Court never explained the basis in contract, land, or case law which permits a corporation (Highway 17) to subject another corporation to obligations it did not agree to. The record of the proceedings relates that Defendant did not make this argument but instead was mute. The Court's adoption of this argument is not from the evidence or testimony of the trial and must be vacated.**

**19. The Plaintiffs Defamation Claim is Without Merit.**

During the trial the Plaintiff **represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory.** His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, **an attached list of cases**, and reported decisions. Since **Plaintiff testified that there was nothing defamatory in Ms. Golding's letter**, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that **the letter was defamatory**.

**Plaintiff's Notes: (1) This "argument" was never made by the Defendant at trial. Defense Counsel sat mute through the presentation, offered no exhibits, and did not challenge any testimony. That the Court included new argument on behalf of the Defendant stuck in the draft order by Defense Counsel not made at trial is (a) outside the proceedings (b) the clear impression of bias meriting a new trial.**
**(2) Plaintiff's words were that the two page letter when sent to her clients was privileged. Plaintiff asserted that this privilege did not apply to the recirculation of material by DEFENDANT KA Diehl, which is not an employee of the IHOA Defendant. KA Diehl itself never asserted any privilege and a privilege, if not asserted, is "waived". The Court has asserted the waive-able privilege on behalf of the OTHER Defendant KA Diehl which has the effect of causing doubt as to the public's perception of judicial integrity, whether there is any or not. The impression that this may be present is sufficient to merit a new trial. Plaintiff never testified that the letter was not defamatory – only that he would not challenge it's privilege when limited to between the attorney and client. There was no argument made that homeowners were "the clients" or that Diehl was "a client". In point of fact until several months later, Diehl was NOT McNair's client.**
**(3) The Court has observed that in addition to the letter there was a separate "list of cases"**

**and some reported decisions. There is no record of any discussion of the "reported decisions" in the proceedings – because Plaintiff stayed away from them. At her deposition KA Diehl employee Julie Case admitted that she was entirely responsible for assembling the defamatory package and for arranging to mail it to over 500 people and to email it to several hundred more. PLAINTIFF'S ACTUAL TESTIMONY was that it was the text of the "list of cases" – written by an unknown author – that was defamatory AND the unrefuted testimony of witness Lou Astorino that Defendant's officer William Fletcher had said to Astorino that Plaintiff was a "child molester" which is Defamatory Per Se. This testimony went unchallenged.**

**(4) At trial Plaintiff testified from the "list of cases" and in comparing them to the actual cases with actual extracts in evidence argued that the text of the "list" was not an extract of the cases but was separately authored (i.e., not by the court or a party to the original cases), and that it contained blatant lies about the cases and about Plaintiff. At trial plaintiff read from the text of the "list" and then from the actual case documents showing the lies. Plaintiff questioned several witnesses who testified that the lies distributed by DIEHL were what gave them a defamatory impression about Plaintiff. At trial Plaintiff presented many emails from homeowners which had unfavorable comments which – it was uncontroverted – came from the list. At trial Defense Witness Sullivan testified that the homeowners did not know anything about Plaintiff prior to "the list". The Court's order is silent about the actual evidence. Defense Counsel's allegation in her draft order that Plaintiff did not contend that any of the material was defamatory is FRAUDULENT, and is a ground under the rules for a new trial, especially when the fraudulent description of the proceedings is in the Court's order.**

**(5) The Court never made a finding of fact nor conclusion of law whether co-defendant KA Diehl committed an actionable defamation of Plaintiff. This merits opening the proceedings because Defense Counsel ignored the allegations against Diehl, did not controvert Diehl's culpability, and was silent about any Diehl defense.**

a. The Defense of Absolute Privilege Bars Plaintiffs Claims.

**Defamatory statements made during the course of a judicial proceeding are absolutely privileged.** ***See Redfearn v. Pusser, 276*** **S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity.** ***Texas Co. v. C. W. Brewer & Co., 180 S. C. 325, 185 S.*** **E. 623** ***(1936).*** **Moreover, the privilege extends to communication that are preliminary to the judicial proceedings.** ***Crowell v. Herring,*** **301 S. C. 424,** ***392 S.*** **E.** ***2d*** **464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings.** ***Id.*** **It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any**

official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. *325*, 185 S.E. 623.

Ms. Golding's letter was prepared as a result of Plaintiff's lawsuit and provided to the Defendant HOA Board of Directors. The letter was disseminated to the Community members to provide information regarding the lawsuit. This communication is an utterance arising out of a judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

**Plaintiff's Note: (1) The above argument was never made by anyone at trial. As meritorious as it might be, it is a waive-able argument of privilege and is waived unless made AT TRIAL – which it was not.**
**(2) Defendant KA Diehl was not a party to the lawsuit and had no reasonable expectation they would be sued when Diehl put together the package, apparently authored the list, and published it to Plaintiff's neighbors. The testimony of Board member Sullivan, supported by a letter from Case, was that there was no direct communication between the attorney and Diehl. The contracts of Diehl, in evidence, had no element that Diehl was responsible to do anything relating to the Defendants other than manage the property – they had no contractual role in litigation. Diehl did not assert the privilege and the Court Order does not explain how the privilege would extend to Diehl. As a matter of law and relying on the fact in evidence, Plaintiff is entitled to a JAML against Diehl on defamation.**

b. The Defendants' statements are privileged.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." Murray v. Holnam, Inc., 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

**Plaintiff's note: (1) This argument was not made by Defense Counsel at trial. The Court is not permitted to give Defense Counsel a post – trial opportunity to assert new arguments, now matter how potentially applicable, outside the proceedings and not subject to rebuttal.**
**(2) Diehl is not an "employee" of the IHOA so the above is inapplicable.**

The Defendant HOA notified its members regarding Plaintiffs lawsuit and his history of filing litigation pro se. The Defendant HOA had a duty to inform its members that Plaintiff has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not

exceed the scope of the privilege nor provide an opinion as to the motives of Plaintiffs litigation.

20. The Claims Against the Defendant Rosemary Toth are Without Merit.

**Plaintiff's Notes: (1) The first page of the defamatory package was a letter signed by Diehl employee Beckie Abel on Diehl letterhead color stationery. Diehl had none of the "duties" mentioned above by the Court. The package is in evidence. The Beckie Abel lists only the McNair letter as coming from the attorney. It separately lists "the list" without any authorship identified or claimed. Defense Counsel never claimed the "list" was authored by the attorney or privileged and that is the law of the case.**

The Plaintiff alleged that the Defendant Rosemary Toth, former President of the Defendant HOA, defamed him, invaded his privacy, **caused intentional infliction of emotional distress**, violated her obligations of good faith and fair dealing, and **failed to properly provide to him information**. He also alleged that **due to the counterclaim asserted by the Defendant HOA, the Defendant Ms. Toth violated the South Carolina Frivolous Proceedings Act**. Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

**Plaintiff's Notes: (1) Plaintiff never complained of "intentional infliction of emotional distress" or argued this at court. When a court adopts a straw man argument not in the record and uses it in an order to justify the order that creates the impression of bias or worse and merits a new trial. This issue came up in a hearing before Hon. Judge Hyman where Plaintiff corrected Defense Counsel who was making that bogus argument at the time and Golding admitted at the hearing that there was no such claim in the case. The court now mysteriously resurrects this bogeyman McNair claim for improper purpose. (2) Likewise, there is no claim related to defamation that "provide him information" is related to the count of defamation. Plaintiff never sought damages from Toth or any defendant for failing to provide information. Statutory immunity under the Act only from exposure to damages – not from being ordered to obey the law as to releasing information. (3) The assertion that Plaintiff implicated Toth in his Frivolous Proceedings claim is an invention of Defense Counsel. Plaintiff always asserted the "frivolous counter claim" was an IHOA tort. In a hearing April 16 the Court ruled as Plaintiff requested (a) that Plaintiff's Frivolous Proceeding claim would not be dismissed because sufficient facts were stated; (b) that as Plaintiff argued at the time, the "Wall" Defense Counter – Claim was on behalf of the IHOA not on behalf of Toth (and thus that under no circumstances was she entitled to attorney fees or damages.**
**(3) The order as crafted by Defense Counsel is contradicted in that Plaintiff's "Frivolous" proceedings claim was filed on March 20, 2012 in the "11320" case, not the "3596" case. The only defendant in the 11320 case is the IHOA, thus the assertion that the frivolous proceeding claim was aimed at Toth is sheer invention. This is a significant mis-statement of the case leading to a finding of fact and conclusion of law which is impossible to be supported by the evidence and the record. That the Order contains this (and other) significant errors of fact indicates that leads to the impression, true or not, that the Court completely disregarded the pleadings, evidence and testimony which merits a new trial.**

All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence. **No evidence was presented that Ms. Toth acted improperly in any way** much less acted in a wanton, willful or grossly negligent manner or that she breached any duty to the Defendant HOA or its members.

**Plaintiff's Note: (1) The Order as written by Defense Counsel once again has made a finding of fact that is contrary to the evidence. The Court's order does NOT say that despite the evidence, or that the evidence was insufficient, but that "no evidence was presented". Once again the finding is not just unsupported by the evidence, it is contrary to the evidence, a fraudulent conclusion by Defense Counsel. Plaintiff provided evidence that Toth joined in the order to distribute $ 75 of Central Electric money to each homeowner. Plaintiff cited the South Carolina Non-Profit Corporation Act which says that any distribution, except at dissolution, is illegal. Plaintiff cited the Act which says that a director who does not oppose such a distribution is personally liable to the distribution, and that the immunity is explicitly lacking, per the law, in this instance. Plaintiff also read from the Covenants which requires all easements for utilities to be underground, which makes granting an above ground easement an act prohibited by the Covenants and thus "ultra – vires"; the immunity only running for "intra – vires" acts.**
**(2) The Court was asked to hold Toth personally liable only for one other tort – defamation. For every other cause of action, and there was approximately 700 exhibits (not "no evidence", the relief was remedial – to obey and comply with either the Covenants or The Act. There is no immunity from being required to obey the law and the board's source of authority, the covenants. "Acted improperly" includes acted in defiance of the law or covenants, thus the conclusion of fact ignores hundreds of items of evidence made part of the case at trial and such a gross error is grounds for a new trial.**

Plaintiff alleged that Ms. Toth failed to produce documents, that she entered contracts on behalf of International Club HOA that were in violation of the Declaration, she voted in favor of the Central Electric easement, she directed K.A. Diehl to mail a list of lawsuits Plaintiff has been a party to, she made representations about the ownership of the roads and parking lots that were inaccurate, she did not follow the advice of committees, and she failed to disclose the Golf Course Agreement. However, Ms. Toth's actions were consistent with the Declaration and her obligations as a Board member. **Ms. Toth did not act individually**; instead, **all actions were authorized by the Board**. The Board had the authority to reject recommendations of committees and to vote in favor of the easement. With respect to the mailing about Plaintiff,

Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

**Plaintiff's note: The minutes of every meeting of the board of directors is in evidence. The uncontroverted testimony of Butryn and Pizzi at trial, and of Toth at her deposition, is that she approved various contracts. Toth, Freiboth and Sullivan never disputed that almost every board decision, including landscaping and management contracts, prior to Freiboth's election was made without a vote on the record at a meeting of the board (or outside per the alternative procedure stated in The Act). Butryn and Pizzi's testimony was that Toth personally approved these contracts. Her name is on the management contract. No contracting action except the Central Electric contract is "in the minutes" so the evidence is that none of these contracts "were authorized by the Board" as required by The Act. So the conclusion of fact is contrary to the evidence, and thus follow – on conclusions of law are likewise unsupported. These blatant mis-representations by Defense Counsel of the record also create the impression of judicial incompetence or bias and merit a new trial. Toth was present at trial and Defense did not call her to controvert the accusations relating to her by the other witnesses, thus they are admitted as "more likely than not".**

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its **intra vires** action tested by the business judgment rule. *Dockside Assn, 291 S.C.* at 216-17, 352 S.E.2d at 715-16. Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith. *Id.*

**Plaintiff's note. Once again the Order added, post trial, an argument never raised by the Defense at trial. Defense counsel never argued "business judgment" or "intra-vires" and never cited to "Dockside" at trial. These new arguments inserted, post trial, on behalf of the Defendant into the draft order creates a presumptive indication of bias or procedural error violating constitutional rights (to confront the contention) and merits a new trial.**

As long as Ms. Toth acted within her authority under the Declaration and no evidence of bad faith exists, her actions are protected by the business judgment rule. I find that Ms. Toth acted within her authority and in good faith, and therefore, Plaintiffs claims against Ms. Toth are without merit.

**21. The Plaintiff's Invasion of Privacy Claim is Without Merit.**

**Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with v rich the public has no legitimate**

concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the Community members was regarding public matters, lawsuits Plaintiff filed.[3] There was no exploitation of Plaintiffs personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

**Plaintiff's notes: (1) Defense counsel never argued the first paragraph above. Defense counsel was mute during and after Plaintiff's testimony and presentation of evidence. Once again the Court has added, post-trial arguments on behalf of Defendant which are not part of the record.**
**(2) The "invasion of privacy" allegation was made against the IHOA and DIEHL in connection with the disclosure, to the ARB, of Plaintiff's putative alleged outstanding HOA account balance. The Court has held in this order that the ARB is not part of the HOA but a separate entity and Plaintiff argued that if this is the Court's line of reasoning, that Plaintiff had a reasonable expectation of privacy as to his financial account. The testimony of Diehl employee Beckie Abel at trial was that Diehl gave the ARB that information. Separately in the Order the Court has made the conflicting allegation that ARB member Roche (Toth's husband) gave the ARB this information – and Plaintiff explained that Toth was not a member in 2012 and could not have, and was not alleged to have, given the ARB Plaintiff's financial information. At trial the invasion of privacy allegation was carefully segregated from the defamation information and the Order's depiction of the arguments at trial is a fraudulent insertion by Defense Counsel and gives the impression either that the Court ignored the record, is incompetent, or concluded in spite of the evidence – any of which merits a new trial whether any of these are true or not.**
**(3) Once again the Order has created and put into the Defense "mouth" arguments never raised by defense counsel at trial which was mute on the proceeding through the trial. This creates the impression of bias and certainly depends on material which could have been argued but which was not argued at trial. As a matter of constitutional due process the Court is required to restrict itself to the record of trial proceedings..**

**22. Plaintiffs Intentional Infliction of Emotional Distress Claim is Without Merit.**

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1,* 530 S.E.2d 132, 160 (Ct.App. 2000). In fact, Plaintiffs witness Ms. Pizzi testified that the

litigation in which Plaintiff was involved could be googled.

**Plaintiff's outrage claim** is based upon the letter that was sent by the Defendant HOA to its members. Courts rarely grant relief under outrage claims. The Defendant HOA communicated **that the Plaintiff is a litigious individual**, which is true, and a fact that its members had a right to know based upon the multiple claims asserted in this lawsuit. Plaintiffs claim is without merit.

**Plaintiff's notes: (1) That the Court adopted Defense Counsel's assertion post trial in a "draft order" which is not part of the record of the proceedings, not available to Plaintiff to enter objections, nor to contest, indicates that it is more likely than not that the Court did not read the Complaint – because plaintiff did not have an allegation of "emotional distress" . The Court's order ignores the evidence and testimony of witnesses relating to the grounds which WERE asserted by Plaintiff: (a) that HOA board appointee Fletcher called Plaintiff a child molester – uncontroverted testimony by Louis Astorino, which is defamatory per se; (b) that Diehl wrote into it's "list of cases" document that Plaintiff was fired from the FBI for cause, which is defamatory per se and a lie – Plaintiff presented his personnel record as evidence; (c) that Plaintiff sued the deputy attorney general of Pennsylvania in a separate law suit, which is a lie, as proved by the docket of a case where said attorney was an "interested party" at her request so as to obtain the evidence and transcript to convict a Pennsylvania state police sergeant to admitted destroying evidence against Jim Frinzi; (d) that Plaintiff accused fellow FBI workers of defamation, where the actual pleadings are that Frinzi was never an employee of any government; (e) that Plaintiff sued "doctor Brian Krolczyk" for no good reason whereas the record of the West Virginia Board of Examiners of Psychologists, in evidence, was that he practiced psychology without a license nor required training and Krolczyk perjured himself at trial by claiming to be licensed falsely representing his training and competency; (f) that Diehl and the HOA claimed Plaintiff was not represented by counsel in any of these case whereas the actual records included representation by a Pennsylvania state prosecutor and by the deputy US Attorney in separate matters (the allegation was that a jury had found against Plaintiff but the uncontroverted record before the court was that the case never went to the jury and was dismissed for procedural reasons), and by attorney Ern Reynolds in many others; (f) that Plaintiff was unsuccessful in every case whereas Plaintiff had secured access to sought records under federal FOIA and had won a judgment in a represented jury trial in federal court.**
**(2) Since the ORDER's finding relative to Defamation was based on claims not actually lodged and the order was silent about the Fletcher and Diehl defamations (child molester / fired for cause from FBI job) as well as the emails presented at court proving actual damage to reputation, this creates the impression of bias by the Court meriting a new trial.**

**23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.**

The Plaintiff attacked the Defendant K.A. Diehl on a number of fronts. First he **testified** that K.A. Diehl obtained monies from capital contributions and these monies are

missing. He testified that there were no **checks and balances in place to prevent any fraud** and it was "more likely than not that K.A. Diehl is responsible . . . ." Then the Plaintiff attacked the practices of K.A. Diehl as a contracting agent for the Defendant HOA. He **testified** that K.A. Diehl's practices were **illegal** and in violation of public policy. He pointed to K.A. Diehl having a vendor program. In order to qualify as an approved contractor for any one of the communities managed by K.A. Diehl, the vendor pays **a fee for advertising services provided by K.A. Diehl**. Plaintiff argued that K.A. Diehl's conduct amounted to a conspiracy to defraud in violation of Section *39-3-140* of the **Code of Laws of the State of South Carolina**. Aside from the fact that the Plaintiff does not have standing with respect to K.A. Diehl's contracts with third parties, K.A. Diehl's actions in no way constitute a conspiracy to defraud. **Nothing in the evidence shows that K.A. Diehl attempted to limit competition in its trade.** Furthermore, there was no evidence that the Defendant HOA utilized K.A. Diehl's preferred vendor program.

**Plaintiff's notes: (1) The Order ignored that every allegation made by Plaintiff was supported by evidence of record – this was not just "testimony". The testimony got the evidence into the record.**
**(2) Defendant Diehl's contracts are in evidence and they have a clause prohibiting IHOA board members who have not agreed to the limitation from competing with Diehl and requires the IHOA not to consider such former board members in competition against Diehl. This alone defeats the Court's contention that "nothing in the evidence". Once again the order as written by Defense Counsel fraudulently misrepresents the record of proceedings and creates the impression of bias meriting new trial.**
**(3) Plaintiff cited to a federal criminal case involving a Walmart employee which depended on a federal fraud law and the federal court, upheld on appeal, depicted the arrangement between Diehl and contractors as criminal.**
**(4) Plaintiff presented evidence that Diehl required potential contractors to join the Community Management Institute (CAI) as a condition of being considered for contracts, and that this made Diehl eligible for "kickbacks" from CAI based on recruiting new members. Beckie Abel testified that CAI is entirely focused on management companies and offers no benefit to a contractor for HOA work. Plaintiff related this to extortion under the law and as a prohibited practice in the law the court cited above. Plaintiff also cited the Diehl contracts as admitting that it retained credit card or manufacturer rebates / refunds related to purchases for the IHOA – and Beckie Abel, the Diehl employee, did not controvert this when confronted with it. Plaintiff's assertions from the witness stand that these funds are the property "of the master" was not controverted and is in fact reflected in IRS regulations which require such refunds to be a reduction in the book value of purchases in making business deductions.**
**(5) The "checks and balances" contention was not an accusation against Diehl but was an explanation of how the disappearance of funds might have occurred un-noticed. Plaintiff alleged that the IHOA had no checks and balances – but this was not a "count" in any**

**complaint against either defendant so the Court's order reflects confusion by the Court and disregard of the record. In a separate letter filed with the Court on or about August 20, 2012, which is in the docket of the case, Plaintiff suggested to the Court that it order the transcript because indications were that the Court was perhaps overwhelmed by the breadth of the case and that Defense counsel was giving the Court "off the record" arguments and false descriptions of the proceedings and evidence.**

Plaintiff also testified that K.A. Diehl failed to perform its duty under the Act and the Defendant HOA Bylaws. He testified that when he requested the membership list, K.A. Diehl refused to provide it; however, Plaintiffs request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiffs **request was denied due to improperly requesting personal information**. Further, she testified that the list was available on the Defendant HOA's website which the Plaintiff could easily access. Lastly, Plaintiff was provided a members' directory on at least one previous occasion.

Plaintiff also testified that he did not receive the Defendant HOA publication known as "Friday Facts". However, the Plaintiff, on cross-examination, admitted that he refused to access the Defendant HOA website for he did not want to disclose his email address and therefore he does not receive Friday Facts. The evidence was abundantly clear that membership lists were available to the Plaintiff on the Defendant HOA website which is a restricted website for the Community members.

**Plaintiff's notes: Beckie Abel admitted that Diehl / the IHOA disregarded three requests and testified that she didn't give what she considered "entitled" information. She also was required to explain how the statute's requirement for number of votes a homeowner is entitled to cast is not the same as "delinquency status" and could not explain why communicating with homeowners about an HOA board election is not a "good reason". The Complaint also perpetuated that the HOA released the list of owners to homeowners to use to sell merchandise to other homeowners which was not controverted in Defense answer or testimony so the record was not that Diehl / HOA insisted on "good purpose" but were trying to control the flow of contrary information to protect their jobs. At trail Beckie Abel admitted that the list they have on their website has "homeowners emails, phone numbers" and addresses so Plaintiff was asking for the "official" list of information Diehl and the HOA was already not holding "private". The Order as crafted by Defense Counsel ignored the admissions of the defendant in impeachment and the conclusions of fact and law are not supported by the evidence. Once again there is the impression of a selective choice of evidence and disregard of actual testimony creating the presumption of judicial bias meriting new trial.**

**24. Plaintiff is indebted to the Defendant HOA in the amount of $7,326.00.**

Due to the Plaintiff's **contesting the enforceability of the Declaration**, including the Bylaws, the Defendant HOA **paid $5,000.00 to the McNair Law Firm**. Declaration Section 13.4, specifically provides that should the Defendant HOA employ legal counsel **to enforce the Declaration**, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred by the Defendant HOA.

**Plaintiff's notes: (1) The Court has agreed that Freiboth testified at trial that the $5,000, actually $ 2,500 in 2009 to defend against the 2009 complaint where there was no counter-claim by Defendants to enforce any covenant provision. It was admitted that the money was NOT paid to enforce the Declaration. This was more than uncontroverted – it was the admission of the president of the IHOA. The Defendants were defending against what was largely a request for Declaratory Judgment as to the Non-Profit Corporation Act and the Covenants. Freiboth also testified that the other $2,500 was paid in November, 2010 to defend against the allegations that the HOA improperly denied a fence. Freiboth admitted that after the $ 5,000 the IHOA did not spend a cent to advocate it's causes or defenses.**
**(2) Freiboth admitted that in both the 3596 and 11320 cases, as they were when the $ 2,500 was paid (in each) there would have been no change to Plaintiff's property if the IHOA prevailed and that Plaintiff had not violated (at that time) any provision of the covenants thus applying the Court's own logic none of that money was spend "to enforce the Declaration" and thus the Court's findings of fact and conclusions of law are contrary to the evidence and law.**
**(3) When the 11320 case was filed the Defendant's $ 2,500 was filed ONLY to ask the magistrate court – where it originated – to dismiss that case as it was then captioned. It was not spent to "enforce" anything or even to prosecute the case.**
**(4) In the case in magistrate court (11320) there was no counter – complaint. Defense counsel alleged that Plaintiff's claim exceeded the magistrate's subject matter jurisdiction. Neither party asked for a transfer to the Court of Common Pleas. The magistrate did so on his own. The record is that immediately thereafter, in the docket of the 11320 case, Plaintiff filed a "precipe" on December 14, 2012 alerting the court that this was procedurally defective.. The document was titled "Plaintiff's Precipe of Objections to Order Transferring" and began with the phrase**

> **"Plaintiff, Ronald Jarmuth, pro se, perpetuates his objections to certain content in the order of the Magistrate Court entered November 30, 2010, transferring this case to this Court."**

**In Frierson v In-Town Suites, No. 2007-UP-549 Filed December 14, 2007 the Court of Appeals observed that the power to transfer a case to Circuit Court when the statutory limit is exceeded occurs only when there is a counter – claim whose amount, when added to the claim, exceeds the statutory limit. There was no counter – claim here so the limited authority of the magistrate court to transfer the 11320 case was not applicable. The appellate court wrote:**

> **"The jurisdiction of the magistrates' court is statutorily limited by South Carolina Code section22-3-10 (2007). Although we note there are limited circumstances where the legislature has allowed magistrates to transfer a case to the circuit court, such as when a counterclaim is filed pursuant to South Carolina Code section 22-3-30 (2007), we believe the legislature intentionally limited the scope of a magistrate's power to transfer cases to the circuit court. In addition to Rainey, we find the statutory guidelines that**

> **govern magistrates' court support this view by not expressly authorizing magistrates to transfer any type of case to the circuit court."**

**This conclusion of law was repeated by the Court of Appeals in the controlling case of Mosseri, Mosseri, Castro v Austin's at the Beach, Inc. and Paris, Inc., Opinion No. 4215 Filed March 12, 2007 which was an appeal from Horry County (this court) with further explanation. The Court wrote that**

> **"In cases that do not fall under Section 22-3-10 (12) of the South Carolina Code [w]hen a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22"**

**The case must be dismissed if the case does not involve the ownership of land, in which case the case still will not be transferred but will be retained in the Magistrate Court. Circuit Court can not obtain subject matter jurisdiction by the consent of the parties; it is statutory. The 11320 case involved "the wall" aka "fence" and as a matter of law required dismissal per the insistence of Defendant. Although the magistrate court transferred without authority, this did not result in this Court having subject matter jurisdiction over the "fence / wall" issue which was part of that case, which should have been dismissed. In the least, the $ 2,500 the HOA spent to obtain dismissal can not survive the transfer because this Court has not authority to award attorneys fees for a case it dose not have jurisdiction over, assuming that the covenants provided that authority (for attorney fees defending, not prosecuting, a case).**

**[text of order continues]**

> **"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."** *Seabrook Island Property Owners Assoc. v. Berger,* 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n,* 368 S.C. *557,* 569, 629 S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime,* 368 S.C. at 375, 628 S.E.2d at 920.

**Plaintiff's note. (1) This was not argued by Defendant in the trial nor in any brief pre-trial. (2) This supports Plaintiff's contention that the $ 5,000 is not recoverable because it was not spend "to enforce the covenants".**
**(3) The next section of the order depends on satisfying the "gatekeeper" provisions in the case law above. These gatekeeper provisions, as a clear issue of fact, were not satisfied.**

> "There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Menne, 368* S.C. at 569, 629 S.E.2d at 697.

**Plaintiff's Notes: (1) The above was not argued by Defense Counsel at court and has been raised by the Court on behalf of the defendant. More exactly, the Court allowed Defense**

**Counsel to argue it's case after the trial closed and the above text reflects the "off the record" document handed to the Judicial Officer by Defense Counsel on or about August 20th, 2012.**
**(2) The next part of the Order is legally irrelevant since the money was not allowable by the covenants to Defense Counsel in seeking dismissal of one case and in not advocating the covenants in the other.**

Clearly, the $5,000.00 that the Defendant HOA seeks to recovery from the Plaintiff is reasonable. This action has lasted over 3 years and much discovery has taken place. The trial lasted 3 full days with court starting each day at 9:00 a.m. and ending each day between 5:00 to 6:00 p.m. The issues raised by the Plaintiff were numerous. I conclude that Plaintiff should pay the Defendant HOA the sum of $5,000.00.

**As to the ARB fines,** as of August 8, 2012, the Plaintiff owes $2,326.00 **to the Defendant HOA.** As stated hereinabove, **the ARB has the authority to assess these fines**. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

**Plaintiff's notes: (1) The Court has previously held in this Order that the ARB is not an extension of the IHOA but a legally separate entity. In the above paragraph the Court identifies the "fines" as being "ARB fines" not HOA fines. This distinction was clearly made to evade the fact that the HOA is not entitled to fines because it did not comply with Section 13.3 or it's asserted bylaws which requires that the HOA may not impose a fine nor suspend rights until after it holds a hearing, whether or not the violator requests it, on the minutes of the Board of Directors of the HOA.**
**(3) The ARB is not a party to this lawsuit. There is no authority in law for the HOA to sue on behalf of another non-party (the ARB) to collect a debt not owed to the party (the IHOA). If the ARB desired to collect it's alleged fine it must have, but did not, petition to join the suit as a party. Having not done so, the ARB fine is not properly before this court.**
**(4) This Order requires that fines allegedly due this separate ARB entity be paid to the IHOA to whom it has never been alleged it is owed.**
**(5) The Order is contrary to the facts and the law in this case. The Order's paragraph immediately above is so self-contradictory it implies utter confusion by the judicial officer and is itself grounds for a new trial. The lack of subject matter jurisdiction or a debt owed the IHOA itself is grounds to amend the Order.**

**25. Plaintiff must remove the brick foundation.**

Since the Plaintiff has intentionally disregarded the ARB's directive to remove the brick foundation, he is hereby ordered to remove the brick foundation and replace with sod within fifteen (15) days from the date of this Order.

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED, and DECREED:**

(a) All Plaintiffs claims against the Defendants are dismissed with prejudice;

(b) The Plaintiff is directed to remove, within fifteen (15) days from the date of this Final Order, such date being set forth below, the brick foundation, and all parts thereof, which was directed to be removed by the Architectural Review Board and to cover the ground area with sod;

(c) The Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

IT IS SO ORDERED.

The Honorable Ralph P. Stroman Horry County Special Referee

Conway, South Carolina

Dated: September 10, 2012

**Planning & Zoning Department**

1301 2nd Ave. Ste. 1D-09
Conway, SC 29526

Horry County
SOUTH CAROLINA
Committed to Excellence

**Phone:** 843-915-5340
843-205-5340

**Fax:** 843-915-6340

www.horrycounty.org

April 16, 2009

The International Club HOA
Rosemary Toth - President
c/o K.A.Diehl
11740 Highway 17 By-Pass South
Murrells Inlet, SC 29576

Re: On Street Parking

Dear Ms. Toth:

As a general rule, the county does not prohibit on street parking in subdivisions. In other words, there are no laws against it. However, covenants and restrictions are a different matter altogether. They are in essence private contractual agreements. While the county does not enforce covenants and restrictions, it does not interfere with a HOA's ability to enforce them on county maintained roads.

The information I am providing is general in nature. I have not reviewed the covenants and restrictions for your subdivision and express no opinion as to what rights, if any, the HOA may have in this regard. You would have to consult with a private attorney if you have any questions of that nature.

Sincerely,

Janet L. Carter

Janet L. Carter
Planning Director/I&R Counsel

**ENGINEERING DEPARTMENT INFRASTRUCTURE & REGULATION DIVISION**

4401 Privetts Road
Conway, South Carolina 29526

Horry County
SOUTH CAROLINA
*Committed to Excellence*


Post Office Box 1236
Conway, SC 29528-1236

Phone: (843) 915-5160
Fax: (843) 365-2170

Defendants' Exhibit 61

August 24, 2009

Mr. Michael Butryn
1008 Ennis Drive
Murrells Inlet, SC 29576

Re: The Links @ International Club – Phase 1 Plat

Dear Mr. Butryn:

As per our phone conversation last week, I am writing this letter to clarify some issues raised by residents within Phase 1 of The Links. As you had explained to me, many of the questions brought forth to you originated from differences of opinion between individual property owners and their Homeowners' Association (HOA) with regard to maintenance responsibilities and ownership of particular easements, rights-of-way and common areas as shown on the plat for your subdivision. For reference, I have attached a copy of the recorded plat for Phase 1 of The Links and a copy of a sheet from the plat for International Club Boulevard and Pickering Drive.

Pickering Drive and International Club Blvd are both owned and maintained by the county. The right-of-way for each of these roadways is 66 feet in width. Since the asphalt surface for these roadways is approximately 24 feet wide, the county rights-of-way actually extend about 20 feet beyond the back of the curb on each side of these roadways. The grass and landscaped areas alongside these roadways and within the county rights-of-way are maintained by the International Club HOA. Taxes are not paid by the HOA for the land within these platted public rights-of-way.

The International Club HOA owns (and is responsible for paying taxes on) the parcel at the southwest corner of Pickering Drive and International Club Boulevard. This parcel is shown on the attached plat as a 6,534 square foot "common area". The HOA is responsible for maintenance for this parcel; this is indicated as item number 14 under the "notes" section of the attached plat for The Links.

A 15 foot irrigation easement is shown on the plat for The Links. This easement is adjacent to and outside of the county rights-of-way on Pickering Drive and International Club Boulevard, but it is within the rear property boundaries of lots 94 through 98 and lot 1. I was not able to research the restrictive covenants (for The Links or for International Club) for specific references to this irrigation easement, but it appears that the easement was included to allow for sprinkler/irrigation systems to facilitate HOA maintenance of the landscaped areas along International Club Boulevard and Pickering Drive.

If you have any further questions, please do not hesitate to contact me at the phone number shown above.

Sincerely,
HORRY COUNTY

Andrew J. Markunas, P.E.
Deputy County Engineer

Attachments (2)
cc: File

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE MAGISTRATE COURT |
| COUNTY OF HORRY | ) | CASE NO. 2010-CV-26-1072943 |
| RONALD JARMUTH<br>Plaintiff, | ) | |
| vs. | ) | **ANSWER** |
| THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.<br>Defendants. | ) | |

The International Club Homeowners Association, Inc. (hereafter "Defendant"), specifically reserving its rights under its Motion to Dismiss, answers the Complaint filed by Ronald Jarmuth (hereafter "Plaintiff") as follows:

**FIRST DEFENSE**

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. The answering Defendants deny any and all allegations contained in the Complaint.

**SECOND DEFENSE**

3. Paragraphs 1-2 above are incorporated herein by reference and made a part and parcel to Defendant's Second Defense.

4. By answering this Complaint, Defendant in no way abandons the motion it filed on November 9, 2010 with this Court to dismiss the Complaint pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

**EXHIBIT C**

5. The Defendant specifically reserves all rights and arguments set forth in its motion dated November 9, 2010.

6. This Court should dismiss the Complaint in its entirety in accordance with Rule 12(b)(8) of the South Carolina Rules of Civil Procedures because there is currently a pending civil action filed by the Plaintiff against the Defendant before the Court of Common Pleas for the County of Horry, State of South Carolina, Civil Action No.: 2009-CP-26-3596.

**THIRD DEFENSE**

7. Paragraphs 1-6 above are incorporated herein by reference and made a part and parcel to Defendant's Third Defense.

8. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to hear this dispute under section 22-3-10 of the South Carolina Code (2007), as the amount in controversy, or the relief sought in this case by the Plaintiff, exceeds seven thousand five hundred dollars and no/00 ($7,500).

**FOURTH DEFENSE**

9. Paragraphs 1-8 above are incorporated herein by reference and made a part and parcel to Defendant's Fourth Defense.

10. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to declare the contracts entered into by the Defendants as void and return any monies collected under the contracts to Plaintiff. See S.C. Code Ann. § 22-3-10(1) (stating the magistrate court has jurisdiction "in actions arising on contracts for the recovery of money **only**") (emphasis added).

**FIFTH DEFENSE**

11. Paragraphs 1-10 above are incorporated herein by reference and made a part and parcel to Defendant's Fifth Defense.

12. The Plaintiff lacks standing to bring the claims asserted in his Complaint, and therefore, his claims should be dismissed.

**SIXTH DEFENSE**

13. Paragraphs 1-12 above are incorporated herein by reference and made a part and parcel to Defendant's Sixth Defense.

14. The Plaintiff's claims should be dismissed because his Complaint and the causes of action asserted therein are barred by the doctrines of Res Judicata and Collateral Estoppel.

**SEVENTH DEFENSE**

15. Paragraphs 1-14 above are incorporated herein by reference and made a part and parcel to Defendant's Seventh Defense.

16. The answering Defendants assert the Doctrines of Estoppel, Waiver, and Laches as complete affirmative defenses to the allegations contained in the Complaint.

**EIGHTH DEFENSE**

17. Paragraphs 1-16 above are incorporated herein by reference and made a part and parcel to Defendant's Eighth Defense.

18. The Defendant has immunity as to the claims asserted by the Plaintiff as the Defendant has abided by its governing documents and South Carolina State Law in undertaking the actions complained of.

**NINTH DEFENSE**

19. Paragraphs 1-18 above are incorporated herein by reference and made a part and parcel to Defendant's Ninth Defense.

20. All actions of the Defendants were undertaken in good faith and in accordance with the business judgment rule.

**TENTH DEFENSE**

21. Paragraphs 1-20 above are incorporated herein by reference and made a part and parcel to Defendant's Tenth Defense.

22. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

**WHEREFORE**, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed; and

b. for such other and further relief as this Court deems just and proper.

**Respectfully submitted,**

***McNAIR LAW FIRM, P.A.***

Henrietta U. Golding, SC Bar #2173
P.O. Box 336
Myrtle Beach, SC 29578-0336
Ph: (843) 444-1107
Fax: (843) 443-4137
Email: hgolding@mcnair.net
*Attorney for the Defendant*

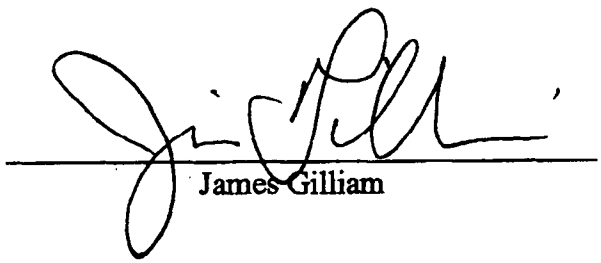
Myrtle Beach, South Carolina
November 17, 2010

**CERTIFICATE OF SERVICE**

I, James Gilliam, an employee of McNair Law Firm, P.A., certify the foregoing document was served via United States Mail, postage prepaid, and/or by Electronic Mail, to the Counsel of Record, and/or Pro Se Parties, on this the 17th day of November, 2010, as follows:

Addressee(s):

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576



James Gilliam

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE MAGISTRATE COURT |
| ) | |
| COUNTY OF HORRY ) | CASE NO.: 2010-CV261072943 |
| Ronald Jarmuth, ) | |
| ) | |
| Plaintiff, ) | |
| ) | |
| vs. ) | **MOTION TO DISMISS COMPLAINT** |
| ) | |
| The International Club Homeowners Association, Inc., ) | |
| ) | |
| Defendant. ) | |
| ) | |

The Defendant hereby moves to dismiss the Complaint in its entirety in accordance with the South Carolina Rules of Civil Procedure, Rule 12(b)(8), in that there is currently pending a civil action brought by the Plaintiff against the Defendant in a South Carolina State Court being Civil Action No.: 2009-CP-26-3596 pending in the Court of Common Pleas for the County of Horry, State of South Carolina. The claims asserted by Plaintiff in this action are the same claims he asserts in the civil action currently pending in the Court of Common Pleas for the County of Horry, State of South Carolina.

As an additional ground, the Plaintiff is seeking relief not within the jurisdiction of the Magistrate Court and therefore the Complaint should be dismissed.

Respectfully submitted:

**McNair Law Firm, P.A.**

**November 9, 2010**

**Myrtle Beach, South Carolina**

Henrietta U. Golding, S.C. Bar #2173
McNair Law Firm, PA
2411 N. Oak Street, Suite 206
Myrtle Beach, SC 29577
Ph: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@mcnair.net



EXHIBIT D

## CERTIFICATE OF SERVICE

I, Carole Koerner, an employee of McNair Law Firm, P.A., certify the foregoing document was served via United States Mail, postage prepaid, and/or by Electronic Mail, to the Counsel of Record, and/or Pro Se Parties, on this the 9th day of November, 2010, as follows:

Addressee(s):

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576

Carole Koerner
Carole Koerner

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE MAGISTRATE COURT |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | CASE NO.: 2010-CV261072943 |
| Ronald Jarmuth, ) | |
| ) | |
| Plaintiff, ) | |
| ) | |
| vs. ) | ORDER TRANSFERRING CASE TO CIRCUIT COURT |
| ) | |
| The International Club Homeowners ) | |
| Association, Inc. ) | |
| ) | |
| Defendant. ) | |

Plaintiff filed this action in Magistrate Court asserting four claims against the Defendant. The Plaintiff's claims are premised upon the legality of the Defendant Association to contract for such things as cable television and garbage collection, as well as to assess the Plaintiff as a homeowner in the International Club community. The Plaintiff seeks to recover monies he and his predecessor in title paid to the Defendant, as well as injunctive relief seeking to bar the Defendant from future assessments and fines.

The Defendant filed a Motion to Dismiss, as well as an Answer. One basis of the Motion to Dismiss is that there is an action pending in the South Carolina Court of Common Pleas, Civil Action No.: 2009-CP-26-3596 in which the Plaintiff and the Defendant are parties and the Plaintiff asserts claims in this action that are the same claims in the Civil Action pending in the Court of Common Pleas for Horry County. Additionally, the Defendant contends that this Court does not have jurisdiction for the Plaintiff seeks injunctive relief and his claim is in excess of $7,5000.00.

Based upon the arguments made before Court and the pleadings in this action, I find that the above entitled action must be transferred to the Court of Common Pleas in that the Magistrate



EXHIBIT E

Court does not have jurisdiction. Further, before any Court can determine if the Plaintiff is entitled to the relief he is seeking, Plaintiff's claim in the Civil Action No.: 2009-CP-26-3596 must be decided. Therefore,

IT IS ORDERED, ADJUGED AND DECREED that the above entitled action is hereby transferred to the Court of Common Pleas for Horry County.

IT IS SO ORDERED.

Magistrate Court Judge

Dated: 11/30/10

Conway, South Carolina

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
ronaldjarmuth@hotmail.com
August 21, 2012

FILED
HORRY COUNTY
2012 AUG 22 PM 1:50
MELANIE HUGGINS-WARD
CLERK OF COURT

Honorable Ralph P. Stroman
c/o Horry County Master-in-Equity's Office 1301 Second Avenue
Conway, SC 29526

Re: *Ronald Jarmuth v. The International Club HOA* Civil Action No. 2009-CP-26-3596; and *Ronald Jarmuth v. The International Club HOA* Civil Action No.: 2010-CP-26-11320

Dear Judge Stroman:

Today I am in receipt of a copy of the Defendants' material which was submitted, as was mine (yesterday) in deference to your order from the bench on August 10, 2012 to submit a "Brief and Proposed Order". I observe that the Defendants' material lacks a Brief. This egregious non-complying omission I respectfully suggest should rule out consideration of what the Defendants did finally offer the Court in written form.

I am not arguing the contents of anything stated what in the Defendants filed as their final submission. It is my understanding that the opportunity to present evidence, cite to cases and law, and to argue a case opens and closes with the trial. There is clearly no opportunity post trial to contest any new matter raised post trial, and I am carefully not doing so.

That being said, it appears to me from reading the Defendants' material and considering mine that there are two entirely different visions of what was before the court at the trial – even as to what issues were or were not argued.

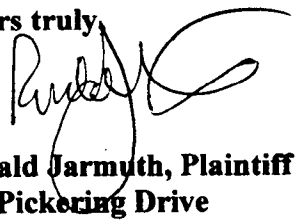
In anticipation of this I insisted (and provided the text) that the Consent Order of Reference explicitly provide that the IHOA Defendant (or more exactly, their insurance company) pay all the costs of the court reporter.

It is my suggestion that the Court utilize this opportunity to order the Transcript of the Trial from the Court Reporter at the (by consent) expense of the Defendant to resolve the question of exactly what was testified to, what issues were argued, what was included in the arguments, what cases and law were cited at trial, and what evidence was submitted either before or during the trial.

EXHIBIT F

**I simply do not recognize from being present at the trial much of what is in the Defendant's proposed Order, but at this point I believe it is for the Court and not me to make this determination.**

**Yours truly,**



**Ronald Jarmuth, Plaintiff Pro Se**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**cc: Defendants through counsel Henrietta Golding**
**hgolding@mcnair.net**

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc., )<br>Rosemary Toth, )<br>and K.A. Diehl & Associates, Inc. )<br>)<br>Defendants. ) | **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S S.C.R.C.P. RULE 50, 52, 59 & 60 POST-TRIAL MOTIONS** |
| ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc. )<br>)<br>Defendant. ) | |

Defendants, The International Club Homeowners Association, Inc. ("HOA"), Rosemary Toth, and K.A. Diehl Associates, Inc. ("K.A. Diehl") (collectively hereinafter "Defendants") respectfully submit this Memorandum in Opposition to the Plaintiff Ronald Jarmuth's ("Plaintiff") Consolidated Post-Trial Motions ("Post-Trial Motions").

## PROCEDURAL HISTORY

### I. Pre-Trial

Consolidated Civil Action Numbers 2009-CP-26-3596 ("2009 Lawsuit") and 2010-CP-26-11320 ("2010 Lawsuit") (collectively hereinafter "Consolidated Cases") were filed by the Plaintiff seeking declaratory judgments that the HOA does not have the authority to perform a plethora of functions, including but not limited to, collecting assessments, reviewing architectural changes to homeowners' lots, enforcing restrictive covenants and the HOA's other governing documents, and entering contracts with third parties. On April 17, 2012, Plaintiff, without consultation with Defendants' counsel, filed a Motion to Refer the Consolidated Cases to Ralph Stroman, as Special Referee. Exhibit A, Plaintiff's Motion to Refer. Based on his objection to sharing the Special Referee's charges, Plaintiff withdrew his motion. Subsequently, the Defendants agreed to pay the Special Referee's charges; therefore, a Consent Order to Refer the Consolidated Cases to Ralph Stroman was signed by this Court and filed June 15, 2012.

Pursuant to the Consent Order, the Consolidated Cases were scheduled to be tried on August 8th, 9th, and 10th. Before the trial commenced, the Plaintiff and the Defendants submitted Pre-Trial Briefs as permitted by S.C.R.C.P., Rule 16. In the Defendants' Pre-Trial Brief, the Defendants addressed the various causes of action contained in the Plaintiff's pleadings, as well as the multitude of other legal arguments Plaintiff raised over the course of the lawsuits. Exhibit B, Defendants' Pre-Trial Brief.

### II. Trial

The trial began, as scheduled, on August 8, 2012 at 9:00 a.m. and concluded on August 10, 2012 at 5:30 p.m. Trial Transcript, pp. 1029, ll. 13-15. On the first day of trial, the Plaintiff

testified the entire day, except for Defendants' witness Chris Sullivan who the Court permitted to be taken out of turn due to his long standing vacation plans. During the Plaintiff's testimony, he admitted over 700 trial exhibits while pontificating on South Carolina law. Much of his testimony was hearsay, lacked a foundation, and constituted legal conclusions. Although the Defendants objected, the Special Referee allowed all evidence to be entered subject to the Defendants' objections. Trial Transcript, pp. 74-79.

The morning of the second day of trial continued at 9:00 a.m. with testimony from the Plaintiff regarding his legal positions. After a lunch break, the Plaintiff called four witnesses, Michael Butryn, Peter Pizzi, Jane Pizzi, and Lou Astorino, and spent several hours examining them regarding often irrelevant matters. In the afternoon, the Defendants called as witnesses Ms. Denise Ambuhl, a representative of HTC, and Ms. Maureen Sullivan, a former HOA board member. The Plaintiff spent over an hour cross examining each of the Defendants' witnesses after direct testimony of less than a half hour. The Plaintiff completed his cross examination of Ms. Sullivan in the evening of August 9, 2012.

On the morning of August 10, 2012, around 9:00 a.m., Plaintiff told the Special Referee "after looking at material and other things I talked about how much time I would need, I had not noticed other subjects on the table. I believe I'm going to need or collectively will need an extra half day beyond what we can accomplish today." Trial Transcript, p. 720, ll. 10-21. In response, the Special Referee noted that the Plaintiff agreed to rest his case by noon, and in reliance of this statement, the Judge made plans for the next day. Id., p. 720, ll. 22-25. Mr. Stroman noted that he had "bent over backwards to help [the Plaintiff] as a pro se" and that he had "two full days" to present his evidence giving him "every opportunity to produce stuff" and ruled that the Plaintiff must rest his case by noon of that day. Id., p. 720-722. No objections were made to this ruling.

On the third trial day, the Plaintiff continued to testify regarding his legal positions and began to repeat testimony he previously presented. Just before noon, the Plaintiff asked the Special Referee if he could present evidence in support of his claim for violation of the South Carolina Frivolous Proceedings Act after the Defendants rested. Id., pp. 828-830. Defendants objected upon the basis that the Plaintiff introduced all the evidence regarding his claim, including the HOA's breach of the covenants, violation of the Architectural Review Board ("ARB") guidelines, the invalidity of the ARB fines, and his argument that he is not subject to the ARB. Id., pp. 830-831. The Court allowed the Plaintiff to present evidence in support of his claim before he rested, and the Plaintiff made no objections to this ruling. Id., pp. 831-832. Then the Defendants presented three witnesses, William Freiboth, the HOA president, Ms. Beckie Abel, the HOA property manager and an employee of K.A. Diehl, and Jeffrey King, Esq., the Defendants' expert witness. The Plaintiff cross examined each of these witnesses at length.

After the Defendants rested late in the afternoon, the Court asked if the parties had any motions, and the Plaintiff remained silent. Id., pp. 1028, ll. 5-8. In lieu of summation, the Court requested that the parties present proposed orders and briefs in support within ten days. Id., pp. 1028-1035. No page limitation was given to either the briefs or the proposed order. Id. The Plaintiff did not make any objections to the Special Referee's request for briefs in lieu of closing argument or the time limitation on presenting on the orders. Id. At the end of the day, the Plaintiff thanked the Special Referee, saying "I'm thankful that you were willing to step in and resolve this issue." Id.

## III. Post-Trial

The Final Order dismissing Plaintiff's Claims and Awarding Judgment Against the Plaintiff in the Amount of $7,326.00 and Injunctive Relief was signed and filed on September

10, 2012 and the Plaintiff was served with a copy. On September 19, 2012, the Plaintiff filed his Post-Trial Motions. In his Motions, the Plaintiff sets forth the following grounds for a new trial, setting aside the order, and amending the order: 1) the Defendants' proposed order constituted fraudulent material and ex parte communications with the trial court, and the Special Referee was biased by executing the Defendants' proposed order; 2) the award of attorneys' fees to the Defendants was improper; 3) the trial court lacked subject matter jurisdiction over the 2010 Lawsuit; 4) The ARB cannot be awarded a judgment, because it was not a party to the Consolidated Cases; 5) procedural irregularities warrant a new trial; and 6) Defendants' exhibits were not produced in discovery. Also, the Plaintiff made specific objections to the Final Order in a marked up copy of the Order attached to the Post-Trial Motions as Exhibit "A". The specific objections argued that the trial court erred as a matter of law as to several issues and that the findings of fact were not supported by the evidence.

On October 2, 2012, the Plaintiff filed a Petition for Writ of Mandamus and Prohibition with the South Carolina Supreme Court ("Petition") seeking an order prohibiting the enforcement of the Final Order and mandating a new trial with a minimum five day duration before a judge from a judicial circuit other than the Fifteenth Judicial Circuit.[1] Exhibit C, Plaintiff's Petition. In his Petition, the Plaintiff argued that the Special Referee was biased and accused Defendants' counsel of unethical behavior. Id.; See also, Exhibit D, Plaintiff's Return to the Defendants' Reply. The State Supreme Court dismissed the Petition. Exhibit E, Supreme Court's Order. The Special Referee also recused himself from hearing the Post-Trial Motions as a result of the Plaintiff's "unfounded and general accusations" that he was biased. Exhibit F,

[1] The Petition is the Plaintiff's second petition filed with the Supreme Court seeking relief in this matter. The first petition was filed on December 21, 2012 and sought a continuance of the trial of the Consolidated Cases. The State Supreme Court also dismissed that petition.

Order of Recusal. In the Order of Recusal, Ralph Stroman "wholeheartedly den[ied] bias and/or misconduct".

## LEGAL ANALYSIS

### I. Plaintiff's Arguments Regarding Procedural Irregularities and Failure to Produce Documents are Not Preserved and are Not Grounds for Altering the Final Order.

The "procedural irregularities" complained of by the Plaintiff include: 1) taking the Defendants' witnesses out of order; 2) not permitting summation; and 3) the time limitation on trial. At trial, the Plaintiff failed to specifically object to the Court's ruling on these issues. The Plaintiff also generally asserts that some of the Defendants' trial exhibits were not produced during discovery but failed to identify the exhibits that were not produced and failed to object to their admissibility at trial. Because the Plaintiff is raising these arguments for the first time, even though he had an opportunity to object at the time of trial, they are not preserved. See South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008), overruled on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010). A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

Even if the issues are preserved, the procedural irregularities and failure to produce documents in discovery, if in fact such occurred, do not warrant setting aside the judgment pursuant to S.C.R.C.P., Rule 61:

> No error in either the admission or the exclusion of evidence and **no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial** or for setting aside a verdict or for vacating, modifying, **or otherwise disturbing a judgment or order**, unless refusal to take such action appears to be inconsistent with substantial justice. The court at every stage must disregard any

> error or defect in the proceeding which does not affect the substantial rights of the parties.

(emphasis added). The Special Referee granted the Plaintiff wide latitude to make legal arguments during the trial while he testified and in his post-trial brief that was over 200 pages in length. Much of the Plaintiff's testimony was repetitive and constituted legal arguments, and he failed to present facts to support his conclusions. Accordingly, providing limitations on the amount of time the Plaintiff had to present evidence and legal arguments was reasonable and did not affect the Plaintiff's "substantial rights". Additionally, the Plaintiff failed to specifically object to the Defendants' exhibits at the time the Defendants moved to admit the exhibits. In the Post-Trial Motions, the Plaintiff fails to specify how the Final Order is in error for relying on the Defendants' exhibits. Because the "procedural irregularities" and discovery issues, at most, constitute alleged defects in the proceeding that do not affect the substantial rights of the parties, the Final Order cannot be altered.

II. **The Special Referee's Execution of the Final Order Does Not Evidence Bias.**

The Plaintiff argues that the Defendants' proposed Final Order constitutes an ex parte communication, includes fraudulent material, and evidences the Special Referee's bias towards the Defendants. The Plaintiff was copied on the cover letter to the Special Referee enclosing the Final Order. Exhibit G, Defendants' Letter to Plaintiff serving Defendants' proposed Final Order dated August 20, 2012. In response, the Plaintiff sent a letter to the Court acknowledging his receipt of the Defendants' order and stating generally that he objected to the Final Order. Exhibit H, Plaintiff's Letter to Court objecting to Defendants' proposed order dated August 21, 2012. Because the Plaintiff was copied on the letter to the Judge, the Final Order is not an ex parte communication.

The Plaintiff argues that the Final Order is fraudulent because: 1) the findings of fact do not conform to the evidence; and 2) the Final Order includes new post-trial arguments and case citations. However, as specifically address in Exhibit I attached hereto, all of the findings of fact challenged by the Plaintiff are supported by the evidence. In a non-jury action on appeal, "the findings of fact of the judge will not be disturbed...unless found to be without evidence which reasonably supports the judge's findings." Waterpointe I Property Owner's Ass'n, Inc. v. Paragon, Inc., 342 S.C. 454, 459, 536 S.E.2d 878, 881 (2000). See also, Ducworth v. Neely, 319 S.C. 158, 159, 459 S.E.2d 896, 897 (Ct.App.1995). The findings of fact are reasonably supported by the evidence as specifically addressed in Exhibit I, and therefore, should not be disturbed.

Additionally, the Final Order cites to legal arguments and case law addressed in the Defendants' Rule 16 Pre-Trial Brief. See Exhibit B. Although the Final Order addresses some issues that were not raised specifically by the Plaintiff at trial, the legal conclusions are responsive to the allegations in the Complaint and Amended Complaint in the 2009 and 2010 Lawsuits. Accordingly, the Final Order is consistent with the record, the pleadings, the arguments made at trial and in the parties' pre-trial and post-trial briefs.

Because the Final Order accurately reflects the proceedings, the Plaintiff's argument that the Special Referee was biased by signing the Final Order is without merit.

## III. The Trial Court has Jurisdiction Over the 2010 Lawsuit.

The Plaintiff also argues that the trial court does not have jurisdiction over the 2010 Lawsuit, because the magistrate transferred the case to the circuit court in violation of S.C. Code Ann. § 22-3-30 (2007). Under § 22-3-30, the magistrate court must transfer cases to the circuit court if a counterclaim is added, which if successful, would exceed the civil jurisdictional limit

of $7,500. According to the Post-Trial Motions, the magistrate cannot transfer cases to the circuit court under any other circumstances. This argument is clearly meritless. The magistrate court has limited concurrent jurisdiction over claims as set forth in S.C. Code Ann. § 22-3-10. S.C. Code Ann. § 22-3-20 specifically provides that the magistrate court does not have jurisdiction over any case where real property title may come into question. Because the Plaintiff's lawsuit deals with restrictive covenants in his chain of title, the magistrate properly determined that he did not have jurisdiction to hear the matter and transferred the case to circuit court. Therefore, the circuit court has subject matter jurisdiction over the claims in the 2010 Lawsuit.

## IV. The Trial Court's Judgment Against the Plaintiff is Proper.

The trial court did not err by awarding the Defendant HOA $7,326.00 in attorneys' fees and fines. The Plaintiff argues that the Final Order erred because: 1) if you accept the Defendants' argument that the ARB fined the Plaintiff, an award of fines is to the ARB instead of the HOA, which is not a party to the Consolidated Cases; and 2) the attorneys' fees are not recoverable under the Declaration, because they were not incurred in "enforcing the Declaration".

The Final Order does not hold that the ARB is a separate legal entity from the HOA. Instead, it holds that it is free standing board of the HOA that is not bound by the procedures for fines governing the HOA's Board. The ARB is an arm of the HOA, and therefore, it was proper for the trial court to award fines to the HOA levied by the ARB.

The award of attorneys' fees to the HOA was also proper. Under the Declaration, Section 8.9, "[s]hould any person employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, because of a breach of the same, all costs incurred in

such enforcement, including a reasonable fee of counsel shall be paid by the Owner of such Unit or Units in breach thereof." Defendants' Ex. 3, p. 27. Likewise, the Bylaws Section 13.4, provides that "[s]hould the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner." Id. The HOA was forced to pay $5,000 in attorneys' fees to enforce the architectural restrictions contained in the Declaration against the Plaintiff, and as a result, an award of attorneys' fees was proper in the Consolidated Cases. See Sea Pines Plantation Company v. Wells, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987).

## V. The HOA Bylaws were Properly Adopted Pursuant to S.C. Code Ann. § 33-31-206.

In the post-trial motions, Plaintiff contends that the Court erred by holding that the Bylaws are valid, because the Board, or an Incorporator of the HOA, did not adopt the Bylaws as required by the Non-Profit Corporation Act ("the Act"), S.C. Code Ann. § 33-31-206. However, the record reflects that Ken Grover as the vice president of Suntech Management, Inc., the manager of the Declarant, Plantation A.D., LLC, incorporated the HOA. Defendants' Ex. 105; Deposition of Ronald Scott Pyle pp. 7 & 28. Ronald Scott Pyle, as the president of Suntech Management, Inc. also executed the Declaration, which was attached to the Bylaws as Exhibit "C". See Defendants' Ex. 3, p. 27. Moreover, Jeffrey King, a real estate attorney, testified that in his expert opinion the Bylaws govern the HOA and are valid. Trial Transcript, p. 847, ll. 13-25, p. 848, ll. 1-3. Because the manager for Plantation A.D., LLC executed and filed the Articles of Incorporation and adopted the Bylaws, and in light of the expert testimony opining that the Bylaws are valid, the trial court did not err by holding that the Bylaws were properly adopted pursuant to S.C. Code Ann. § 33-21-206.

## VI. Pebble Creek is Subject to the Declaration.

The Plaintiff's Post-Trial Motions assert that the trial court erred by holding that his Pebble Creek lot is subject to the Declaration. He argues that Plantation A.D., LLC, the original Declarant, did not own the Pebble Creek property at the time it filed the Declaration, and therefore, no vertical privity exists. Plaintiff's Ex. 545, the deed from Plantation A.D., LLC to Sunbelt Associates, LLC conveying the Pebble Creek property, is dated January 29, 1999 and recorded on February 8, 1999 at 3:27 p.m. The Declaration was filed two minutes earlier at 3:25 p.m. on February 8, 1999. Defendants' Ex. 3, p. 1.

"It is a well established rule of law that a deed is not legally effective until it has been delivered." First Union Nat. Bank of South Carolina v. Shealy, 325 S.C. 351, 355, 479 S.E.2d 846, 847 (Ct.App.1996), citing Johnson v. Johnson, 44 S.C. 364, 22 S.E. 419 (1895); Durham v. Blackard, 313 S.C. 432, 438 S.E.2d 259 (Ct.App.1993). That is, an effective delivery of a conveyance contains two parts: (1) an intention to deliver, and (2) an act evincing a purpose to part with control of the instrument. Shealy, 325 S.C. at 355, 479 S.E.2d at 847 citing Powers v. Rawles, 119 S.C. 134, 112 S.E. 78 (1922). The recording of a deed serves as prima facie evidence of delivery. See Johnson, 44 S.C. 364, 22 S.E. 419. Because Plantation A.D. filed the Declaration at 3:25 p.m. on February 8, 1999, before it delivered the Pebble Creek deed to Sunbelt Associates at 3:27 p.m. by recording the deed, vertical privity exists.

Moreover, even if the record reflected that Pebble Creek deed was delivered to Sunbelt Associates before the Declaration was recorded, which it clearly does not, Plantation A.D.'s and Sunbelt's intention that the Declaration run with the land is clear from the Pebble Creek deed that states "[t]he property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation." Plaintiff's Ex. 545. The Plaintiff's deed also states that his

property is subject to the Declaration. Defendants' Ex. 25 ("This conveyance is made subject to that certain Declaration of Covenants and Restrictions of Murrells Inlet Golf Plantation dated January 31, 1999 and recorded February 8, 2000 in Deed Book 2117 at page 1353..."). The language in the Pebble Creek deed and the Plaintiff's deed subjecting the property to the Declaration is controlling. Charping v. J.P. Scurry Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct.App.1988) (holding that a restrictive covenant is enforceable if there is "an indication that the parties intended for the covenant to run with the land"). The Special Referee did not err in holding that the Plaintiff's Pebble Creek property is subject to the Declaration.

VII. **The Golf Course Agreement is Supported by Consideration.**

The trial court's holding that the Golf Course Agreement is supported by consideration is proper. Pursuant to the Golf Course Agreement, the HOA agreed to decrease the Golf Course's assessment obligations in exchange for real property and access to the Golf Course's irrigation system. Defendants' Ex. 11, pp. 3-4. Plaintiff argues that no consideration existed, because the HOA can use the Golf Course's pond water pursuant to the Declaration. Although the Declaration allows the HOA to use the Golf Course's pond water (See Defendants' Ex. 3, p. 12, §4.17), it does not have a right to tie into the Golf Course's irrigation system and would have to make significant expenditures to install its own system. Trial Transcript, pp. 300-304. As a result, the HOA is receiving access to the irrigation system in exchange for the reduction of assessments owed by the Golf Course. Assuming without admitting that the HOA could access the irrigation system under the Declaration, the HOA still received real property in exchange for the reduction of assessments, which is adequate consideration. See Heyward v. Bradley, 179 F. 325 (4th Cir. 1910) ("only such inadequacy of price as shocks the conscience and amounts to conclusive and decisive evidence of fraud will" render a contract unenforceable).

## VIII. The HOA Properly Adopted the Golf Course Agreement Pursuant to Non-Profit Corporation Act.

The Plaintiff also argues that the trial court committed error by holding that the Golf Course Agreement is valid, because, he argues, that the HOA Board did not approve the agreement as required by the Non-Profit Corporation Act. He asserts that: 1) the agreement was not approved at a Board meeting or the unanimous written consent of the Board as required by S.C. Code Ann. § 33-31-821; and 2) the agreement is invalid due the developer's conflict of interest pursuant to S.C. Code Ann. § 33-31-831. However, the record shows that the HOA Board approved the terms of the Golf Course Agreement at its meetings in 2002 and 2003 (Plaintiffs' Exs. 300-301, 303), and accordingly, the HOA complied with S.C. Code Ann. § 33-31-821. Furthermore, the Golf Course Agreement is fair to the HOA based on the benefits received, and as a result, it is not voidable pursuant to S.C.Code Ann. § 33-31-831. ("A conflict of interest transaction is not voidable of the basis of imposing liability on the director if the transaction was fair to the corporation at the time it was entered into **or** approved as provided in subsections (b) or (c)."). (emphasis added). The Special Referee did not commit error by holding that the Golf Course Agreement is valid, because the requirements of the Non-Profit Corporation Act were met.

## IX. The Plaintiff's Claims Related to the Golf Course Agreement are Barred by the Doctrines of Laches and Estoppel.

The Special Referee did not commit error by holding that Plaintiff's claim to set aside the Golf Course Agreement is barred by the doctrines of laches and estoppel. The Golf Course Agreement reducing the golf course owners' assessment obligations for ten years was signed in 2003. Defendants' Ex. 11. After the Plaintiff purchased his home in 2006, he waited almost

three years before filing his legal action challenging the agreement.[2] The HOA honored the Golf Course Agreement and collected the reduced assessments for over six years with no objection from any homeowner. Defendants' Ex. 102. These facts are sufficient to support the Court's holding that the Plaintiff's claim is barred by the doctrine of laches. See Arceneaux v. Arrington, 284 S.C. 500, 503, 327 S.E.2d 357, 359 (Ct.App.1985) (holding that the Plaintiffs' failure to object to covenant violation for over two years when they knew or should have known of the violation and where the violating party incurred expenses as a result barred the Plaintiffs' claims under the doctrine of laches); see also, Rabon v. Mali, 289 S.C. 37, 40-41, 344 S.E.2d 608, 610 (1986) (holding that the use of a lot for commercial purposes for over ten years barred the Plaintiff from seeking injunctive relief to enforce a covenant restricting the property to residential use). Although the Plaintiff argues that he legally challenged the agreement shortly after he discovered its existence, he knew of or should have known of the agreement earlier because of his review of the HOA's records on previous occasions.

The record also supports estopping Plaintiff's claim. Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct.App.2006) (holding that plaintiff's claim seeking a refund of assessments is barred by the plaintiff's acquiescence to the method of collection without objection), quoting, Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct.App.1987) (holding that owner's counterclaim against home owners association that assessment is invalid is barred by the doctrine of estoppel by silence). Plaintiff's "silence" regarding the reduced assessment to the Golf course bars his claim pursuant to the doctrine of estoppel.

[2] Plaintiff claims that he sued the HOA within 60 days of discovering the Golf Course Agreement. However, the record reflects that Plaintiff knew of the agreement in October 2008, at least six months before he filed suit. See, Defendants' Exs. 39 and 42.

## X. The Amenity Center Assessments are Valid.

The Plaintiff contends that the Court erred by holding that he is obligated to pay assessments for the HOA's Amenity Center, because the provisions in the Declaration requiring payment are personal service contracts and the covenants do not run with the land. "Restrictive covenants differ from contracts in that they 'run with the land' meaning that they are enforceable by and against later grantees." Queen's Grant II Horizontal Property, 368 S.C. at 361, 628 S.E.2d at 913. Covenants that "require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which 'touch and concern' land, and therefore, run with the land." Id. The Amenity Center consists of 1.56 acres of Common Area owned by the HOA. Defendants' Ex. 6. Under the Declaration, sections 5.3 and 6.2, all Common Area is to be maintained by the HOA with assessments collected from owners, including "Recreational Amenities." See, Defendants' Ex. 3, pp. 13-14. Because the obligation to pay assessments for the Amenity Center is "for the upkeep of a particular parcel of property", sections 5.3 and 6.2 are restrictive covenants that "run with the land" and are enforceable. Accordingly, the Special Referee did not commit error by holding that the Plaintiff is required to pay assessments for the Amenity Center.

## XI. The HOA's Assessments for Cable and Garbage Collection Services is Valid.

The Special Referee did not err by holding that the HOA has the right to assess the Plaintiff for cable and garbage collection services. Pursuant to the Bylaws, Article 4, Section 11, "the Board of Directors shall have full power: [t]o carry out the maintenance, care, upkeep, replacement, operation, surveillance, and management of the Common Areas, the Recreational Amenities, and other services and facilities of the Subdivision." Defendants' Ex. 3, Ex. "C", p.

34. The Declaration Article III, Section 3.1(k) further clarifies that those services include cable T.V. and garbage collection. Id., pp. 7-8.

Plaintiff argues that the assessments are invalid for the following reasons: 1) the HOA is a seller of cable services and needs a franchise from Horry County; 2) the HOA selectively assesses some owners for cable and garbage collection services while other owners are not assessed; 3) the contracts violate the Non-Profit Corporation Act, Section 33-31-821, because they were not approved at a Board meeting and the name of the HOA is incorrect on the cable T.V. contract; and 4) the provisions granting the Board the authority to assess for cable T.V. and garbage collection services are not covenants that runs with the land. In his brief in support of the proposed order, the Plaintiff admits that he "at trial explicitly stated that he did not seek to void the contracts."[3] Plaintiff's Post-trial Motions, Exhibit "A", p. 24.

With respect to the first ground, the HOA does not sell cable T.V. services, accordingly it does not need a franchise agreement with Horry County. It entered a bulk billing arrangement with HTC for the benefit of the homeowners. The record does not include evidence that Horry County takes the position that the HOA needs a franchise agreement. Even if the HOA was obligated to have a franchise agreement, which the Defendants do not concede, such obligation would not invalidate the restrictive covenant that it may assess the homeowners for cable services. Consequently, the Plaintiff's first ground is without merit.

The second ground, that the HOA selectively enforces the covenants in violation of the Declaration, is also without merit. The HOA has the right, but not the obligation, to assess all unit owners for cable T.V. and garbage collection under section 3.1(k) of the Declaration.

[3] Plaintiff asserts in the Post-Trial Motions that there is no evidence of a Waste Industries contract. However, at trial, he admitted that the HOA has a contract with Waste Industries. Trial Transcript, pp. 139-40. Maureen Sullivan also testified that the HOA has a contract for garbage collection. Id., p. 711. The contract was admitted as an exhibit as well. Defendants' Ex. 5.

Defendants' Ex. 3, pp. 7-8. Based on the language of Section 3.1(k), the HOA may assess only the owners who are provided services under the HOA's contracts. Two neighborhoods within the community, the Villas and the Cambridge, have separate subordinate associations that contract with HTC and garbage collection companies and the owners pay assessments to those subassociations. Trial Transcript, pp. 749-750. Although this issue has not been specifically addressed in South Carolina, other jurisdictions have held that charging a tiered structure of assessments to different classes of owners is valid so long as the allocation is reasonable. Fifth Third Co. v. Mooreland Estates Homeowners Ass'n, 639 S.W.2d 292, 297 (Tenn.Ct.App.1982) (requirement that assessments be made at "uniform rate" did not prevent charging higher rates for larger units; classification based on level of benefits received was reasonable). Ackerman v. Sudden Valley Community Ass'n, 89 Wash. App. 156, 164-65, 944 P.2d 1045, 1050 (Wash.Ct.App.1997) (2-tiered assessment structure differentiating between improved and unimproved lots was "equitable" within meaning of covenant giving association power to charge and assess its members "on an equitable basis"). Assessing only homeowners who receive cable and garbage services is reasonable and conforms to the Declaration.

The third ground, that the contracts were not approved and properly executed, is also meritless. The Plaintiff concedes that he is not seeking an order that the contracts are unenforceable. Plaintiff's Post-Trial Motions, Ex. "A", p. 24. He is only contesting the right of the HOA to assess owners for cable TV and garbage collection services. Because the Declaration clearly grants the HOA the right to assess for such services, and homeowners receive those services, the HOA's assessments are proper.

Finally, the provisions of the Declaration that provide authority to the Board to enter contracts for cable services and to assess owners are restrictive covenants that run with the land.

In Queen's Grant II Horizontal Property Regime, the South Carolina Court of Appeals held that covenants providing for assessment of services are restrictive covenants that run with the land. 368 S.C. at 361, 628 S.E.2d at 913. Courts in other jurisdictions have held that an HOA may assess for cable television services if permitted by the HOA's governing documents. D'Elia v. Association of Apt. Owners of Fairway Manor, 2 Haw.App. 347, 349 632 P.2d 296, 297 (Haw.Ct.App. 1981) (assessment for installation and operation of cable television is common expense for maintenance, repair, rebuilding, and restoration of common elements within meaning of covenant; court has no power to amend declaration to provide fairer basis for assessing common expenses), River Park House Owners Association v. Crumley, 47 A.3d 870, 874 (Pa. Commw. Ct. 2012) (holding that Pennsylvania law did not prohibit an HOA from entering a bulk cable contract and assessing for cable television services so long as the Board had the authority to assess for that purpose under its governing documents), Ocean Sands Property Owners Association, Inc. v. Munns, 2005 WL 589483 at, *3-4 (N.C.App. 2005) (holding that the HOA had the authority to assess for cable television services if properly voted upon by the members of the association). These Courts recognize the validity of restrictive covenants granting an HOA the authority to assess for cable television services and implicitly hold that such covenants touch and concern the land and run with the land. Based on established jurisprudence, the Special Referee did not err in holding that the HOA may assess owners for cable television services.

## XII. Horry County Code § 12.5-123 does not Prohibit the HOA from Towing Cars Parked on the International Club Roadways.

Plaintiff contends that the Court erred by holding that the HOA has the right to tow cars parked on the International Club streets pursuant to Horry County Code § 12.5-123(a), which provides "[i]t shall be unlawful to remove any motor vehicle from private property without authorization from the owner of the motor vehicle, the county, or authorized law enforcement

agencies, except under the following circumstances: (1) The property owner has proprietary ownership and discretion as to who is authorized to be on said property; and (2) If the property owner is a commercial entity or other like entity which has shared parking spaces," signage must be posted. He argues that the HOA did not post signs providing notice that cars may be towed if parked on the street. However, Horry County Code § 12.5-123 applies to private property; the roadbeds were dedicated to the County subject to the Declaration. Defendants' Exs. 19-21. Likewise, the signage requirements are only applicable to parking that has shared spaces; the record does not reflect that parking spaces are located on the roadbeds. Consequently, Horry County Code § 12.5-123 is inapplicable, and the HOA has the right to enforce the Declaration provisions that provide for towing of parked cars on the dedicated streets without signage.

## XIII. Plaintiff's Request for the Membership Information was Properly Denied by the HOA.

Next, the Plaintiff asserts that the Court erred by holding that his request for the HOA's membership information was properly denied, because he failed to provide a good faith basis for his request under S.C. Code Ann. § 33-31-720. His argument is that this code provision does not require a good faith reason for inspecting the membership list.

Clearly S.C. Code Ann. § 33-31-720 is irrelevant to this case; it is only applicable where a meeting of the HOA has been noticed.[4] Nothing in the record reflects that a meeting was noticed before Plaintiff made his request. As a result, S.C. Code Ann. § 33-31-720 is not germane; therefore, the Plaintiff was required to provide a good faith reason for his request pursuant to S.C. Code Ann. § 33-31-1602.

[4] S.C. Code Ann. § 33-31-720 states: "The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting for which the list was prepared..."

Moreover, Plaintiff's request was not for a membership list as defined by the Act, but instead, sought private information, including the owners telephone numbers, account status, and email addresses. Defendants' Ex. 53; Trial Transcript pp. 1000-1003. The HOA properly denied his request for private information of the members.[5]

## XIV. The HOA's Grant of an Easement to Central Electric Power was not an Ultra Vires Act under Sections 4.10 and 7.23 of the Declaration.

The Post-Trial Motions contend that the Special Referee erred by holding that the HOA had the power to grant an easement to Central Electric Power to install utilities. The Plaintiff argues that Sections 4.10 and 7.23 of the Declaration prohibit above ground utilities, and therefore, the installation of the utilities is an ultra vires act of the Board. He also states that the court erred, because "Plaintiff never challenged granting an easement", and therefore, the trial court should not have held that the easement was proper. Plaintiff's Post-Trial Motions, Exhibit "A", p. 29.

Declaration Sections 4.10 and 7.23 provide the following:

> "Section 4.10...There is hereby reserved for the benefit of...the Association...the power to grant...easements to...any private or public authority, agency, public service district, public or private utility or other person upon, over, under, and across: (i) all of the Common Areas...for the purpose of installing...cable systems....and all utilities. Such easements may be granted...by the Board of Directors...**To the extent possible, all utility lines and facilities serving the Subdivision and located therein shall be located underground...it shall be expressly permissible for the providing utility company to...(i) erect and maintain pipes, lines**, manholes, pumps and other necessary equipment and facilities..."
>
> "Section 7.23...All electrical service, wire, pipes, lines, telephone, cable television (CATV) lines....of any type shall be placed in the appropriate conduit underground..."

[5] Beckie Abel, the HOA's property manager, testified that the Plaintiff could access members' names and addresses if he simply signed up for the HOA's website, however, Plaintiff refused because he did not want owners to be able to access his information. Trial Transcript, pp. 1000-1003.

Defendants' Ex. 3. (emphasis added). The HOA granted an easement to Central Electric Power "for the construction, maintenance, alteration, and replacement of an electric transmission line or lines, towers, poles, anchors, and necessary fixtures and wires attached thereto, counterpoise underground wires, and all structures and appliances necessary in connection therewith..." Defendants' Ex. 73. By his own admission, Plaintiff concedes that this easement was proper. Central Electric Power, not the HOA, installed the above ground utility, and accordingly, the installation was not an ultra vires act of the Board. Therefore, the Court did not err in holding that the HOA's grant of the easement was proper.

## XV. The Board Members did not Violate the Non-Profit Corporation Act by Refunding Assessments to its Members.

In the Post-Trial Motions, Plaintiff argues that the payment of $75.00 to each member of the HOA was an unlawful distribution and violated S.C. Code Ann. § 33-31-1301.[6] He asserts that the trial court erred in failing to hold liable the board members who voted in favor of the transaction.[7]

The payment made is not a distribution pursuant to the Non-Profit Corporation Act, S.C. Code Ann. 33-31-101 *et seq*. Pursuant to the Act, S.C. Code Ann. § 33-31-140(11),

> "Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. **The term does not include**:
> (a) the payment of compensation in a reasonable amount to its members, directors, or officers for services rendered;
> (b) **conferring benefits on its members in conformity with its purposes**; or

[6] S.C. Code Ann. 33-31-1301 provides: "Except as authorized by Section 33-31-1302, a corporation may not make any distributions."

[7] The Plaintiff did not properly plead a claim under the Non-Profit Corporation Act with respect to the $75.00 payment. Furthermore, the only individual board member named as a defendant is Rosemary Toth. The Plaintiff did not establish at trial that Ms. Toth voted in favor of the disputed transaction, but instead, referred to the minutes of the 2010 special meeting. Trial Transcript, pp. 273-75. Defendant's Ex. 72, the minutes of the meeting, reflect the HOA members voted to grant an easement to Central Electric, but no specific motion was made to refund money to the homeowners.

> (c) repayment of debt obligations in the normal and ordinary course of conducting activities.

(emphasis added). The official comment to S.C. Code Ann. 33-31-1302, defining distributions that are lawful, specifically states the following: "the return of an overcharge or the providing of services for which members have paid is not a distribution." According to the testimony of Maureen Sullivan, a former Board member, the Board considered crediting the owners' accounts, but instead, decided to pay owners funds directly. Trial Transcript, p. 704, ll. 6-17. Similarly, Mr. Freiboth testified that the funds were returned to the homeowners to confer a benefit. Trial Transcript, p. 920, ll. 4-16, p. 932, ll. 8-19. The HOA's expenses were lower than expected for that year, which allowed the HOA to refund assessments to the owners. The HOA's refund was intended to "confer[] benefits on the members in conformity with its purposes", not to distribute profits to its members.

Nevertheless, assuming arguendo that the payment was a distribution, S.C. Code Ann. § 33-31-833, entitled "Liability for Unlawful Distributions" provides:

> a) **Unless a director complies with the applicable standards for conduct described in Section 33-31-830**, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

(emphasis added). The board members complied with S.C. Code Ann. § 33-31-830, and accordingly, are not liable under § 33-31-833. Under § 33-31-830(a), a director "shall discharge his duties as director...1) in good faith; 2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and 3) in a manner the director reasonably believes to be in the best interests of the corporation." The board member is "entitled to rely" on "legal counsel" "in discharging his duties."

William Freiboth testified that the Board believed the agreement with Central Electric Power was in the best interests of the HOA, because it conferred benefits on the homeowners. Trial Transcript, p. 918, ll. 2-10. In refunding the money, the Board relied on the advice of counsel:

> Q. Did the board seek legal advice on whether it could distribute any of the proceeds?
> MS. THOMPSON: Okay.
> MR. JARMUTH: I didn't ask what it was.
> MS. THOMPSON: Yes, he has to answer with respect to whether legal counsel was consulted regarding that issue, but none of the communication between the attorneys. Okay. Just making sure it's clear. Go ahead.
> THE DEPONENT: My answer is of course.

Deposition of William Freiboth, p. 92, ll. 18-25, p. 93, ll. 1-9.[8] Because the evidence establishes that the Board acted in good faith, in the best interests of the corporation, and relied on the advice of professionals, the trial court did not err by not holding liable the individual board members.[9]

## XVI. The HOA's Committees and the ARB are Consistent with the Act.

The Special Referee held that the organization of the ARB and the committees are consistent with S.C. Code Ann. § 33-31-825, which provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board." Plaintiff argues that the constitution of the

[8] Plaintiff filed all the depositions taken in this case before the trial. During the trial, he moved to admit the filed depositions as exhibits and the trial court granted his motion. Trial Transcript, p. 886, ll. 16-25, p. 887, ll. 1-5.

[9] S.C. Code Ann. § 33-31-833 states that "[a] director held liable for an unlawful distribution...is entitled to contribution...from each person who received an unlawful distribution for the amount of the distribution whether or not the person receiving the distribution knew it was made in violation of this chapter." If you accept Plaintiff's argument, he is also liable for the refund he received.

ARB and other committees of the HOA violate this provision, because members of the Board do not serve on the ARB or the HOA's committees.

The HOA's committees and ARB do not perform the functions of the Board, and accordingly, § 33-31-825 does not apply. The official comment to the section sets forth the following:

> Section 8.25 deals with committees of the board of directors that exercise the powers of the board...[t]he board may delegate non-board functions to committees or individuals apart from the provisions of section 8.25. As these committees and individuals are not exercising board powers, the provisions of section 8.25 do not apply to them.

The South Carolina Reporter's Comment provides further clarification regarding the requirements of Section 8.25:

> This section is not intended to prevent creation by the board of, or provision in the articles or bylaws for, committees not complying with subsections (a) and (b) of this section. Such noncomplying committees would not, however, be empowered to exercise board's authority, nor would they be "committees of the board" for purposes of other provisions of this Chapter. An example of a permissible, non-complying committee would be a board-appointed planning committee including as members non-director consultants and staff.

The above commentary clarifies that the Bylaws or Articles of Incorporation may create separate free standing committees or Boards that do not comply with Section 8.25 if those entities do not exercise the Board's authority.

The HOA's committees make recommendations to the Board, however, they have no separate decision making authority and do not exercise any functions of the Board. Deposition of Rosemary Toth, p. 78, ll. 4-25, p. 79, ll. 1-2. Therefore, the HOA's committees do not need to comply with § 8.25 of the Act.

Similarly, the Declaration, as part of the Bylaws, creates the ARB to review applications for architectural review and to enforce the restrictions on improvements in the Community.[10] Id.; Defendants' Ex. 3, pp. 16-17. These functions are not Board duties. As the official comment recognizes, the Bylaws may create a separate board to perform non-board duties under the Act.

Assuming arguendo that the ARB performs functions of the Board, the governing documents of the HOA may delegate authority to a separate board to exercise the Board's authority without meeting the requirements of §8.25. See S.C. Code Ann. § 33-31-801 ("The articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board."). The official comment to § 33-31-801 sets forth:

> The [] Act allows considerable flexibility in structuring nonprofit corporations. While every corporation must have a board of directors, the articles may authorize a person or persons to exercise some or all of the powers of the board. Insofar as the powers of the board are delegated to some other person or persons, that person or persons assume the duties of the board and must meet the standards set forth in sections 8.30-8.33.

The Declaration creates the ARB to perform the separate functions of architectural review and enforcement, and accordingly, complies with the Act.

The Plaintiff argues that the Declaration cannot create a separate board; instead the articles of incorporation must confer authority on the ARB to exercise the Board's authority. However, the Declaration is the organizational document of the HOA. It serves the same purpose as the articles of incorporation and should be considered part of the articles for the purposes of the Act. Even if the definition of "articles" does not include the Declaration, the language in the Declaration creating the ARB and defining its composition should control:

[10] The Declaration is part of the Bylaws for the purposes of the Act, as it is part of "the code or codes of rules, other than the articles, adopted pursuant to this chapter for regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated." S.C. Code Ann. § 33-31-140(4).

> The organizational form adopted for exercise of the community's powers, a nonprofit corporation, for example, often creates an additional relationship between community members and the association, which is governed by an independent body of law. Because the organizational form is simply a tool to facilitate operation of the property relationship among community members, in the event of conflict between servitudes law and the law applicable to the association form, servitudes law should control.

Restatement (Third) of Property Servitudes §6.13 (2000).

Pursuant to S.C. Code Ann. §§ 33-31-801 and 33-31-825 and the official comments, the Special Referee did not err in holding that the ARB and the HOA's committees comply with the Act.

**XVII. The Architectural Guidelines are Valid.**

Plaintiff contends that the Special Referee erred by holding that the Architectural Guidelines are valid, because they allegedly prohibit swing sets and this prohibition is not contained in the Declaration. The Architectural Guidelines do not prohibit swing-sets, but instead, they require homeowners to obtain the approval of the ARB for all swing-sets. Defendants' Exs. 28 & 94, p. 4. Similarly, the Declaration, Article VII, Section 7.2, requires all homeowners to apply to the ARB for any "building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement." Defendants' Ex. 3, pp. 16-17. The application must include the "location" of the proposed improvement. Id. The ARB has the authority to disapprove applications "based on any grounds, including purely aesthetic grounds." Id. Because a swing-set is an improvement that must be approved by the ARB under the Declaration and the Architectural Guidelines, the guidelines do not expand the restrictions found in the Declaration.

**XVIII. The ARB did not Waive its Architectural Review Rights.**

The Special Referee did not err by holding that the ARB did not waive its right to exercise architectural control under Article VII of the Declaration and the Architectural Guidelines. Plaintiff's argument is two-fold: 1) the First Amendment to the Declaration waives architectural review rights; and 2) the ARB inconsistently applied the restrictions and guidelines by allowing fences and swing-sets.

First, the evidence reasonably supports the Special Referee's holding that the ARB did not waive its architectural review rights pursuant to the Declaration's First Amendment. R. Scott Pyle, a principal of the original developer, testified that the purpose of the First Amendment was to waive rights only under certain circumstances. Deposition of Ronald Scott Pyle, p. 46, ll. 20-25, p. 47, ll. 1-21. Jeffrey King also testified that, in his expert opinion, the waiver of architectural review rights was not with respect to the whole subdivision, but instead, only with respect to the builder of the multi-family parcel being annexed by the First Amendment. Trial Transcript, pp. 873-877. Since the filing of the First Amendment on April 29, 2003, the ARB's actions have been consistent with Mr. King's interpretation. The Developer and the ARB have continually required applications for all improvements, including fences and swing-sets. Trial Transcript, p. 999, ll. 24-25, p. 1000, ll. 1-9. From 2005 to the present, Architectural Guidelines have been enforced against the homeowners. Defendants' Exs. 28 & 94, p. 4. Therefore, the record reasonably supports the Court's holding that the ARB did not waive its architectural review rights. Although South Carolina courts strictly construe restrictive covenants in favor of free use of the property, the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)). The fact that the Developer, the drafter of the First Amendment, continued to

exercise architectural review controls is convincing evidence that it did not intend to waive all rights under Article VII. Id. ("The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution.")

Secondly, the ARB did not waive its right to enforce the Declaration and Architectural Guidelines with respect to fences and swing sets. The Plaintiff argues that the existence of two fences in the Community near property lines waives the ARB's right to enforce Section 7.4 of the Declaration prohibiting such fences.[11] The current and past President of the HOA testified that these fences were approved by Charles Flynn, the developer of Pebble Creek, in the early 2000's, but subsequently, the ARB has consistently denied fences near the property line and in the front yard. Trial Transcript, p. 900, ll. 1-25, p. 901, ll. 1-20; Deposition of Rosemary Toth, p. 83, ll. 12-24. The HOA's consistent disapproval of fences on the property line since the early 2000's supports the conclusion in the Final Order that the HOA did not waive its right to enforce Section 7.4.

Additionally, the Plaintiff contends that the ARB approved a swing-set in the side yard, and such approval acts as a waiver of its right to deny similarly situated swing-sets. The Presidents of the HOA testified that the swing-set referred to by the Plaintiff was properly screened and not visible from the street, while the proposed location of the Plaintiff's swing-set was in a highly visible location. Trial Transcript, p. 896, ll. 5-25, p. 897, ll. 1-8, p. 992, ll. 19-25, p. 993, ll. 1-25, p. 994, ll. 1-21; Defendants' Ex. Nos. 52 & 60; Deposition of Rosemary Toth, p. 104, ll. 22-25, p. 105, ll. 1-25, p. 106, l. 1. Essentially, the ARB approved the swing-set in one

[11] Section 7.4 of the Declaration provides: "No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board and set back from Unit lines at such a distance as the Developer and the Architectural Review Board in their sole discretion may require, or except those erected by the Developer in the Common Areas. Said fences and patio fences shall be allowed only after obtaining prior written approval of the Developer and Architectural Review Board..." Defendants' Ex. 3, p. 17-18.

location while denying the Plaintiff's application based on aesthetic reasons, which was proper under Section 7.2 of the Declaration and does not waive the ARB's right to deny Plaintiff's application.[12] See Sea Pines Plantation Company, 294 S.C. at 271, 363 S.E.2d at 894 (holding that a refusal to approve plans for aesthetic reasons will be upheld where the covenant has provided guidelines for enforcement and expressed the purpose of the covenant), see also, Palmetto Dunes Resort v. Brown, 287 S.C. 1, 2, 336 S.E.2d 15, 16 (Ct.App.1985) (holding that the Board has a right to disapprove plans that would mar the general appearance of the subdivision and thus diminish the overall quality of the development).

Consequently, the Plaintiff's argument that the HOA waived its right to enforce Article VII of the Declaration and the Architectural Guidelines is meritless.

**XIX. K.A. Diehl did not Violate Plaintiff's Privacy Rights.**

The Plaintiff contends that the Final Order should be amended to hold that K.A. Diehl violated his invasion of privacy rights by disclosing his account information and past violations to the ARB. Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956). As an arm of the HOA, the ARB is entitled to information related to the Plaintiff's violations and fines. Accordingly, K.A. Diehl did not "publicize the Plaintiff's private affairs" justifying an amendment to the Final Order.

[12] The Plaintiff also argues that the denial of his swing-set application was arbitrary and capricious as a result of the ARB's approval of the swing-set in his neighbor's side yard. Emails from the ARB Board members clearly reflect that the Plaintiff's application was denied based on aesthetic principles. See Defendants' Exs. 52 & 60. His neighbor's swing-set was hidden and less visible. The ARB's treatment of the Plaintiff was reasonable under the circumstances.

XX. **The ARB's Deferral of Plaintiff's Application was Proper.**

Next, the Plaintiff asserts that the ARB's deferral of his 2012 application for improvements was improper for the following reasons: 1) the ARB does not have the authority to defer applications; and 2) Charles Roche, the Defendant Ms. Toth's husband, voted in favor of the deferral making it a conflict of interest transaction under S.C. Code Ann. § 33-31-831.

The record reflects that without Mr. Roche's vote, a quorum of the ARB did not exist to vote on the transaction. Trial Transcript, p. 795, ll. 23-25, p. 796, ll. 1-4. As a result, the ARB had no choice but to defer the Plaintiff's application. Because the result would have been the same whether Mr. Roche voted or not, the deferral was "fair" as defined by the Act and cannot be the basis for imposing liability. See S.C. Code Ann. 33-31-831 ("[a] conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into...").

XXI. **The ARB has the Authority to Enforce the Architectural Restrictions and Impose Fines without a Hearing.**

The Post-Trial Motions assert that the HOA violated § 13.3 of the Bylaws by imposing a $50.00 fine on the Plaintiff for constructing improvements without ARB approval. The motions also contend that the HOA violated the same section by imposing a $100.00 monthly fine due to his refusal to remove the improvements that were later denied by the ARB. Lastly, the Plaintiff contends that the ARB does not have the authority to enforce the architectural restrictions or fine homeowners.

Section 7.2 of the Declaration provides that the Developer had the authority to perform the functions of the ARB until a certain amount of Units are transferred. Defendants' Ex. 3, pp. 16-17. As the predecessor of the ARB, the Developer adopted Architectural Guidelines that fine Owners $50.00 for failure to submit a request to the ARB for improvements and $100.00 a

month for an Owner's refusal to remove improvements that are not approved by the ARB. See Defendants' Ex. 18, Exhibit "B", p. 9; Trial Transcript, p. 892, ll. 15-21. Under sections 7.2 and 8.1 of the Declaration, the Declarant and the ARB have the authority to adopt architectural guidelines and impose fines for infractions.[13]

The Plaintiff argues that the fines levied against him for his modifications without ARB approval are invalid under Section 13.3 of the Bylaws, because he was not provided with a hearing. The provision provides:

> "Except with respect to failure to pay Assessments, **the Board** shall not impose a fine, suspending voting rights, or infringe upon or suspend any other rights of an Owner or other occupant of the Subdivision for violations of the Declaration, By-Laws, or any rules and regulations for the Association, unless and until the following procedure is followed:
> 1)written demand to cease and desist from an alleged violation...
> 2)**the Board may serve such Owner with written notice of a hearing to be held by the Board in executive session**..."

(emphasis added). Plaintiff is incorrect for two reasons: 1) Section 13.3 only applies to fines imposed by the Board, not fines imposed by the Developer or the ARB; and 2) Section 13.3 states that the Board may, but is not required, to hold a hearing before imposing fines.

Even if the Court accepts the Plaintiff's argument that fines may not be imposed without a hearing, the Plaintiff waived his right to a hearing. See Defendants' Ex. 87 ("I reserve my right to take parallel recourse at law or in equity, since by disputing the authority of the HOA in this matter I am disputing the necessity of an appeal."); Trial Testimony, p. 902, ll. 13-25, p. 903, ll. 1-7. The Plaintiff took parallel action by filing his lawsuit challenging the ARB's authority to

[13] Section 7.2 states "[t]he Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder." Defendants' Ex. 3, pp. 16-17. Under Section 8.1, "[t]he Developer and the Association as the case may be, shall have the right to establish, assess, and collect reasonable fines and penalties for violations of this Declaration, which shall be liens against Units and improvements thereon in the same manner as Assessments as provided herein. Such fines shall not exceed $50.00 per violation per day." Id., p. 25.

act under the Declaration. Accordingly, Plaintiff's argument that Section 13.3 of the Bylaws bars the fines levied against him is without merit.

## XXII. The Amendments to the Declaration do not Prohibit the Glens Homeowners from Utilizing the Amenity Center.

In the Post-Trial Motions, Plaintiff asserts that the Special Referee erred in holding if the Glens is a multifamily parcel, the Glens homeowners are entitled to use the Amenity Center, because the Glens Parcel does not have its own amenities. Plaintiff argues that the First, Fourth, and Fifth Amendments to the Declaration bar the Glens homeowners from using the Amenity Center based on the following language: "The owners of Dwelling Units within the Multifamily Parcel shall not have the right to use any Recreational Amenities..." See Defendants' Exs. 4, 17, & 32.

However, it is clear that the purpose of each of the amendments was to subject specific multifamily parcels to the Declaration, to designate such parcels as "multifamily", and to exclude those specific parcels from using amenities. The HOA cannot exclude Owners from using recreational amenities unless the subordinate community is specifically designated as "multifamily" under Section 1.18 of the Declaration. The Glens was not specifically designated as "multifamily" as required by the Declaration in the amendment that annexed the parcel into the Community. Consequently, the trial court did not err by holding that the Glens homeowners are entitled to use the Amenity Center, because the Glens does not have its own amenities.

Moreover, it is clear that the Declarant did not intend to exclude Glens homeowners from using the Amenity Center. The D.R. Horton advertisement for the Glens homes evidence that the Developer intended for the Glens to have access to the Amenity Center. See Defendants' Ex. 14. The Developer's Agreement also evidences the intent of the Declarant to designate only

horizontal property regimes (the Glens is not a horizontal property regime) as multifamily parcels as defined by the Declaration. Defendants' Ex. No. 8.

Construing the provisions of the Declaration as whole and considering the evidence that reflects the intent of the Declarant, the trial court did not err in holding that the Glens homeowners may use the Amenity Center.

**XXIII. The HOA Used and Accounted for the Capital Contributions in Accordance with the Declaration.**

Plaintiff argues that the Final Order is in error, because it does not hold that the Board's use and accounting of the contributions were an ultra vires act under the Declaration.

The Plaintiff concedes in his motions that he "never said a single word (sic.) nor made any allegation about the use of the capital contributions" at trial. Plaintiff's Post-Trial Motions, Exhibit "A", p. 49. Therefore, the issue raised in Jarmuth's post-judgment motion for the first time regarding the use of capital contributions is not properly before this court. See, South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008), overruled on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010).

Assuming that the issue was properly raised, Plaintiff attacks the use of capital contributions on two fronts: 1) the HOA paved the Amenity Center parking lot in violation of §6.3 of the Declaration; 2) the HOA maintained the front entrance of the Community in violation of § 1.6 of the Declaration.

The Plaintiff did not present any evidence that the HOA used capital contributions to pave the Amenity Center parking lot. Even if evidence exists, Section 6.3 of the Declaration does not govern the use of capital contributions. See, Defendants' Ex. 3, p. 14. This provision applies to special assessments for the capital improvements. In contrast, Section 6.2 specifically

grants the HOA the authority to assess for improvements to the Common Area. Id. Therefore, the HOA would have been within its authority if it paid for the paving of its Common Area with capital contributions.

The Plaintiff also argues that the HOA maintained the entranceway to the Community with capital contributions in violation of Section 1.6 of the Declaration, which defines Common Area as property owned by the HOA. See Id., p. 2. The record does not reflect that the HOA used capital contributions to maintain the entranceway of the Community before title was transferred from the Developer to the HOA. Even if the HOA did maintain the entranceway before it owned the property, it is within its rights to do so pursuant to Section 3.1 of the Declaration; it allows the HOA to maintain property in the Subdivision, whether owned by the HOA or a third party. Id., pp. 7-8.

Plaintiff also argues that the HOA failed to separately account for capital contributions collected from multi-family owners and single family owners in violation of the Declaration. The HOA has accounting records reflecting the amount of capital contributions collected. See Defendants' Ex. 98. Nothing in the Declaration requires the HOA to keep the funds in separate account or to use them for certain purposes.

The Special Referee did not err by holding that the capital contributions were properly used by the HOA.

## XIV. The Third and Fourth Amendments to the Declaration are Valid.

Plaintiff contends that the Third and Fourth Amendments are invalid for three reasons: 1) the homeowners were not provided notice of the amendments; 2) S.C. Code Ann. § 33-31-1021 required approval of 75% of the homeowners to change the capital contribution requirements; 3) the Developer failed to comply with §8.5 in amending the Declaration.

First, the homeowners were provided adequate notice of the amendment pursuant to South Carolina law. See Queen's Grant II Horizontal Property Regime., 368 S.C. at 367-68, 628 S.E.2d at 916-17. In Queen's Grant II Horizontal Property Regime, the Court held that filing an amendment in the chain of title of owners' properties provided adequate notice to owners of an amendment filed by a Developer. The Third and Fourth Amendments were filed in the chain of title of the owners' properties providing adequate notice. See, Defendants' Exs. 17 & 32.

Next, the Plaintiff argues that the Non-Profit Corporation Act requires 75% of the homeowners' approval to file the Third and Fourth Amendments. S.C. Code Ann. § 33-31-1021 provides limitations on a "**board of director's**" amendment of a corporation's "**bylaws**". (emphasis added). Under the Act, a corporation's board can amend the bylaws without approval of the members unless the articles of incorporation reserve the power to amend the bylaws to its members. This provision does not apply to a Developer's amendment of the Declaration.

Assuming the Plaintiff is correct that this provision applies to a Developer's amendment to the Declaration, the articles of incorporation, the Declaration, and the Bylaws do not require the approval of the membership to amend the Declaration if the Developer is filing the amendment. In fact, Section 8.5 of the Declaration specifically provides that the Developer has the authority to amend the Declaration without the approval of the homeowners. Defendants' Ex. 3, p. 25. Under Queen's Grant II Horizontal Property Regime, a "**Developer**" can amend a "**Declaration**" without approval of homeowners if the Declaration specifically provides that the Developer has the authority to file the amendment. 368 S.C. at 350, 628 S.E.2d at 907. (emphasis added).

Lastly, as discussed above, Section 8.5 provides the Developer with the authority to amend the Declaration without the approval of the membership. Id.. The Plaintiff argues that

the Developer failed to comply with Section 8.5 by not certifying that the Developer approved the amendments. The Whereas clauses of the Third and Fourth Amendments summarize the Developer's authority to amend the Declaration without the approval of the owners if, in the Developer's sole discretion, the amendments do not materially alter the members' use and enjoyment of the property. The amendments are signed by the Developer and state that they do not materially alter the members' use and enjoyment of the property. Defendants' Exs. 17 & 32. This language in the Third and Fourth Amendment and the Developer's execution of the amendments complies with the requirements of Section 8.5.

Accordingly, the Final Order is correct in holding that the Third and Fourth Amendments are valid.

## XXV. The HOA Properly Assessed Owners to Maintain Property Other than Common Area.

In the post-trial motions, Plaintiff contends that the Special Referee ignored his request for a declaratory judgment that the HOA cannot assess homeowners for maintenance of property other than Common Area. Section 6.2 of the Declaration defines the purpose of Assessments:

> **The Assessments levied by the Association shall be used exclusively** to promote the recreation, health, safety, and welfare of the Owners in the Subdivision...and for the improvement, protection, replacement, operation, and maintenance of the Common Areas and the Recreational Amenities...and **for the provision of necessary and reasonable services for and other expenses of the Association..."**

Defendants' Ex. 3, p. 14. (emphasis added). Section 3.1 clarifies the meaning of necessary and reasonable services:

> The Association **shall be authorized but not required to provide the following services**: Clean up, **maintenance**, repair, **landscaping of**, and management of plant and animal life in, all **open spaces**, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, **whether the same are within the Subdivision or in a reasonable proximity of the Subdivision**

**such that their condition would affect the appearance of the Subdivision as a whole.**

Id., pp. 7-8. (emphasis added). Under Section 3.1 and 6.2 of the Declaration, the Association may collect assessments to pay for services, including the maintenance of property that is not Common Area that is within a reasonable proximity of the Subdivision. As a result, the trial court did not err by holding "that the HOA may maintain property that it does not own" without qualifying that assessments may not be used to pay for these services.

**XXVI. The Fairways and Enclave Owners are not Members of the HOA.**

The Plaintiff also makes the argument that the Fairways and Enclave are subject to the Declaration and the owners must pay assessments to the HOA, because those neighborhoods were part of the zoning documents submitted to Horry County for approval. The record reflects that the Fairways and the Enclave owners are not members of the HOA, because the Fairways and the Enclave were not subjected to the Declaration. See, Defendants' Exs. 3, 4, 7, 13, 17, & 32. Therefore, the Final Order is proper by not including language that those neighborhoods must pay assessments to the HOA.

**XXVII. The Meadows was Subject to the Declaration.**

Plaintiff argues that because the Meadows was not part of the original plans for the International Club P.U.D. submitted to Horry County for zoning approval, the Meadows owners are not members of the HOA and the property is not subject to the Declaration. However, based on the Defendants' expert testimony, the Meadows was annexed into the Declaration by an amendment. Trial Transcript, p. 850, ll. 12-16. Jeffrey King testified that the developer had the authority to annex the Meadows into the Community even though it was not part of the original P.U.D. document submitted to the county. Trial Transcript, p. 864, ll. 5-25. Accordingly, the trial court did not err by holding that the Meadows is subject to the Declaration.

## XXVIII. The Connector Road Declaration is Valid.

Pursuant to the Post-Trial Motions, Plaintiff asserts that the Special Referee erred by holding that the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration") is valid. His argument is that 1) the Connector Road Declaration does not contain covenants that run with the land, because the property maintained is far from his lot; 2) horizontal privity does not exist, because the International Club is not adjacent to the Connector Road; 3) circumstances have changed meriting a dissolution of the covenants; 4) the HOA did not exist at the time the Connector Road Declaration was filed, and therefore, could not have agreed to collect assessments from its members to pay the Connector Road Association.

With respect to the first and second ground, the HOA's Common Area, the main entranceway to the Community, is adjacent to the Connector Road. Therefore, the Plaintiff is incorrect that his lot and the Community are not adjacent to the property being maintained under the Connector Road Declaration.

His third ground is also meritless. The Plaintiff argues that the dedication of the road constitutes a change in circumstances warranting dissolution of the Connector Road Declaration. "Restrictive covenants may be rendered invalid or unenforceable where there has been such a radical change in the character of the neighborhood within and surrounding the restricted area that the original purpose of the covenant has been defeated, it is no longer of substantial value to the benefited land, and its enforcement would be unduly oppressive to the burdened land." 76 A.L.R.5th 337; see also, Inabinet v. Booe, 262 S.C. 81, 81, 202 S.E.2d 643, 643 (1974). In Inabinet, the South Carolina Supreme Court held that the rezoning of a lot restricted for residential purposes to a less restrictive classification did not relieve the restrictive covenants on

the property and conditions did not change residential character of restricted subdivision so as to warrant removal of restrictions. Id. Similarly, the dedication of the Connector Road to the county does not affect the purpose of the Connector Road Association: to beautify the area near the International Club. Although Horry County maintains the road top, it does not landscape the area surrounding the Connector Road, which the Association continues to do as required by the Connector Road Declaration. See, Defendants' Exs. 19-21.

Lastly, Plaintiff argues that the HOA did not exist at the time that the Connector Road Declaration was filed, and therefore, the HOA could not have agreed to collect assessments from its members. The incorporator of the HOA, Plantation A.D., agreed on behalf of the HOA that it would collect funds to pay the Connector Road Association. Defendants' Ex. 1. Under South Carolina law, the Developer as the incorporator of a homeowners association can enter agreements on behalf of an association before it is incorporated. See Concerned Dunes West Residents, Inc. v. Georgia-Pacific, Corp., 349 S.C. 251, 562 S.E.2d 633 (2002).

**XXIX. The Defendants did not Defame the Plaintiff.**

First, the Plaintiff argues that the Special Referee erred by finding that the Plaintiff stipulated that Henrietta Golding's May 2009 letter was not defamatory. The trial transcript reflects that Plaintiff stated "I'm not contesting or alleging that anything in the letter, of the actual letter, signed by Henrietta Golding is defamatory." Trial Transcript, p. 582, ll. 21-25, p. 583, ll. 1-2. The Plaintiff's statement was not qualified, as argued in the Post-Trial Motions, and accordingly, the Court did not err in noting the Plaintiff's stipulation.

Secondly, the Plaintiff contended that the trial court erred in holding that the Defendants did not defame him, because Lou Astorino testified that William Fletcher called the Plaintiff a child molester. See, Trial Transcript, p. 473, ll. 2-17. The Plaintiff failed to present any evidence

that Mr. Fletcher was an agent of the Defendants at the time that the alleged statement was made, and in fact, Defendants presented evidence that Mr. Fletcher was never a HOA Board member. Trial Transcript, p. 922, ll. 10-13. As a result, it was proper that this testimony was not referenced in the Final Order.

Third, the Plaintiff asserts that K.A. Diehl is liable for defamation, because the absolute privilege does not extend to the HOA's management company. K.A. Diehl is an agent of the HOA and sent the letter out to the homeowners on the HOA's behalf. As a result, the trial court did not err by holding that K.A. Diehl is not liable for defamation.

**XXX. <u>No Evidence Exists that Defendant Toth Acted Improperly</u>.**

The Post-Trial Motions attack the Final Order for holding that "[n]o evidence was presented that Ms. Toth acted improperly an any way" because the Plaintiff asserts that Ms. Toth voted in favor of paying $75.00 to homeowners, signed contracts on behalf of the HOA without Board approval, and "act[ed] in defiance of the covenants". Plaintiff's Post-Trial Motions, Exhibit "A", p. 61. As discussed above, the payment was a refund to the homeowners, and as a result, was proper. Furthermore, the record does not reflect that Ms. Toth voted in favor of refunding the money to the owners. With respect to the contracts, Plaintiff failed to present any evidence that the contracts at issue were improper, and according to Ms. Toth's deposition testimony, all actions taken were by the Board and not by Ms. Toth individually. Deposition of Rosemary Toth, p. 13, ll. 10-15, p. 17, ll. 20-25, p. 18, ll. 1-5, p. 32, ll. 9-13, p. 38, ll. 15-19, p. 46, ll. 22-25, p. 47, ll. 1-4, p. 48, ll. 23-25, p. 49, ll. 1-5, p. 59, ll. 18-25, p. 60, ll. 1-4, p. 86, ll. 5-9, p. 116, ll. 7-10. Lastly, the general assertion that Ms. Toth acted in defiance of the covenants is not supported by any evidence, and consequently, the trial court did not err by holding that her

actions were proper. See, Trial Transcript, pp. 916-17 ("Rosemary Toth wouldn't even buy a cup of coffee from the—using Association funds.")

**XXXI. K.A. Diehl Properly Performed its Duties as Property Manager.**

Plaintiff testified that his Exhibit Numbers 701, 703, and 704 evidence that K.A. Diehl stole $16,063.00 in capital contributions. Contrary to Plaintiff's unsubstantiated generalizations regarding these documents, Beckie Abel, the property manager, testified that independent audits are conducted of the HOA's financial records on an annual basis, and the C.P.A. who conducts these audits never found that K.A. Diehl misappropriated, embezzled, or stole funds from the HOA. Trial Transcript, p. 1004, ll. 13-21. Mr. Freiboth, the HOA's president, also testified that he reviewed the capital contributions collected by D.R. Horton on behalf of the HOA and determined that K.A. Diehl did not steal any funds. Trial Transcript, p. 913, ll. 1-25, p. 914, ll. 1-7. The Special Referee did not err by rejecting Plaintiff's argument that K.A. Diehl stole funds.

## CONCLUSION

Based on the foregoing, the Defendants respectfully request that this Honorable Court deny the Plaintiffs' Post-Trial Motions for relief under S.C.R.C.P., Rules 50, 52, 59, and 60.

McNair Law Firm, P.A.

Alicia Thompson

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*Attorneys for the Defendants*

Myrtle Beach, South Carolina
January 23, 2012

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>RONALD JARMUTH<br>☒ Plaintiff<br><br>v.<br><br>Int'l Club Hoa Inc Et Al<br>☐ Defendant. | ) | IN THE COURT OF COMMON PLEAS<br><br>CASE NO.<br>2009-CP-26-3596<br><br>MOTION AND ORDER INFORMATION FORM AND COVER SHEET |

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Ronald Jarmuth, Bar No. Pro Se<br>Address:<br>249 Pickering Dr; Murrells Inlet SC 29576<br>phone: 843-314-4355 fax:<br>e-mail: other: | Henrietta Golding, Bar No. 2173<br>Address:<br>2411 Oak Street; Suite 206; Myrtle Beach, SC 29577<br>phone: 843-444-1107 fax:<br>e-mail: other: |

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion for Order of Referenc
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

**SECTION II: Motion/Order Type**

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — April 17, 2012 Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

| JUDGE'S SECTION | |
|---|---|
| ☐ Motion Fee to be paid upon filing of the attached order.<br>☐ Other: | _____<br>JUDGE<br><br>CODE: _____ Date: _____ |

**CLERK'S VERIFICATION**

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

**EXHIBIT A**

**Ronald Jarmuth**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**April 17, 2012**

**The Honorable Steven H. John**
**Chief Administrative Judge**
**1301 Second Avenue, Suite 3A30**
**Conway, SC 29526-5234**
**Office: (843) 915-6696**
**Fax: (843)915-5859**

**VIA CLERK OF COURT**

**Re: Ronald Jarmuth v International Club HOA et al, 2009-CP-26-396 consolidated with 2010-CP-26-11320**

**Hon. Judge John:**

**This case came before Hon. Judge Culbertson yesterday for trial. Upon inquiry by the Court, both sides agreed that this case would require at least three, and perhaps as many as five, days for trial.**

**Judge Culbertson stated that because of the shortage of judicial resources, no civil case requiring more than a one day trial could be fit into the Circuit's jury trial rosters. Judge Culbertson stated that in order for this non-jury civil case to be heard, the Plaintiff needs to file a motion for the case to be referred to a Special Referee per SCRCivP Rule 53.**

**The attached motion and draft order explains the complexity of the case in more detail and conforms to the Court's guidance. A copy has been served on Defendants' counsel, per the Certificate of Service.**

**Ronald Jarmuth, Plaintiff Pro Se**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**Encl:**
**- Draft Order, Motion, Certificate of Service**
**- 2 Pending Plaintiff Motions (Continuance / Discovery; Amendment)**
**- 1 Pending Defendant Motion (Protective Order) w Plaintiff Response**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Ronald Jarmuth,<br>Plaintiff<br>vs.<br>The International Club<br>Homeowners Association, Inc..<br>et al<br>Defendants | ) | NO. 2009-CP-26-3596<br><br><br><br><br>CONSOLIDATED FOR TRIAL WITH |
| Ronald Jarmuth<br>Plaintiff<br>vs<br>The International Club<br>Homeowners Association, Inc.<br>Defendant | ) | NO. 2010-26-11320<br><br>ORDER OF REFERENCE |

It appearing that pursuant to Rule 53(b) SCRCP the herein action is appropriate to be referred to Ralph P. Stroman. an attorney who has previously served as a Master In Equity and Special Referee for Horry County with authority to enter a final judgment in the case:

IT IS ORDERED that this case is referred to Ralph P. Stroman who, pursuant to Rule 53(b) SCRCP, shall exercise all the power and authority that a circuit judge sitting without a jury would have, including but not limited to pre-trial interlocutory matters, including discovery; making findings of fact and conclusions of law; directing entry of final judgment in this action under Rule 53(b) SCRCP; hearing any issues, including motions, after judgment; and issuing any and all Orders and Supplemental Orders including Writs of Assistance.

Pursuant to Rule 53(b) SCRCP, any appeal from the final judgment entered by the Special Referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

_____

Presiding Judge, Horry County

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Ronald Jarmuth,<br>Plaintiff<br>vs.<br>The International Club<br>Homeowners Association, Inc..<br>et al<br>Defendants | ) | NO. 2009-CP-26-3596<br><br><br><br><br><br>CONSOLIDATED FOR TRIAL WITH |
| Ronald Jarmuth<br>Plaintiff<br>vs<br>The International Club<br>Homeowners Association, Inc.<br>Defendant | ) | NO. 2010-26-11320<br><br>PLAINTIFF'S MOTION<br>FOR ORDER OF REFERENCE |

In accordance with South Carolina Rule of Civil Procedure Rule 53(b), [1] Plaintiff moves that this Court Order these consolidated cases be referred to Ralph P. Stroman. an attorney who has previously served as a Master In Equity for Horry County, to act as a Special Referee with all the powers and authority provided under that Rule.

On April 16, 2012 these cases - which were previously consolidated for joint determination of facts and law through a common trial - came before the Court on the non-jury trial roster, the Hon. Judge Culbertson presiding. The parties agreed that the non-jury trial would last at least three days. Judge Culbertson stated from the bench that in this judicial circuit, due to a shortage of judicial resources versus the case load, no-jury (request) civil case which requires a trial lasting more than a single day will ever be heard. Judge Culbertson stated that the resolution of this can only be had by referring the case to a Special Referee, using the procedure provided by South Carolina Rule of Civil Procedure Rule 53. Judge Culbertson stated that the Plaintiff needs to prepare and submit a Motion for the case to be so referred. This motion conforms to the Court's guidance.

[1] (b) References. In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case.

Defendant's Rule 16 Pre-Trial Brief submitted on or about January 17, 2012 listed seven (7) witness including one expert and seventy nine (79) exhibits, most of which are many pages long.

Plaintiff has previously subpoenaed or deposed nine witnesses and has identified several others. The depositions of Plaintiff's witnesses took almost three days with little interruption. Plaintiff's list of exhibits submitted on or about January 17, 2012 is seven single spaced pages long and a single entry, in many instances, represents a multi-page exhibit.

Plaintiff's Rule 16 Pre-Trial Brief identifies at least twenty (20) separate areas of contention, some of which are in equity, some in law, and some in both. A very partial list of these includes such diverse topics as a declaratory judgement as to the interpretation of covenants; the application of provisions of the South Carolina Non-Profit Corporation Act to the affairs of the homeowners association; who owns the roads in the community; the application of pre-emptive federal statutes and regulations to cable television services in the community; the correct disposition of proceeds from the sale of an easement to an electric transmission company; the correct assessments for a golf course in the development; and a determination whether an arrangement between the HOA and another non-profit corporation to contribute to road maintenance outside the bounds of the development is a personal services contract or a servitude.

Before the case can go to trial there remain pending interlocutory motions regarding discovery by both Plaintiff and Defendant, and Plaintiff's Motion to Amend the complaint to reflect recent (related), tortious conduct by the Defendants. In accordance with standard practice it is appropriate that the Order of Reference send all pending and future interlocutory matters to the Special Referee as well as the trial itself.

A copy of each of the pending motions with responses where filed is attached:

- Plaintiff's Motion to Amend (no responsive pleading filed).

- Plaintiff's Motion for Continuance and Discovery Relief (no responsive pleading filed).

- Defendant's Motion for Protective order related to Deposition, Plaintiff's responsive pleading attached.

**A draft order of reference has been provided.**

**Ronald Jarmuth, Plaintiff Pro Se**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**April 17, 2012**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NO. 2010-CP-26-11320 |
| | ) | |
| Ronald Jarmuth, | ) | CONSOLIDATED WITH |
| Plaintiff | ) | |
| | ) | CASE NO> 2009-CP-26-3596 |
| vs | ) | |
| | ) | |
| The International Club Homeowners | ) | AFFIDAVIT OF |
| Association, Inc. | ) | SERVICE OF |
| Defendant | ) | MOTION |

## CERTIFICATE OF SERVICE OF MOTION FOR ORDER OF REFERENCE

I certify that on April 17, 2012, I served a copy of the attached Plaintiff's "Motion for Order of Reference" upon Defendant by mailing same to Defendant's attorney, Henrietta U. Golding McNair Law Firm, P.A., 2411 Oak Street; Suite 206, Myrtle Beach, SC 29577-3164 by depositing same in the United States Mail with first class postage prepaid.

Ronald Jarmuth, Plaintiff Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
April 17, 2012

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc., )<br>Rosemary Toth, )<br>and K.A. Diehl & Associates, Inc. )<br>)<br>Defendants. ) | **DEFENDANTS' RULE 16 PRETRIAL BRIEF** |
| ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, )<br>)<br>Plaintiff, )<br>)<br>vs. )<br>)<br>The International Club Homeowners )<br>Association, Inc. )<br>)<br>Defendant. ) | |

Defendants, The International Club Homeowners Association, Inc. ("HOA"), Rosemary Toth ("Ms. Toth"), and K.A. Diehl Associates, Inc. ("K.A. Diehl") (collectively hereinafter "Defendants") provide this Pre-Trial Brief pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure.

## INTRODUCTION

Consolidated Civil Action Numbers 2009-CP-26-3596 ("2009 Lawsuit") and 2010-CP-26-11320 ("2010 Lawsuit") (collectively hereinafter "Consolidated Cases") were filed by the pro se Plaintiff, Jarmuth ("Plaintiff" or "Jarmuth"). In both cases, Plaintiff asserts a declaratory judgment action challenging the HOA's authority to perform several functions, including but not limited to, its power to assess and collect dues from its members, review architectural changes to the homeowners' lots, enforce restrictive covenants, and negotiate contracts with third party vendors.

## PROCEDURAL HISTORY

The 2009 Lawsuit alleges breach of fiduciary duty against Rosemary Toth (former HOA President) and against the HOA and seeks a declaratory judgment regarding the validity and interpretation of the restrictive covenants and other HOA governing documents. Jarmuth amended his complaint with additional causes of action against Ms. Toth and the HOA and added K.A. Diehl and the HOA's attorney, Ms. Golding, as Defendants. The additional claims include 1) defamation; 2) invasion of privacy; 3) intentional infliction of emotional distress; 4) breach of contract; and 5) failure to produce documents. The Court dismissed the claims against Ms. Golding and Jarmuth appealed. The South Carolina Court of Appeals affirmed Ms. Golding's dismissal and remitter was issued.

While the 2009 Lawsuit was on appeal, Jarmuth filed the 2010 Lawsuit against the HOA in Magistrate's Court alleging that assessments were invalid, the HOA did not have authority to act under the restrictive covenants, and seeking a declaratory judgment with respect to the HOA's rights of architectural review under the restrictive covenants and the Architectural Guidelines. The HOA moved to dismiss the case, or in the alternative, remove the case to the

circuit court. The HOA's motion for removal was granted on December 1, 2010. Thereafter, Jarmuth moved for partial summary judgment as to the HOA's ability to enforce the restrictive covenants and moved to deposit with the Court the money representing his assessments due to the HOA until the resolution of the 2010 Lawsuit. The Court denied Jarmuth's motions on April 18, 2011. Thereafter, the HOA moved to consolidate the 2010 Lawsuit with the 2009 Lawsuit, which was granted by Order filed September 16, 2011.

Per Court Order dated October 11, 2011 the Defendants amended their Answer to assert additional defenses and for the HOA to add a counterclaim seeking the payment of a fine related to Jarmuth's violation of the restrictive covenants and the removal of a brick foundation for his unapproved fence. In Reply, Jarmuth filed a Motion to Dismiss and a Counterclaim for Violation of the South Carolina Frivolous Proceedings Act. Defendants filed a Motion to Strike the Plaintiffs' Counterclaim on December 28, 2011. The Court ordered that Jarmuth's Counterclaim was an amendment to the Plaintiff's claims to which the Defendants' answered.

Jarmuth filed a Motion for Summary Judgment and Preliminary Injunction seeking a declaratory judgment as to ninety two (92) legal issues in the Consolidated Cases. Jarmuth's motions were denied by order dated January 26, 2012 and filed on February 12, 2012.

Defendant K.A. Diehl withdrew its motion to dismiss on October 11, 2011 and filed and served an Answer in the 2009 Lawsuit on October 14, 2011. Although Jarmuth was served with the Answer via U.S. Mail, he filed Motions for Entry of Default and Default Judgment Against K.A. Diehl. At a hearing on May 16, 2012, Jarmuth withdrew his motion for Default Judgment.

The Consolidated Cases were placed on the non-jury roster in December 2011. Jarmuth filed a Petition for Writs of Mandamus and Prohibition with the Supreme Court of South Carolina on December 22, 2011 ("Petition"), requesting that the Supreme Court order a

continuance, enter a scheduling order regarding discovery, and an order compelling Defendants' discovery responses in the 2009 and 2010 Lawsuits. On December 29, 2011, Jarmuth filed a Motion for Continuance of Trial Assignment of Errors on Appeal and for Discovery seeking essentially the same relief as his Petition. Then Jarmuth filed a Motion to Stay with the Supreme Court on January 5, 2012 seeking a stay of the Consolidated Cases. The Supreme Court denied his Petition and the request for the stay of the Consolidated Actions by Order dated January 13, 2012. However, the Motion for Continuance dated December 29, 2011 was granted, and the Court ordered that the Consolidated Cases be placed on the trial roster for the week of April 16, 2012.

Recently Jarmuth submitted an application to the International Club HOA Architectural Review Board ("ARB"). Since Mr. Jarmuth has been in violation of the ARB rules, his application was deferred pending his compliance and payment of fines. Jarmuth filed a motion to amend his Amended Complaint to assert an additional cause of action due to the deferral. The Court ordered that Jarmuth's additional claim was encompassed by his Complaints and Amended Complaints in the Consolidated Cases and denied his motion to amend in an Order filed on May 23, 2012.

The Parties referred the Consolidated Cases to the Honorable Ralph Stroman and agreed that trial shall commence on August 8, 2012 by Consent Order filed on June 15, 2012. No motions are currently pending before the Court.

## CAUSES OF ACTION AND DEFENSES

**2009-CP-26-3596**

Complaint:

1. Breach of Fiduciary Duty against Ms. Toth and the HOA;

2. Declaratory Judgment that:

    - Declaration of Covenants is null, void, and unenforceable;
    - Pebble Creek owners were deprived of their equitable interest in the amenity center;
    - Bulk cable TV contract is null and void;
    - HOA Board failed to collect golf course assessments;
    - HOA Board misspent funds;
    - Glens is a multi-family or townhouse project;
    - Grand Vista is a condo project subject to the Declaration;
    - The directors were not properly elected;
        - Members, including unit owners at the Villas and the Cambridge, were not listed as eligible as voters;
        - Golf Course is delinquent so representatives should not have voted;
        - Golf Course was not listed as eligible voters;
        - Impropriety at election;
        - No quorum for 2007 or 2008 election;
    - The grounds maintenance contract was not awarded properly;
    - The golf course agreement regarding assessments is invalid because no properly elected Board existed before September 2007;
    - Board failed to honor requests for documents and for inspection;
    - K.A. Diehl approved improper charges;
    - All existing contracts are null and void after March 2007 when mandated that Board be elected by homeowners;
    - The developer/declarant could not amend the Declaration or the HOA rules.

First Amendment to Complaint:

Claims against K.A. Diehl, Rosemary Toth, and International Club HOA:

1. Defamation;
2. Invasion of Privacy;
3. Intentional Infliction of Emotional Distress;
4. Breach of Contract alleging the HOA has not dealt in good faith and fairly with Jarmuth;
5. The HOA failed to properly provide information to Jarmuth.

HOA's and Ms. Toth's Amended Answer to the Complaint and First Amendment to Complaint and Counterclaim:

- General Denial;
- Statute of Limitations;
- Waiver, Estoppel, Laches;
- Business Judgment Rule;
- Unclean Hands;
- Consent and/or Novation;

- Immunity with respect to Toth;
- Privileged;
- Communications were made in Good Faith and are privileged;
- Comments about Plaintiff were fair comment and are protected;
- Comments made about Plaintiff are neutral reportage and are protected;
- All facts relating to litigation involving Plaintiff are privileged;
- Plaintiff has failed to add indispensable parties;
- Ambiguous Declaration;
- Payment;
- Counterclaim seeking attorney's fees and costs;
- HOA Counterclaim for Breach of Covenants and Architectural Guidelines.

K.A. Diehl's Answer to the Complaint and First Amendment to the Complaint:

- General Denial
- Statute of Limitations;
- Waiver, Estoppel, Laches;
- Business Judgment Rule;
- Unclean Hands;
- Consent and/or Novation;
- Privileged;
- Communications were made in Good Faith and are privileged;
- Comments about Plaintiff were fair comment and are protected;
- Comments made about Plaintiff are neutral reportage and are protected;
- All facts relating to litigation involving Plaintiff are privileged;
- Plaintiff has failed to add indispensable parties;
- Ambiguous Declaration;
- Payment.

Reply to Amended Answer and Counterclaim:

- General Denial;
- Res Judicata;
- Lack of Standing;
- Collateral Estoppel;
- Waiver, Consent, Laches, Estoppel;
- Defendant HOA's Waiver of Restrictive Covenants;
- Good Faith and Compliance with Restrictive Covenants;
- Novation;
- Unclean Hands;
- Laches;
- Harassment and Violation of South Carolina Rules of Ethical Practice.

2nd Amendment to the Complaint (stylized as Counterclaim to Counterclaim):

1. Violation of South Carolina Frivolous Proceedings Act against HOA and Ms. Toth.

HOA's and Ms. Toth's Answer to 2nd Amendment to the Complaint:

- General Denial;
- Governing Documents are Ambiguous;
- Business Judgment Rule;
- Claim warranted under Facts alleged;
- Plaintiff's breach of governing documents.

**2010-CP-26-11320**

Complaint:

1. Declaratory Judgment Action:

    - International Club Home Owners' Association, Inc. does not have the authority to collect assessments or enter contracts pursuant to the Declaration;
    - The Cable TV Assessments are invalid;
    - The Waste Management Assessments are invalid;
    - All HOA Assessments are invalid;
    - The Amendments to the Declaration removed restrictions on fences and architectural review board rights and control;
    - The HOA lacks standing to enforce the Declaration, because Murrells Inlet Golf Plantation is the valid HOA;
    - The Architectural Review Board did not follow the proper procedures under the Declaration;
    - The Bylaws are invalid;
    - The ARB Rules are invalid;

2. Harassment and Interference with Enjoyment of Property.

Amended Answer and Counterclaim:

- General Denial;
- Dismiss pursuant to Rule 12(b)(8);
- Lack of Standing;
- Res Judicata/Collateral Estoppel;
- Estoppel, Consent, Waiver, and Laches;
- Compliance with Governing Documents;
- Business Judgment Rule;
- Equitable Estoppel;
- Payment;

- Unclean Hands;
- Counterclaim: Breach of Covenants and Architectural Guidelines.

Reply to Amended Answer and Counterclaim:

- General Denial;
- Res Judicata;
- Lack of Standing;
- Collateral Estoppel;
- Waiver, Consent, Laches, Estoppel;
- Defendant HOA's Waiver of Restrictive Covenants;
- Good Faith and Compliance with Restrictive Covenants;
- Novation;
- Unclean Hands;
- Laches;
- Harassment and Violation of South Carolina Rules of Ethical Practice.

1st Amendment to the Complaint (stylized as Counterclaim to Counterclaim):

1. Violation of South Carolina Frivolous Proceedings Act against HOA and Ms. Toth.

HOA's Answer to 1st Amendment to the Complaint:

- General Denial;
- Governing Documents are Ambiguous;
- Business Judgment Rule;
- Claim warranted under Facts alleged;
- Plaintiff's breach of governing documents.

## UNDISPUTED FACTS

### I. BACKGROUND INFORMATION REGARDING JARMUTH

Jarmuth resides in the International Club community (Community), a residential community consisting of single family and multi-family phases. This Community is located off of Highway 707 in Horry County approximately ten (10) miles south of Myrtle Beach. Jarmuth resides in the Pebble Creek phase, a neighborhood consisting of single family homes. The property was conveyed to him by deed dated October 23, 2006 from Cheryl Essex for $358,000.00. Ms. Essex bought the home in September, 2001.

## II. DEVELOPMENT OF THE INTERNATIONAL CLUB COMMUNITY

The Community consists of 671 single family and multi-family units. This Community was developed by several builders in different phases; the phases are the following:

- Pebble Creek: Single Family Homes
- The Glens: Townhouse Homes
- The Highlands: Phase I – Single Family Homes<br>Phase I(a) – Single Family Homes<br>Phase II – Single Family Homes<br>Phase III – Single Family Homes
- The Meadows: Single Family Homes
- The Links: Phase I – Single Family Homes<br>Phase II – Single Family Homes<br>Phase III - Single Family Homes<br>Phase IV – Single Family Homes
- The Villas: Large Multi Family Development (condominiums)
- The Cambridge: Small Multi Family Development (condominiums)

In addition to the residential phases, a golf course called "The International Club" is located in the Community. This golf course is privately owned and open to the public.

The original Developer, also known as Declarant, was Plantation A.D., LLC; however, Plantation A.D., LLC did not develop neighborhoods within the Community. Instead, third parties bought acreage and constructed the phases. The Community's original name was "Murrells Inlet Golf Plantation", the name reflected in the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation filed on February 8, 1999 in Deed Book 2117, Page 1353 ("Restrictive Covenants"). In 2003, D.R. Horton, Inc. ("D.R. Horton") was assigned Declarant and Developer rights under the Third Amendment to the Restrictive Covenants.

The Restrictive Covenants have been amended five (5) times. The amendments include:

- First Amendment, May 9, 2000: This amendment changed the name of the Community to "International Club", added the property that was to be developed as the Villas Horizontal Property Regime (however no property description was attached to the amendment) and waived the Declarant's rights to certain provisions in the Restrictive Covenants. The waiver was with respect to Villas Horizontal Property Regime, but Jarmuth claims the Declarant waived its rights as to all neighborhoods in the International Club Community.
- Second Amendment, April 25, 2003: This amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community. Thus, as of April 25, 2003, the Developer was D.R. Horton.
- Third Amendment, March 26, 2004: This amendment added approximately 100 acres, The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Restrictive Covenants regarding capital contributions from purchasers and added "Designated Builders" as defined by the Restrictive Covenants.
- Fourth Amendment, December 23, 2004: The Villas, a ten acre multi-family development, was added to the Community, resolving the issues with the First Amendment.
- Fifth Amendment, June 20, 2008: The amendment adds 14.10 acres for the development of a multi-family phase. This property was also subjected to the Restrictive Covenant pursuant to Exhibit "A" of the governing documents. The development does not exist.

The developers of each of the phases are the following:

- Pebble Creek: Sunbelt Associates, LLC ("Sunbelt Associates");
- The Meadows, the Links, the Highlands, the Cambridge, and the Glens: D.R. Horton, Inc.;
- The Villas: Seacoast Associates, LLC ("Seacoast Associates").

When D.R. Horton assumed the authority and rights of the Declarant and Developer of International Club from Plantation A.D., LLC in 2003, it entered into a Developer's Agreement on May 16, 2003 and then a Golf Course Agreement on October 3, 2003. The parties to the Developer's Agreement are DR Horton, Plantation A.D., LLC, and Sunbelt Associates. This agreement sets forth that D.R. Horton agrees to "construct an amenities center on Parcel D on a

plat of International Club Golf Course" and that "the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..." Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the agreement for the construction of the amenities center.

The parties to the Golf Course Agreement are D.R. Horton, Plantation Golf A.D., LLC (the owner of the golf course at the time) and the HOA. This agreement sets forth that all assessments due before December 31, 2003 from the golf course owner were forgiven and the HOA assessments due from the golf course owner would be calculated as follows:

1) for the calendar year of 2004, the golf course owner owed assessments twenty (20) times the rate of Unit Owners who pay for recreational amenities;

2) for the calendar year 2005, the golf course owner owed assessments twenty three (23) times the rate of the Unit Owners who pay for recreational amenities; and

3) the amount increased by three units through 2014 (2014 adding 4 units).

Other neighborhoods are adjacent to the Community and utilize its infrastructure; however, those properties were never subjected to the Restrictive Covenants. The neighborhoods are the Fairways and the Enclave (constructed by Signature Homes) and the Grand Vistas (constructed by D.R. Horton). The Fairways and the Enclave appear to be part of the original Planned Unit Development.

## III. JARMUTH'S DISPUTES WITH HOA

Jarmuth argues that the HOA's assessment for utilities is invalid. He also argues that the HOA and the ARB do not have the authority to review applications for improvements on lots nor enforce the architectural review provisions in the Restrictive Covenants. Furthermore, he argues that he has not been provided a voter's list and other HOA documents.

From October 23, 2006 to the present, Jarmuth paid assessments to the HOA as required by the Restrictive Covenants. He also received benefits as a result of the payment of the assessments, such as garbage collection, cable, and the use of an Amenity Center that includes a pool and fitness center. The former owner of Lot 12, Cheryl Essex, also paid all assessments.

On July 24, 2009 Jarmuth applied to the ARB to install a swing set. The application was denied, because he desired to construct the swing set in his side yard. Then Mr. Jarmuth extended his flower bed and installed edging around the garden and installed a brick foundation for a fence along his property line. On September 27, 2010, he was sent a violation notice that his improvements were not approved by the ARB and that he owed the HOA $50.00. Mr. Jarmuth paid the $50.00 charge under protest and applied for an extension to his flower bed, brick edging, and a fence along his property line with a brick foundation. The flower bed and brick edging were approved. The fence and its foundation were denied because only privacy fences are allowed pursuant to the Restrictive Covenants, and the fence was in the front yard and within the setback and the HOA's easements. The ARB requested that Jarmuth remove the brick foundation. To date, Jarmuth has refused to remove the brick foundation because he maintains that it constitutes brick edging that was approved by the HOA, or in the alternative, the HOA has no rights of architectural review pursuant to the First Amendment.

## DISPUTES

The following are disputed by the Plaintiff:

1. His property in the Community is subject to the Restrictive Covenants;
2. The Bylaws were properly signed, indexed, and acknowledged by the Declarant as the organizer of the HOA;
3. The Architectural Guidelines are valid;

4. The HOA properly collected, managed, and spent HOA revenue, including assessments and capital contributions;

5. Horry Telephone Cooperative (HTC), the Community cable provider, did not make capital credit allocations to the HOA from 2003 through the present;

6. All HTC rate increases were in compliance with HTC's agreement and federal, state, and local laws;

7. The HOA owns title to the parking lots for the Amenity Center;

8. The HOA has the authority to restrict parking on the streets in the Community as well as on the Amenity Center property;

9. The Glens development is a single family home neighborhood that is allowed access to the Amenity Center;

10. The property known as Enclave, Fairways, and Grand Vistas are not subject to the Restrictive Covenants;

11. The Restrictive Covenants require builders to pay the Declarant, not the HOA, $1,000.00 for each home constructed in Pebble Creek as a contribution for the construction of the Amenity Center;

12. The First Amendment's waiver of the Declarant's rights of architectural review is with respect to the Villas and not with respect to other neighborhoods within International Club;

13. The HOA denied the foundation of Jarmuth's brick fence;

14. The HOA granted Jarmuth access to requested HOA documents on numerous occasions;

15. The HOA properly denied Jarmuth's request for voting information;

16. The HOA contracts for cable, maintenance, garbage and the related covenants are valid;

17. The HOA is acting properly when it pays assessments to the Highway 17 Connector Association.

## ANALYSIS OF LEGAL ISSUES

## I. JARMUTH'S CLAIMS AND APPLICABLE DEFENSES

### 1. Jarmuth's claims regarding the 2007 and 2008 elections and the 2009 maintenance contract are moot.

By email dated September 20, 2011, Jarmuth stated that his claims relating to the 2007 and 2008 HOA elections and the 2009 maintenance contract are moot. (Defendants' Exhibit 93). Therefore, Defendants respectfully request this Court to dismiss the claims related to the elections and 2009 maintenance contract at the commencement of trial.

### 2. The Restrictive Covenants are valid and are enforceable against Jarmuth.

The Restrictive Covenants for International Club were filed on February 8, 1999 in the Horry County Register of Deeds Office in Deed Book 2117, Page 1353. Pursuant to the Restrictive Covenants section entitled "DECLARATION":

> "the Developer hereby declares that all of the Property described in Exhibit "A" and the Additional Property described in Exhibit "B" or so much of it as Developer may, in Developer's sole discretion, see fit to develop or dedicate, and as, by subsequent amendment hereto, may be subjected to this Declaration, shall be...subject to the following easements, restrictions, covenants, charges, liens, and conditions which are hereby imposed for the purpose of protecting the value and desirability of these lands and which the restrictions, easements, charges, liens, conditions, and covenants shall touch and concern and run with title to the real property subjected to this Declaration and which shall be binding on all parties having any right, title or interest in these lands or any portion of them."

The property description contained in Exhibit "A" included the following (which was also shown on Plat Book 160, Page 79):

a) 76.08 acres identified as "Reserved for Future Development—Parcel 1" ("Parcel 1" or "Pebble Creek");
b) 192.5 acres identified as "Parcel G-1" ("Parcel G-1" or "Golf Course");
c) 9.07 acres identified as "clubhouse" ("Clubhouse"); and

d) 13.08 acres identified as "Reserved for Future Development—Parcel 4" ("Parcel 4" or "Ballycastle").

This property was subjected to the Restrictive Covenants at the time of filing.

Restrictive covenants are contractual in nature and defined as "agreements to do, or refrain from doing, certain things with respect to real property." *Queen's Grant II Horizontal Property Regime v. Greenwood* Development *Corporation*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). Restrictive covenants differ from contracts in that they "run with the land" meaning that they are enforceable by and against later grantees. *Id.* The most common ways restrictive covenants are created are 1) by deed; 2) by declaration; and 3) by implication from a general plan or scheme of development. *Id.* at 362, at 913.

Jarmuth's property in Pebble Creek is subject to the Restrictive Covenants. First, his property, and all property in Pebble Creek, was identified as property subjected to the Restrictive Covenants pursuant to the Declaration's Exhibit "A". This property was further identified by reference to plat recorded in Plat Book 160, Page 79. Secondly, Jarmuth's deed sets forth that his property is subject to the Restrictive Covenants and the amendments to the covenants. By filing the Restrictive Covenants and making reference to them in the deed, they are in Jarmuth's chain of title and "run with the land."

**3. <u>The Bylaws are valid</u>.**

Jarmuth separately argues that the Bylaws are invalid, because the Bylaws were not signed, not indexed to any HOA, not adopted by the HOA Board, not approved by the homeowners, were created a year prior to the establishment of the HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Homeowners Association". His contention that the Bylaws are invalid is without merit.

The homeowners association governing the property subjected to the Restrictive Covenants came into existence at the time that the Restrictive Covenants were filed. The developer at the time, Plantation A.D., LLC, as the declarant of the International Club (at that time Murrells Inlet Golf Plantation) had certain rights under the Restrictive Covenants with respect to the HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

The Recitals state:

> "The Developer has or will cause to be incorporated under South Carolina law "Murrells Inlet Golf Plantation Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

Pursuant to Section 3.1 and the Recitals, the HOA, whether it was incorporated or not, was to be governed by the Bylaws. In fact, it is common practice in South Carolina to attach the Bylaws as an Exhibit to the restrictive covenants and file the restrictive covenants, with the attached Bylaws, in the chain of title of the property before an association is incorporated by the Developer. Mr. Jeffrey King, a real estate attorney, will testify to the fact that it is common practice to attach Bylaws as an exhibit to the restrictive covenants before a homeowners association is incorporated.

The Non-Profit Corporation Act, S.C. Code Section 33-31-206, "Bylaws", is consistent with this position. Pursuant to South Carolina law "[t]he incorporators or board of directors of a

corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). The Developer, as the incorporator of the HOA, had the ability to adopt the Bylaws on behalf of the HOA before the Association was incorporated pursuant to this statutory provision.

The Non-Profit Corporation Act does not include any requirements that the Bylaws be signed or separately adopted by the members or the Board. Jarmuth is likely relying upon *Arcadian* Shores *Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they were not properly signed, acknowledged, and indexed. If the Court construes *Arcadian Shores* to require a signature, acknowledgement, and index, the Bylaws in this case are different, because they are attached as an Exhibit to the Restrictive Covenants, which were properly signed, acknowledged, and indexed by filing them with the Horry County Register of Deeds Office. Because the Bylaws are part of the Restrictive Covenants and were filed as an Exhibit thereto, this Court should hold that the Bylaws are valid.

**4. Jarmuth's claims regarding § 4.10, 4.11, 4.12, and 4.16 of the Restrictive Covenants are not justiciable controversies and lack merit.**

"Before any action can be maintained, a justiciable controversy must be present. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App. 2003).

Plaintiff asserts that the Developer deleted several sections of the Restrictive Covenants under the First Amendment to the documents:

- Section 4.11 Easements for walks, trails and signs
- Section 4.12 Easements for the Association
- Section 4.16 Environmental Easement
- Section 7.28 Mail Receptacles
- Section 7.31 Prohibition of Outdoor Storage

- Section 7.37 Special Restrictions Affecting Golf Residential Areas

Defendants are unaware of any real or substantial controversy regarding these covenants. The HOA is not presently enforcing the covenants against Jarmuth to his detriment. Accordingly, Jarmuth's motion for the Court to determine whether the provisions were deleted from the Restrictive Covenants is improper.

Assuming arguendo that Jarmuth's claims are justiciable controversies, Sections 4.10, 4.11, 4.12, and 4.16 were not deleted. Instead, the Developer waived its rights under those sections with respect to the Villas HPR, the property that became subject to the Restrictive Covenants per the same amendment. Restrictive covenants will be enforced unless they are too indefinite or contravene public policy. *Id. See also, Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct.App. 1985). The paramount rule of construction of restrictive covenants is to ascertain and give effect to the intent of the parties as determined by the whole document. *Palmetto Dunes Resort*, 287 at 6, 336 S.E.2d at 18. The rules that ambiguities should be construed against the party enforcing it and in free use of the property should not be applied to defeat the plain and obvious purpose of the instrument. *Id.*, *see also*, *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

According to Scott Pyle, a member of the original developer Plantation A.D., LLC, the developer waived its rights in a limited manner and did not intend to delete the provisions. Because the Villas HPR has its own HOA and restrictive covenants governing the above issues and activities, the Declarant no longer intended to exercise the controls set forth in the above sections against the Villas. Beckie Abel, the HOA property manager, will testify that these provisions have been continuously enforced since K.A. Diehl has managed the HOA. Because the provisions have been continually enforced against Pebble Creek owners and the waiver was

only with respect to the Villas, the provisions were not waived with respect to Pebble Creek owners, such as Jarmuth.

5. **The Architectural Guidelines are valid.**

Jarmuth argues that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores*, the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

Here, the Architectural Guidelines are distinguishable from the rules and regulations in *Arcadian Shores*. The HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations, to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § 7.2 of the Restrictive Covenants.[1] The Architectural Guidelines do exactly that, set specific standards for approval to create uniformity in the application of the Restrictive Covenants and clearly delineates the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the HOA has the authority to pass the

[1] Section 7.2 of the Restrictive Covenants sets forth: "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder."

Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Restrictive Covenants, they are valid. *See Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons will be upheld where the covenant or appropriate authority has provided guidelines for enforcement and expressed the purpose of the restrictive covenant).

6. **The ARB's denials of Jarmuth's applications for a fence and swing set and the deferral of his application for two pindo palms and extension of brick edging are valid.**

The ARB's denial and deferral of Jarmuth's applications are valid, because the ARB has the authority to disapprove and defer and it exercised its authority reasonably and in good faith.

When reviewing the actions of an architectural review board, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." *Id.* (citing *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an architectural review board's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987)). Likewise, the Restrictive Covenants

provide that the ARB members are not liable as a result of any approval or denial of an application for improvements.[2]

a. The ARB has the authority to regulate improvements within the International Club.

First, the ARB had the authority to deny Jarmuth's applications for fence and a swing set. Restrictive Covenants, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk...shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.....this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Section 7.4 of the Restrictive Covenants specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Jarmuth argues that Sections 7.2 and 7.4 were deleted by the First Amendment to the Restrictive Covenants. Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified during his deposition that the Declarant deleted Section 3.7 under the First Amendment, however, Sections 7.2 and 7.4 were not deleted. He further testified that the Declarant only intended to waive its rights under those provisions with respect to the parcel addressed in the

[2] Section 7.2 of the Restrictive Covenants provides in relevant part: "Further, neither Developer nor any member of the Architectural Review Control Committee shall be liable for damages to anyone submitting plans or specifications for approval under this section, or to any owner of property affected by this Declaration by reason of mistake in judgment, negligence, or non-feasance arising out of or in connection with the approval or disapproval or failure to approve or disapprove any such plans or specifications. Every person who submits plans or specifications to the Architectural Review Board for approval agrees, by submission of such plans and specifications, and every owner of any Unit agrees, that such Owner will not bring any action or suit against Developer, or any member of the Architectural Review Board, to recover for any such damage.

First Amendment, the Villas, and that the document must be read as a whole. Jeffrey King will also testify that in his expert opinion, the 1st Amendment only waived the Declarant's rights with respect to the Villas; the HOA's and ARB's rights were unaffected.

Jarmuth argues secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by approving various other fences. "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

Jarmuth primarily relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). The case is illustrative of the doctrine of waiver. In *Arcadian Shores*, testimony revealed that some homeowners did not submit plans or specifications for certain projects to the Association and that the Association never consistently enforced the requirement that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.*

The facts here are distinguishable from *Arcadian Shores*. Beckie Abel, the HOA property manager, will testify that the ARB has been in place since at least 2005. The ARB has enforced the restrictions in Article VII against all homeowners, requiring applications for all improvements, including fences and swing sets. Jarmuth applied for other improvements and was given approval by the ARB. Not until his applications for improvements for a swing set and fence were denied did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Jarmuth's waiver argument, because the approved fences are privacy fences blocking neighbors' views of the back of the home, which are permitted under the Restrictive Covenants.

The argument that other swing sets have been approved also does not waive the HOA's right to enforce the Restrictive Covenants, because the Architectural Guidelines do not allow swing sets to be built in the side yard, a rule that has been evenly applied by the ARB. All existing swing sets are in the backyards. Even if the Architectural Guidelines are invalid, the Board has the authority under the Restrictive Covenants to reject applications for structures upon any reasonable basis, including aesthetics. The ARB has consistently rejected applications for swing sets in locations other than the backyard.

b. The ARB acted reasonably and in good faith in denying Jarmuth's applications.

The ARB's denial of Jarmuth's applications was reasonable, rendered in good faith and was not arbitrary or capricious.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles is not arbitrary or capricious. *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.* A homeowner within Sea Pines Plantation constructed several improvements without the ARB's

approval. *Id.* When the homeowner sought approval after construction, the ARB denied the homeowners' application based on aesthetic reasons and filed suit for injunctive relief asking the Court to enforce the covenants and require the removal of the unapproved structures. *Id.* The Court held that the Plaintiff violated its restrictive covenants by constructing structures without the ARB's approval, the ARB's disapproval based on aesthetic reasons was valid, and the ARB was entitled to injunctive relief. *Id.*

Jarmuth's proposed fence was denied because it was in the front yard and did not act as a privacy fence, and the swing set was denied because its proposed location was the side yard. The denial of the Jarmuth's applications are reasonable and consistent with the ARB's previous rulings.

c. The deferral of Jarmuth's application was valid.

On February 27, 2012, Jarmuth filed an application with the ARB requesting the approval of two pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred the application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Jarmuth argues that the ARB's knowledge of the fines owed is a violation of his privacy. He also alleges that the deferral of the application is a breach of the Restrictive Covenants and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are allowed under the Restrictive Covenants. He also argues that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction by voting to defer the application and disclosing the fine amount to the other ARB members.

Jarmuth's claim is without merit. The ARB is an arm of the HOA and has access to the total amount of ARB fine violations for members. Further, this information was not disclosed to the ARB through Mr. Roche, but instead, was provided to the ARB by the management

company, which manages the accounts of the HOA. Also, to comply with Jarmuth's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Jarmuth's application.

d. The ARB complied with the Bylaws when fining Jarmuth for his violations.

Jarmuth argues that the HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Restrictive Covenants, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and given a period of 10 days to remedy the violation without further sanction. If the violation is not abated within 2 months, the HOA must provide the Owner with a hearing.

However, Section 13.3 specifically applies to the Board of Directors, not the ARB. The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Restrictive Covenants. The $50 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines. Furthermore, Jarmuth specifically disputed the necessity of an Appeal and refused to acknowledge the ARB's authority to approve improvements in correspondence and his application to the HOA (Defendants' Exhibits 83 and 87). Therefore, Jarmuth waived his rights under Section 13.3 of the Bylaws.

7. **The Glens owners are allowed access to the Amenity Center.**

Jarmuth argues that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the HOA amenities. Section 6.5 of the Restrictive Covenants states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision **which will contain separate recreational amenities.**

In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association." (emphases added).

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that are "multi-family" from using amenities is contingent upon the developer having provided separate amenities for that neighborhood under Section 6.5 of the Restrictive Covenants. The Glens do not have separate amenities, and therefore, the Glens homeowners are entitled to access to the Amenity Center.

In the alternative, the Glens are single family homes within the meaning of the Restrictive Covenants and are allowed access to the Amenity Center. First, the Developers of the International Club state clearly in the Developer's Agreement that "multi-family homes" only include horizontal property regimes:

> The amenities center shall be for the sole and exclusive use of the owners of Single Family Residences within the Planned Unit Development known as the International Club or any other Planned Unit Development created by DRH located within the property described in Exhibit "A". For purposes of this Agreement, "Single Family Residences" shall be defined as any residence which is not a part of a Horizontal Property Regime as defined in §27-31-10, et seq. of the S.C. Code of Laws, 1976 as amended.

The Glens is not a horizontal property regime and is not a multi-family parcel as referenced in Section 6.5 of the Restrictive Covenants.

Secondly, the Developer marketed the Community amenities to prospective purchasers of the Glens. The marketing of the amenities to the prospective purchasers is evidence as to the intent of the Developer.

Lastly, the intent of the Declarant to include the Glens as single family homes is reflected in the 4th and 5th Amendments, which clearly delineate the Villas HPR and a future development

planned for a parcel subject to the Restrictive Covenants as "multi-family" but do not identify the Glens as a multi-family parcel. Nor is a similar designation made in the 3rd Amendment, the amendment that subjected the Glens to the Restrictive Covenants.

8. **The Grand Vistas Horizontal Property Regime is not subject to the Restrictive Covenants.**

Assuming arguendo that Jarmuth does not need to join the Grand Vistas owners or association to this lawsuit seeking declarations of the Grand Vistas owners' rights and obligations under the Restrictive Covenants, the Grand Vistas is not subject to the Restrictive Covenants. The property description for the additional property that the Declarant may annex is as shown on Exhibit "B" to the Restrictive Covenants; it includes the Grand Vistas multi-family parcel. However, the property was not annexed by any amendment to the Restrictive Covenants. Therefore, the Grand Vistas owners have no obligations under the Restrictive Covenants to pay assessments for the maintenance of the entranceway or International Club Boulevard. Jarmuth argues that the Grand Vistas property is in the Planned Unit Development ("PUD") approved by Horry County, and as a result, the property is subject to the Restrictive Covenants. However, the Grand Vistas is not part of the PUD. Assuming arguendo that the Grand Vista is part of the PUD, the PUD is a creature of zoning and does not subject the Grand Vistas property owners to the Restrictive Covenants.

9. **The HOA has the right to restrict parking on the Amenity Center parking lots and the streets within the Community.**

Pursuant to the Restrictive Covenants, the HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. Street Parking.

Section 7.25 of the Restrictive Covenants provides:

> Parking, Certain Vehicles Prohibited from Units. Two off-street parking spaces shall be provided by the Owner for the parking of automobiles or other vehicles owned by such Owner, such Owner's guests, invitees or tenants, and such Owner agrees not to park any automobile or other vehicles (including golf carts) or those of such Owner's guests on the streets or Common Areas in the Subdivision (except in designated guest parking areas). Parking shall only be allowed on designated paved parking areas, which shall not be changed in size or location without prior written approval of the Developer. No travel trailers or mobile homes, campers, or other habitable motor vehicles of any kind, whether self propelled or not, school buses, motorcycles, trucks or commercial vehicles, or boat trailers or boats shall be used, kept, stored or parked overnight, either on any Common Area (except from any common storage area so designated by the Developer), specifically including streets and guest parking areas, or any other Unit. The Association shall have the right to have towed or otherwise removed any vehicle in violation of Section 7.25, and shall charge the cost thereof to the Owner of the Unit involved, and shall have a lien for such cost against such Unit, enforceable in the same manner as an Assessment as provided herein.

The Restrictive Covenants subject the streets in the International Club to the covenants, by including their property descriptions in Exhibit "A" and in Amendments to the Restrictive Covenants. Subsequent to the filing of the Restrictive Covenants, the developers dedicated the streets to Horry County. Jarmuth argues that the dedication precludes the HOA from enforcing Section 7.25.

"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville*, 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.*

"The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations, appropriate and specific language must be used." *Id.*, *See also*, *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.*

D.R. Horton dedicated International Boulevard and Pickering Drive to public use on November 11, 2005 by granting a "Right of Way Easement" to Horry County. The dedication was for a "Right of Way" and therefore, the public, including homeowners in the Community, cannot use the road for any other purpose, including parking, pursuant to *Sloan*. Further, the dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the plats referenced by the dedication documents, shows the portions of International Club Drive that were dedicated for public use. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Restrictive Covenants.

With respect to other roads dedicated in the Community, they were also dedicated subject to the Restrictive Covenants, as the covenants were in the chain of title the roads. Horry County accepted the dedicated property conditioned upon the Association's right to enforce restrictions of record, including the Restrictive Covenants.

Additionally, the Horry County Zoning Department has confirmed that Restrictive Covenants binding dedicated roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants. (Defendants' Exhibit 92).

b. Amenity Center Parking.

The amenity center property is subject to the Restrictive Covenants pursuant to its property description being included in Exhibit "A" attached to the Restrictive Covenants. The property was conveyed to the HOA, and therefore, is Common Area. As a result, the parking restrictions contained in Section 7.25 apply to the amenity center parking. Pursuant to Section 7.25, parking is only allowed in designated guest parking spots. Furthermore, certain vehicles may not be parked on property subject to the Restrictive Covenants, including mobile homes, trailers, etc. The Association has the right to tow any vehicle in violation of Section 7.25.

c. Section 7.25 was not Waived or Deleted.

Jarmuth argues that section 7.25 was deleted by the First Amendment due to the language that the Developer waived its rights under other provisions contained in Article VII, which lacks merit as discussed above. Waiver was with respect to the Villas HPR property only and did not waive the Declarant's rights with respect to the rest of the development.

**10. Jarmuth's request for members' information along with a voter's list was properly denied.**

The Non-Profit Corporation Act (Act), Section 33-31-1602 sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's

demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose."[3] *See* S.C. Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

The Act places other restrictions on the request for a membership list. S.C. Code Ann. Section 33-31-1605 (1976) of the Act sets forth that "a membership list or any part of a membership list may not be obtained or used by a person for any purpose unrelated to a member's interest as a member" unless the board consents. This includes solicitation for the following purposes: 1) solicitation of money or property, unless either is solicited to be used to solicit votes of members in an election; 2) solicitation for commercial purpose; and 3) solicitation to sell the list to any person. *Id.*

Jarmuth failed to state a good faith basis for his request for the membership list as required by the Act. He requested the membership list to "communicate with fellow homeowners" after he filed his complaint in the 2009 Lawsuit. The request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was denied. Jarmuth may have been contacting the members to solicit funds or for a commercial purpose, which is improper under the Act. If the HOA had provided Jarmuth with the list and he used the list improperly, the HOA may have exposed itself to liability or breached a duty to the homeowners.

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[3] Section 3.8 of the Restrictive Covenants provides that the HOA "shall maintain current copies of this Declaration, all amendments thereto, the By-Laws of the Association and other rules concerning the Subdivision as well as its own books, records, and financial statements available for inspection by Owners." They provide that "[a]ll such documents shall be available upon reasonable notice and during normal business hours."

11. **The HOA's cable TV and garbage contracts and the related Restrictive Covenants are valid.**

The HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the HOA "shall pay to [HTC] for the Service fee set forth in Exhibit 'B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the International Club homeowners. The HOA pays for the cable services with the funds from the assessments collected from the homeowners. In exchange for the bulk billing arrangement, homeowners receive cable services at a significantly discounted rate. The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the HOA or upgrading HTC services.

The HOA also entered a contract with Waste Management Industries for the collection of homeowners' garbage on May 31, 2001. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community, consisting of 671 units. The cost is approximately $138.41 per unit per year.

a. The Restrictive Covenants "Touch and Concern" the Land.

Jarmuth argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. 21 C.J.S. Covenants § 42. "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore 'run with the land'." *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006). Assessing all

owners for cable and garbage collection services lowers the cost of the services for all the units within the Community, which arguably, makes the owners' properties more marketable and as a result has a beneficial effect on the value of the property. Because the assessments have a beneficial effect on the owners' properties, the assessments touch and concern the land and are enforceable.

b. The Restrictive Covenants are Enforceable.

Jarmuth argues that the assessments regarding utilities are based upon unreasonable covenants and therefore are unenforceable, relying upon case law from other jurisdictions that an HOA's actions must be reasonable to be valid. The HOA has the authority to manage the property, including contract with third parties for services such as landscaping, garbage collection, and cable. In fact, these covenants are common in governing documents.

c. The HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Jarmuth argues that the HTC Contract is void, therefore, the cable assessment violates public policy. He relies on the following authority:

- *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007);
- *National Cable & Telecommunications Ass'n v. Federal Communications Commission and United States of America*, 567 F.3d 659 (D.C. Cir. 2009); and
- Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).

The HOA agrees that contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations. However, the HTC Contract does not contain an exclusivity

clause; the contract constitutes a system of bulk billing several owners within an MDU.[4] The International Club homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the HOA and by paying the assessments to the HOA. The FCC specifically addressed this issue *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):

> The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

Pursuant to the FCC's 2010 Order, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, Jarmuth's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is also without merit.

[4] Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

**12. Capital contributions and initial assessments from Owners were properly collected and managed.**

Jarmuth argues that the capital contributions and initial assessments owed by International Club homeowners to the HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Restrictive Covenants provide the following:

> Section 3.5 Capital Contribution. The Association shall collect a capital contribution equal to 1/6th of the aggregate annual assessment for each Unit as set forth in Article VI. Each Unit's share of said capital contribution shall be collected and transferred to the Association at the time of the closing of the initial sale of each Unit by the Developer. All sums paid as a capital contribution are in addition to and not in lieu of regular assessments for common expenses.
>
> Section 6.7 Initial Assessment. At the time of the first sale of each Unit from the Developer to an Owner, there shall be assessed by the Association and collected from each Owner/purchaser an Initial Assessment equal to two months' Assessments for such Unit, as a Capital Contribution for the use and benefit of the Association. Such capital contribution shall not be considered as advance payment of regular Assessments.

The Third Amendment to the Restrictive Covenants adds the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deletes Section 3.5 of the Restrictive Covenants in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment annexed the Villas HPR and added the following language: "Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. Separate Accounting for Capital Contributions.

Jarmuth argues that funds paid as capital contributions to the HOA must be segregated from the operating funds. Nothing contained in the Restrictive Covenants, Bylaws, or rules and regulations for the HOA require the HOA to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were collected, they were separately accounted for in the HOA's general ledgers. Therefore, Jarmuth's argument regarding the separation of capital contributions is without merit.

b. Equitable Ownership of Capital Contributions.

Jarmuth asserts that the unit owners equitably own the funds they pay to the HOA under sections 3.5 and 6.7 of the Restrictive Covenants. The Restrictive Covenants do not create equitable ownership in the capital contributions. Once the payment is made to the HOA, the HOA owns the funds.

c. Developer's and HOA's Use of Capital Contributions to construct Infrastructure or Amenities.

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Restrictive Covenants:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision...and for the improvement, protection,

> replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the HOA to improve Common Areas and Recreational Amenities. If any Developers controlled the HOA Board and decided, on behalf of the HOA, to construct improvements with the Assessments, that action is valid under the Restrictive Covenants. However, no evidence exists that the Developer constructed improvements with HOA funds.

d. Assessments from Single Family Owners and Multi-Family Owners.

Jarmuth argues that the capital contributions from single family owners (who can use the amenities center) and multi-family owners (who cannot use the amenities center) must be separated. The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. Nothing in the HOA governing documents prohibits it from pooling the funds together, even if the use of the assessment is specified in the Fourth Amendment.

e. Validity of Capital Contributions.

Jarmuth contends that Third and Fourth Amendments requiring capital contributions from multi-family and single family owners are invalid. He asserts that the funds can only be used for the maintenance of the entranceway. Further, he states that the roads were dedicated to Horry County, and as a result, the entrance area cannot be maintained by the HOA and the capital contributions are useless. Jarmuth's argument is without merit, because the entrance area is approximately 5.42 acres and owned by the HOA, and as the owner, may maintain the property.

Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures.

f. Validity of the Third Amendment.

Jarmuth contends that the Third Amendment is invalid, because it was not approved by the homeowners. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;

2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;

3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and otherwise may be provided by law; and

5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

*Queen's Grant II Horizontal Property Regime*, 368 S.C. at 350, 628 S.E.2d at 907.

Pursuant to Restrictive Covenants Section 8.5, the Declarant has the right to amend the Restrictive Covenants without consent of any owner or mortgagee, provided that such amendment does not materially alter or change the owners' use and enjoyment of their property and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 364-65, 628 S.E.2d at 915-15 ("Sufficient

Property Interests" include ownership of right of ways, easements, and land held in trust for the association).

D.R. Horton complied with the Restrictive Covenants, in that the Capital Contribution amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same. 1/6 of the annual assessment is equal to 2 months of assessments. The capital contribution requirement only applies to new Owners. The existing Owners at the time of the Amendment did not have to make any additional contributions.

D.R. Horton provided notice of the amended covenants by filing the Third Amendment in the chain of title of the owners' properties. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at 367-68, at 916-17.

Jarmuth argues that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. However, upon advice of counsel, the HOA has never collected a capital contribution in this circumstance. The HOA collects 2 months assessments from the new Owner but applies the payment towards future assessments owed. The capital contributions were collected upon sale of unit from the Developer to the Owner as reflected by the HOA's documents, which is consistent with the original Section 3.5.

g. Validity of the Fourth Amendment.

Jarmuth argues that the Fourth Amendment is invalid, because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment. The Restrictive Covenants sets forth different monetary payments for the single family owners and multi-family owners, because single family

owners have access to the amenities center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Restrictive Covenants, the contribution of $150.00 is reasonable and not in violation of public policy. Furthermore, the developers of the multifamily parcels damaged the roads as a result of the construction. According to K.A. Diehl, the purpose of the Fourth Amendment was to ensure that the roads were repaired. Unlike D.R. Horton, the developers of the multifamily parcels were not obligated to fund the HOA, and a shortfall could have occurred without the maintenance assessment.

13. **The Third Amendment's Reference to Developer Contributions is Related to the Developer Agreement.**

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Restrictive Covenants. The following sentence was also added to Section 7.2:

> Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and 00/100 ($,1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

Jarmuth seeks an order as to whether builders that construct homes within the International Club are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a capital contribution for the construction of amenities and infrastructure within the International Club. This is clear based upon the requirement that the designated builders enter a separate agreement with the Developer. The Developer Agreement is consistent with this interpretation

of the Third Amendment, which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

**14. The HOA's assessments were properly levied.**

Jarmuth argues that Section 6.5 stating that "both annual and special assessments must be fixed at a uniform rate for all units" invalidates the amenity center assessment levied against single family owners but not multi-family owners. The HOA uniformly assessed the owners, because the multi-family owners do not utilize the Amenity Center. The single family owners receive the additional benefit of the Amenity Center, while the multi-family owners, who do not pay for the center, cannot use the center. This arrangement is equitable and consistent with the Restrictive Covenants.

**15. The Golf Course Agreement is Valid.**

Jarmuth challenges the validity of the Golf Course Agreement because it reduced the amount of assessments owed under the Restrictive Covenants.

Jarmuth argues that pursuant to the Act, S.C. Code Ann. Section 33-31-1021 (1976), the reduction in assessments had to be approved by the members of the HOA. Jarmuth is incorrect; the Developer had the authority to unilaterally amend the Restrictive Covenants pursuant to Section 8.5 of the Restrictive Covenants. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 350, 628 S.E.2d at 907. The Golf Course Agreement amends the parties' agreement regarding the payment of assessments.

Plaintiff also argues that the Golf Course Agreement was not supported by consideration. In exchange for the forgiveness of assessments, the HOA received parking for its Amenity Center as well as the right to use the water for irrigation purposes. Jarmuth argues that the HOA had the authority to access the irrigation system of the golf course without permission under

Section 4.17 of the Restrictive Covenants. Illogically, he also argues that Section 4.17 of the Restrictive Covenants was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, will testify that the HOA ties into the golf course's irrigation system through the pump house and that the HOA could not simply pump water out of the pond to irrigate the whole neighborhood. The HOA President, William Freiboth, will testify that the pump house is not located on Common Area. For this reason, the HOA does not have the right or ability to access the irrigation system of the golf course without the owner's permission. Mr. Sullivan will testify regarding the significant costs associated with the HOA installing its own irrigation system.

Furthermore, Jarmuth's claim related to the amendment to the assessments owed by the Golf Course is barred by the doctrine of laches. "Laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App.1999)); *see also Eldridge v. Eldridge*, 2012 WL 1609134, at * 4 (SC 2012). "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)). The Golf Course Agreement was entered in 2004 and has been

enforced since that date. Jarmuth has been an owner since October 2006 and did not file a lawsuit challenging the agreement until May 2009. Based on the delay and the prejudice to the HOA in challenging the agreement, Jarmuth's claim is barred by the doctrine of laches.

16. **The HOA's maintenance contracts are proper.**

Jarmuth's claim that the HOA misspent funds stems from his argument that the HOA maintains property that it does not own. However, pursuant to Sections 3.1(a) of the Restrictive Covenants, the HOA may maintain "all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole." Therefore, the HOA has the authority to maintain property that it does not own to ensure that the neighborhood as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

17. **The Fairways and Enclave are not subject to the Restrictive Covenants.**

The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community. These projects also utilize the same entranceway as the other neighborhoods within the International Club and the County dedicated roads. However, the properties that constitute the Fairways HPR and Enclave are not subject to the Restrictive Covenants.

18. **The Highway 17 Connector Association Covenants are valid and the HOA is obligated to collect the assessments.**

Jarmuth challenges the validity of the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads.

The purpose of the Connector Road Declaration, as stated in its whereas clauses, is to provide landscaping along the connector road and to maintain drainage and provide signage. The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Declaration and it purportedly includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). See Article II, Section 1 of the Connector Road Declaration and Exhibit "A". The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. The International Club property is subject to the Connector Road Declaration, and therefore, the covenants are valid.

Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth: "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder." Pursuant to this provision, the HOA has the obligation to collect assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

**19. <u>The sale of the easement to Central Electric Power Cooperative was properly effectuated.</u>**

Jarmuth challenges an easement granted to Central Electric Power Cooperative ("Central Electric").

The HOA Board of Directors have the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Restrictive Covenants and Article 4, Section II of the Bylaws:

> Article 4. Section 11. <u>Powers</u>. The Board of Directors shall manage and direct the affairs of the Association and may exercise all of the powers of the Association subject only to approval by the Owners when specifically required by the Declaration or these By-Laws...Without limiting the generality of the foregoing, the Board of Directors shall have full power:

(e) To acquire, operate, lease, manage and otherwise trade and deal with property, real and personal, including Units in the Subdivision, as may be necessary or convenient in the operation and management of the Association.

Section 4.3. Extent of Owners' Easements The rights and easements created hereby shall be subject to the following:

(a) The right of the Developer, and of the Association, to dedicate, transfer or convey all or any part of the Common Areas, with or without consideration, to any successor association, governmental body, district agency or authority, or to any utility company, cable television company or security company, provided that no such dedication, transfer or conveyance shall adversely affect the use of the Common Areas by the Owners...

(b) The right of the Developer, and the Association, to grant, reserve, and accept easements and right-of-ways through, under, over, and across the Common Areas, for the installation, maintenance, and inspection of lines and appurtenances for public or private water, sewer, drainage, fuel oil, and other utilities and services, including a cable (CATV) or community antenna system or security system and irrigation or lawn sprinkler systems, and the right of the Developer to grant and reserve easements and rights-of-ways through, over, and upon and across Common Areas for the completion of the Subdivision, and for the operation and maintenance of the Common Areas;

Section 4.10. Easement for Utilities There is hereby reserved for the benefit of Developer, the Association and their respective successors and assigns the alienable, transferable and perpetual right and easement, as well as the power to grant and accept easements to and from any private or public authority, agency, public service district, public or private utility or other person upon, over, and under and across: (i) all of the Common Areas . . . for the purpose of installing, replacing, repairing, maintaining and using master television antennae and/or cable systems, security and similar systems, and all utilities, including but not limited to storm sewers and drainage systems and electrical, gas, telephone, water and sewer lines. Such easements may be granted or accepted by Developer, its successors and assigns, or by the Board of Directors . . . . By virtue of any such easement and facilities, it shall be expressly permissible for the providing utility company or other supplier or servicer, with respect to the portions of the Subdivision so encumbered: (i) to erect and maintain pipes, lines, manholes, pumps and other necessary equipment and facilities; (ii) to cut and remove any trees, bushes or shrubbery; (iii) to grade, excavate or fill; or (iv) to take any similar action reasonably necessary to provide economical and safe installation, maintenance, repair, replacement and use of such utilities and systems.[5]

[5] Jarmuth's argument that Section 4.10 was waived by the Association pursuant to the First Amendment is invalid for the reasons set forth above.

The Board sent out several notices to the homeowners regarding the proposed easement to Central Electric. Thereafter, an informational meeting was held discussing the distribution of the sale proceeds (less expenses associated with the easement conveyance) to the homeowners and Central Electric's agreement to add several landscaping features to the Common Areas. A special members meeting was held. The Special Meeting minutes reflect that a motion to convey the easement was passed unanimously.

Jarmuth's argument that the HOA improperly transferred the easement to Central Electric is probably based upon Section 11.1 of the Bylaws:

> Article 11. CONDEMNATION 11.1.1 Whenever all or any part of the Common Areas or Recreational Amenities of the Subdivision shall be taken by condemnation or eminent domain, or is conveyed in lieu thereof by the Board acting on the agreement of at least seventy-five (75%) percent of the total vote of the Association and of the Developer (for so long as Developer owns any Unit primarily for the purpose of sale or has the unexpired option to add the Additional Property or any portion thereof to the Subdivision), then the award or the proceeds collected for such taking or sale in lieu thereof shall be payable to the Association and shall be disbursed or held:
>
> 11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then, unless within sixty (60) days after such taking Developer,....together with at least seventy-five (75%) of the total membership of the Association, shall otherwise agree, the Associations hall restore or replace such improvements...
>
> 11.1.2 If the taking or sale in lieu thereof does not involve any improvements to the Common Areas, or if there are funds remaining after any such restoration or replacement of such improvements is completed, then the award, proceeds or net funds shall be retained by and for the benefit of the Association.

The HOA has the right to grant easements to public utilities pursuant to Sections 4.3 and 4.10 of the Restrictive Covenants. Under Article 4 of the Bylaws, the Board exercises all rights of the Association, unless a provision specifically requires a vote of the membership. The vote requirement in Article 11 of the Bylaws does not apply, because the Association did not convey Common Area; it granted an easement over Common Area. Furthermore, condemnation was

never threatened by CEP; the Board was offered a package of significant value in exchange for the easement, including $75,000.00 and landscaping valued at over $20,000.00, and it entered the transaction based on that consideration. Nevertheless, based on the minutes of the special meeting, the vote complied with Article 11 of the Bylaws.

Additionally, Jarmuth first raised objections to the easement conveyance in January 2012, more than two (2) years after the easement was granted despite being provided ample notice of the easement. Therefore, his claims are barred by the doctrines of waiver and laches.

**20. Mr. Roche and Ms. Toth are immune from liability.**

The Act, S.C. Code § 33-31-834 shields the individual Defendants from liability. Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

> All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence.

Because the board members' conduct was not wanton, grossly negligent, or willful, they are immune from liability. Similarly, Mr. Roche is exempt from liability pursuant to Section 7.2 of the Restrictive Covenants.

**21. The Plaintiff's breach of fiduciary duty claim against Ms. Toth is without merit.**

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Restatement (2d) of Torts* § 874 (1979). A fiduciary duty exists when "one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of one reposing confidence." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 828 (Ct.App. 1993). A Plaintiff is entitled to damages for harm caused

by the breach of a fiduciary duty owed to him or her. Restatement 2(d) of Torts § 874 comment b (1979). The Act sets forth the fiduciary duties of board members of South Carolina non-profit corporations:

> A director shall discharge his duties as director, including his duties as a member of a committee: (1) in good faith; (2) with the care of an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the association. S.C. Code § 33-31-830.

No evidence exists that the Ms. Toth breached a duty to the HOA or its members. Jarmuth alleges that Ms. Toth failed to produce documents, that she entered maintenance contracts on behalf of International Club HOA that were in violation of the Restrictive Covenants, she voted in favor of the CEP Easement, she directed K.A. Diehl to mail a list of lawsuits Jarmuth has been a party to, and she failed to disclose the Golf Course Agreement. However, as discussed above, Ms. Toth's actions were consistent with the Restrictive Covenants. She and the other board members also carried out the contracts put in place by the developer D.R. Horton and was reasonable to rely on those contracts. Furthermore, Ms. Toth did not act individually; instead, all actions were authorized by the Board. With respect to the mailing about Jarmuth, Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its intra vires action tested by the business judgment rule. *Dockside Ass'n v. Deyton*, 291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987). Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment

rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." *Id.*

As long as Ms. Toth acted within her authority under the Restrictive Covenants and no evidence of bad faith exists, her actions are protected by the business judgment rule. Jarmuth will fail to present evidence of fraud, that Ms. Toth breached the Restrictive Covenants, or that she acted in bad faith.

**22. The Plaintiff's defamation claim is without merit.**

a. The Defense of Absolute Privilege Bars Plaintiff's Claims.

Defamatory statements made during the course of a judicial proceeding are absolutely privileged. *See Redfearn v. Pusser,* 276 S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity. *Texas Co. v. C. W. Brewer & Co.,* 180 S. C. 325, 185 S. E. 623 (1936). Moreover, the privilege extends to communication that are preliminary to the judicial proceedings. *Crowell v. Herring,* 301 S. C. 424, 392 S. E. 2d 464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings. *Id.* It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. 325, 185 S.E. 623.

Jarmuth argues that a listing of lawsuits that he was a party to is inaccurate and defamatory. The list was prepared by Ms. Golding after the 2009 Lawsuit was filed and provided to the HOA Board of Directors. The list was later disseminated to the homeowners

within the community to provide information regarding the lawsuit. This communication is an utterance arising out of a judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

b. The Elements of Defamation are not Met.

The Plaintiff cannot present evidence that meets his burden of proof with respect to the elements of defamation. The elements of defamation include:

1. A false and defamatory statement concerning another;
2. An unprivileged publication to a 3rd party;
3. Fault on the part of the publisher;
4. Either actionability on the statement irrespective of special harm or the existence of special harm caused by publication.

*Parker v. Evening Post Publishing Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct.App. 1994).

i. The Defendants did not make any defamatory statements regarding the Plaintiff.

A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Holtzsheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998).

The defamatory meaning of a message or statement must be obvious on the face of the statement, in which case the statement is defamatory per se. *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 506 S.E.2d 497 (1998). An example of defamation per se is "plaintiff is a thief." *Id.* If the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, then the statement is defamatory per quod. *Id.* In cases involving defamatory per quod, the Plaintiff must introduce facts intrinsic to the statement itself in order to prove a defamatory meaning. *Id.*

The statements alleged in the Amended Complaint were not defamatory. The letter simply informed homeowners of the pending lawsuit, and provided a list of Jarmuth's other lawsuits. A list of lawsuits is not defamatory on its face.

ii. The Defendants' statements were true.

A defamatory statement is presumed false at common law. *Parker v. Evening Post Publishing Co.*, 317 S.C. 236, 452 S.E.2d 640, 644 (Ct.App. 1994). Truth is an affirmative defense, and the burden of proof is upon the Defendants. *Beckham v. Sun News*, 289 S.C. 28, 344 S.E.2d 603, 604 (1986). However, statements are not defamatory if proven that they are substantially true. *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976).

The statements were substantially true. It is a fact that Jarmuth was a party to many lawsuits. For this reason, this Court should hold that the statements were substantially true and not actionable under South Carolina law.

iii. The Defendants' statements are privileged.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "The privilege does not protect any unnecessary defamation." *Fulton v. Atlantic Coast Line R.R.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951); *see Constant*, 316 S.C. at 89, 447 S.E.2d at 196 (stating the privilege does not apply if one "wander[s] beyond the scope of the occasion"). "In order for a communication to be

privileged, the person making it must be careful to go no further than his interests or his duties require." *Fulton*, 220 S.C. at 297, 67 S.E.2d at 429. If the speaker exceeds his privilege and the communication goes beyond what the occasion demands and is unnecessarily defamatory, he will not be protected by the privilege. *Id.*

The Board notified the HOA members regarding Jarmuth's lawsuit and his history of filing litigation pro se. The Board had a duty to inform the HOA that Jarmuth has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not exceed the scope of the privilege nor provide an opinion as to the motives of Jarmuth's litigation.

**23. The Plaintiff's invasion of privacy claim is without merit.**

Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Meetze v. The Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the HOA members was regarding public matters, lawsuits Jarmuth filed. There was no exploitation of Jarmuth's personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

**24. Plaintiff's intentional infliction of emotional distress claim is without merit.**

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so

severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 160 (Ct.App. 2000).

Jarmuth's outrage claim is based upon the letter that was sent by the HOA to its members. Courts rarely grant relief under outrage claims. A Court is unlikely to hold that the HOA's conduct exceeds all possible bounds of decency or is intolerable in civilized society. The HOA communicated that Jarmuth is a litigious individual, which is true, and a fact that its members had a right to know based upon the multiple claims pending against the HOA. Furthermore, Jarmuth cannot present evidence of any emotional distress.

## II. HOA'S CLAIMS AGAINST JARMUTH

As a result of Jarmuth's refusal to remove the brick foundation to his fence and his continuing violation of the Restrictive Covenants, the HOA filed a counterclaim against Jarmuth for collection of a fine and injunctive relief seeking the removal of the brick foundation. The HOA has the right to file an action at law or in equity to remedy any violation of the Restrictive Covenants pursuant to Section 8.9 of the covenants and pursuant to Section 13.2 of the Bylaws. Additionally, the ARB has the authority to deny Jarmuth's application and the denial was in good faith and not arbitrary or capricious. Therefore, Jarmuth is liable for his continuing violation of the Restrictive Covenants, and the HOA is entitled to injunctive relief ordering him to remove the brick foundation as well as monetary damages. *See Sea Pines Plantation Co.*, 294

S.C. at 271, 363 S.E.2d at 894. The HOA also seeks attorneys' fees in connection with their pursuit of the counterclaims pursuant to 8.9 of the Restrictive Covenants.[6]

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Myrtle Beach, South Carolina
August 8, 2012

[6] Section 8.9 provides: "Should any person employ counsel to enforce any of the foregoing covenants, conditions, reservations or restrictions, because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee of counsel shall be paid by the Owner of such Unit or Units in breach thereof."

## LIST OF EXHIBITS AND WITNESSES

### I. Defendants' List of Exhibits

Exhibit 1: Letter from Kaminski Owners/Kaminski 17 Limited Partnership to Suntech AD, LLC, Plantation AD, LLC, and Shore Road Partners regarding "Letter of Intent for proposed Highway 17 Connector" dated July 31, 1998 with Exhibit A

Exhibit 2: Declaration of Special Covenants for the Highway 17 Connector Road Maintenance District Association, Inc. filed (in Horry County on December 29, 1998, Deed Book 2105, Page 607; Georgetown County on December 30, 1998, Deed Book 935, Page 35)

Exhibit 3: Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (International Club), and Exhibits "A" through "C" filed on February 8, 1999 in Deed Book 2117, Page 1353

Exhibit 4: Amendment to Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (Now International Club) and Submission of Additional Property Thereto filed on May 9, 2000 in Deed Book 2258, Page 1453

Exhibit 5: Waste Industries, Inc. Service Agreement with International Club HOA dated May 24, 2001

Exhibit 6: Quitclaim Deed from Plantation Golf A.D., LLC to the HOA filed August 22, 2002 in Deed Book 2511, Page 0967 (Parcel "D" containing 1.56 Acres—Amenity Center and parking lot)

Exhibit 7: Amendment to the Declaration of Covenants and Restrictions for International Club and Assignment of Developer/Declarant Rights filed on April 29, 2003 in Deed Book 2588, Page 1441

Exhibit 8: Developers Agreement dated May 16, 2003

Exhibit 9: Minutes of the HOA Board of Directors Meeting September 3, 2003

Exhibit 10: Telecommunications Service and Access Agreement dated October 30, 2003

Exhibit 11: Golf Course Agreement dated November 20, 2003

Exhibit 12: Minutes of the HOA Board of Directors Meeting January 13, 2004

Exhibit 13: Third Amendment to Declaration of Covenants and Restrictions for International Club filed on March 29, 2004 in Deed Book 2714, Page 0551

Exhibit 14: Marketing Materials for the Glens

Exhibit 15: DR Horton International Club Map

Exhibit 16: Deed from Plantation Golf A.D., LLC to the HOA filed August 4, 2004 in Deed Book 2771, Page 1480 (.258 acres, Amenity Center parking lot)

Exhibit 17: Fourth Amendment to Declaration of Covenants and Restrictions for International Club filed on December 23, 2004 in Deed Book 2840, Page 0740

Exhibit 18: Minutes of the Regular Meeting of the HOA Board of Directors January 18, 2005

Exhibit 19: Right of Way Easement dedication from D.R. Horton, Inc. to Horry County for International Club Boulevard dated February 21, 2005

Exhibit 20: Right of Way Easement dedication from D.R. Horton, Inc. to Horry County for International Club Boulevard and Pickering Drive dated February 21, 2005

Exhibit 21: Resolution of Horry County Council to Accept Dedication of Road and Drainage at International Club and Pickering Drive into County Road System dated February 21, 2005

Exhibit 21A: Minutes of HOA Board of Directors June 10, 2005.

Exhibit 22: Minutes of Second Annual Members' Meeting dated August 19, 2005

Exhibit 23: Horry County Warranty Agreement with D.R. Horton, Inc. dated November 11, 2005

Exhibit 24: Minutes of HOA Board of Directors Meeting May 24, 2006

Exhibit 25: Warranty Deed from Cheryl Tucker Essex to Ronald E. Jarmuth filed on October 23, 2006 at Deed Book 3178, Page 180.

Exhibit 26: Emails between Rosemary Toth and Jarmuth regarding Amenity Center November 2007

Exhibit 27: Minutes of HOA Board of Directors March 11, 2008

Exhibit 28: Architectural Guidelines amended April 2008

Exhibit 29: Emails between Beckie Abel and Jarmuth regarding ARB Minutes dated June 2008

Exhibit 30: Emails between Beckie Abel and Jarmuth regarding ARB Minutes and Amenity Center dated June 2008

Exhibit 31: Email from Rosemary Toth to Jarmuth regarding the Amenity Center shower dated June 18, 2008

Exhibit 32: Fifth Amendment to Declaration of Covenants and Restrictions for International Club filed on June 20, 2008 in Deed Book 3344, Page 2064

Exhibit 33: Email from Rosemary Toth to Jarmuth regarding Amenity Center and road dedication dated June 28, 2008

Exhibit 34: Email from Rosemary Toth to Jarmuth regarding late fees and administration fees dated July 15, 2008

Exhibit 35: Email from Beckie Abel to Jarmuth emailing a list of the resident's directory dated August 8, 2008

Exhibit 36: Email from Rosemary Toth to Jarmuth regarding the Highway 17 Connector Association dated October 4, 2008

Exhibit 37: Email from Rosemary Toth to Jarmuth responding to questions regarding ownership of roads and dedication dated October 5, 2008

Exhibit 38: Email from Rosemary Toth to Jarmuth regarding Exhibit "E" dated October 12, 2008

Exhibit 39: Email from Jarmuth to Beckie Abel requesting November 3, 2003 agreement between Plantation AD, LLC and HOA dated October 16, 2008

Exhibit 40: Email from Jarmuth to Beckie Abel seeking a statement of account dated November 17, 2008

Exhibit 41: Letter from Jarmuth to Rosemary Toth regarding HTC Cable Contract dated December 12, 2008 (duplicate)

Exhibit 42: Letter from Jarmuth to Rosemary regarding proposed 2009 Budget dated December 12, 2008

Exhibit 43: Letter from Rosemary Toth to Jarmuth responding to questions dated December 17, 2008

Exhibit 44: Letter from Jarmuth to Beckie Abel requesting to inspect K.A. Diehl management contracts dated December 19, 2008

Exhibit 45: Emails between Jarmuth, Rosemary Toth, and Beckie Abel regarding Jarmuth's request to inspect all board minutes dated December 19, 2008

Exhibit 46: Letter from Jarmuth to HOA request to copy K.A. Diehl contract and minutes from meeting with Villas Board dated January 26, 2009

Exhibit 47: Emails between Jarmuth and Beckie Abel regarding request to inspect Landscape Contracts dated February 17, 2009

Exhibit 48: Emails between Jarmuth and Beckie Abel regarding request for HTC contract and confirming meeting to inspect documents dated February 17th and 18th 2009

Exhibit 49: Emails dated February 18, 2009 between Jarmuth and Beckie Abel regarding request to inspect building maintenance and HTC billing documents and confirming document review

Exhibit 50: Email dated February 18, 2009 from Beckie Abel to Jarmuth confirming Jarmuth's receipt of HTC correspondence

Exhibit 51: Letter from Jarmuth to the HOA requesting landscaping contract for 2008, HOA Tax Returns for 2006-2008, HTC correspondence, and minutes of meeting with the Villas board dated February 20, 2009

Exhibit 52: Email from Larry Sherman to Jarmuth regarding ARB's decision to deny swing set dated March 16, 2009

Exhibit 53: Email from Jarmuth to HOA dated April 28, 2009 with attached request for voter list

Exhibit 54: Quit Claim Deed from D.R. Horton, Inc. to International Club Home Owners Association, Inc. filed on June 19, 2009 in Deed Book 3406, Page 1694 (5.42 acres, entranceway to International Club)

Exhibit 55: Email communication dated June 22, 2009 from Julie Case to all property owners security and higher regarding response to HTC refund

Exhibit 56: Email communications dated June 23, 2009 between Denise Ambuhl of HTC and William Freiboth regarding credit allocations

Exhibit 57: Email communication from Julie Case to all property owners security and higher regarding HTC response for credits dated June 24, 2009

Exhibit 58: Jarmuth's Application to the ARB for a swing set dated July 21, 2009

Exhibit 59: Notice of Disapproved Request from ARB dated August 5, 2009 to Jarmuth for swing set

Exhibit 60: Email dated August 22, 2009 from John White to ARB Board and K.A. Diehl regarding denial of the swing set

Exhibit 61: Letter dated August 24, 2009 from Horry County Engineering Department Infrastructure & Regulation Department to Michael Butryn

Exhibit 62: Copy of International Club HOA Check #2469 dated October 15, 2009 in the amount of $2,500.00 to McNair representing insurance deductible

Exhibit 63: State of South Carolina Human Affairs Commission Determination of No Reasonable Cause in Ronald Jarmuth v. International Club HOA dated December 11, 2009

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| Exhibit 64: | Letter dated January 11, 2010 from International Club HOA Board of Directors to Mr. & Mrs. Gene Malott regarding property maintenance and list of homeowners to receive letter |
| Exhibit 65: | Astorino parking violation pictures February 11, 2010 through December 3, 2011 |
| Exhibit 66: | International Club HOA Friday Facts dated March 12, 2010 regarding Central Electric Power Cooperative seeking easement |
| Exhibit 67: | International Club HOA Friday Facts dated March 19, 2010 regarding Central Electric Power Cooperative seeking easement |
| Exhibit 68: | Jarmuth's Application to the ARB dated March 22, 2010 for an extension of palm bed |
| Exhibit 69: | International Club HOA Friday Facts dated March 26, 2010 regarding Central Electric Power Cooperative seeking easement |
| Exhibit 70: | International Club HOA Notice of Special Meeting dated April 6, 2010 |
| Exhibit 71: | Notice of Approval from ARB dated April 8, 2010 of Jarmuth's Application for the extension of the palm bed |
| Exhibit 72: | Minutes of Special Meeting of the HOA April 19, 2010 |
| Exhibit 73: | MS#194-32-01-313 T42 Collins Creek TAP Power Line Easement #364 Tract #14 dated April 20, 2010 |
| Exhibit 74: | Jarmuth's Application to the ARB dated April 22, 2010 for the installation of a bench |
| Exhibit 75: | International Club HOA Friday Facts dated April 23, 2010 regarding Special Meeting relating to Central Electric Power Cooperative easement |
| Exhibit 76: | Landscaping Mitigation Agreement between International Club HOA and Central Electric Power Cooperative, Inc. |
| Exhibit 77: | Minutes of the Regular Meeting of the HOA Board of Directors May 5, 2010 |
| Exhibit 78: | Notice of Approval from ARB dated May 10, 2010 of Jarmuth's Application for the bench |
| Exhibit 79: | Copy of International Club HOA Check #2732 dated June 10, 2010 in the amount of $2,500.00 to McNair representing insurance deductible |
| Exhibit 80: | Architectural Guidelines amended July 2010 |
| Exhibit 81: | International Club HOA Board Action Without a Meeting dated August 11, 2010 |
| Exhibit 82: | Violation Notice from ARB dated September 27, 2010 to Jarmuth for the landscape with curbing and brick addition to yard |
| Exhibit 83: | Letter to the ARB from Jarmuth dated September 30, 2010 enclosing application for fence and lawn edging |
| Exhibit 84: | International Club ARB Meeting Minutes – October 5, 2010 |
| Exhibit 85: | Notice of Approval from ARB of Jarmuth's Application for flower bed and edging dated October 8, 2010 |
| Exhibit 86: | Notice of Disapproved Request from the ARB to Jarmuth for vinyl fence with brick foundation to side yard dated October 8, 2010 |
| Exhibit 87: | Letter from Jarmuth to the ARB received by the ARB on October 13, 2010 enclosing a check from Jarmuth in the amount of $50.00 |
| Exhibit 88: | International Club ARB Meeting Minutes – December 7, 2010 |

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| Exhibit 89: | International Club HOA Parking Rules 2011 dated July 1, 2011 (duplicate) |
| Exhibit 90: | International Club HOA Friday Facts dated July 15, 2011 |
| Exhibit 91: | Action taken by written consent of Board of HOA dated July 25, 2011 regarding parking violations |
| Exhibit 92: | Letter from Horry County Planning & Zoning Department dated September 13, 2011 to Jarmuth |
| Exhibit 93: | Email from Jarmuth dated September 21, 2011 confirming 2009 maintenance contract and 2007 and 2008 election issues are moot |
| Exhibit 94: | Architectural Guidelines amended November 2011 |
| Exhibit 95: | Jarmuth ARB Modification Request Application dated February 27, 2012 for landscaping modification |
| Exhibit 96: | Email reply dated March 5, 2012 from Vanessa Fattoross to Jarmuth email regarding Jarmuth ARB Submission of February 27, 2012 |
| Exhibit 97: | Letter dated March 16, 2012 from Vanessa Fattoross of K.A. Diehl to Jarmuth regarding ARB deferral |
| Exhibit 98: | General Ledger Trial Balance 2004-2007 for Account #422-0000 |
| Exhibit 99: | TOPS Financial Transactions for the Golf Course July 31, 2002 through December 17, 2010 |
| Exhibit 100: | Jenark Resident Transaction Report for International Club, LLC, Golf Course, December 31, 2010 through the present |
| Exhibit 101: | Jenark Resident Transaction Report for International Club, LLC, the Glens Condo, December 31, 2010 through the present |
| Exhibit 102: | Summary of International Club Golf Course Accounting Records |
| Exhibit 103: | Account Balance for Ronald Jarmuth August 2012 |
| Exhibit 104: | Pictures of Golf Course Irrigation System |

PLAT EXHIBITS

| | |
|---|---|
| Exhibit A: | Subdivision Survey of 9.79 Acres and 5.42 Acres for Suntech Management, Inc. filed on October 21, 1998 filed in Plat Book 158 at Page 155 (reflects 9.79 Acres, Grand Vistas, plat referred to in Exhibit "B" to Restrictive Covenants) |
| Exhibit B: | Lantana P.U.D. Revised Master Plan (Plat 1) (formerly known as Murrells Inlet Golf Plantation) Horry County, South Carolina, Prepared for Plantation A.D. approved May 14, 1999 |
| Exhibit C: | Plat of 459.22 Acres of Land Located West of McDowell Shortcut Road, Socastee Township, Horry County, South Carolina prepared for Plantation A.D., LLC filed in Plat Book 160, Page 79 (reflects property annexed into the International Club pursuant to Exhibit "A" of the Restrictive Covenants, the golf course and Pebble Creek and reflects additional property that may be annexed pursuant to Exhibit "B" of the Restrictive Covenants, the Glens, the Highlands, the Links, the Meadows, and the Cambridge) |

| | |
|---|---|
| Exhibit D: | Subdivision Plat of Tract I-1A of Phase I-1 at International Club PUD, filed on May 5, 2000 in Deed Book 169, Page 115 (property added per Third Amendment) |
| Exhibit E: | Plat of Phasing Plan Villas at International Club revised June 6, 2000 filed in Plat Book 171, Page 149 (Villas property added per Fourth Amendment) |
| Exhibit F: | Plat of 205.36 Acres International Club Golf Course Horry County, SC prepared for Plantation Golf, A.D. filed on January 2, 2002 in Deed Book 181, Page 89 |
| Exhibit G: | Plat of Tract 2 & 3 Totaling 94.06 Acres located International Club Golf Course filed April 29, 2003 in Deed Book 189, Page 154 (property annexed per Third Amendment) |
| Exhibit H: | Combination Plat Totaling 14.10 Acres filed on May 9, 2008 at Plat 237, Page 296 (Ballycastle property added per Exhibit "A" to restrictive covenants and Fifth Amendment) |
| Exhibit I: | International Club Subdivision Tax Map |
| Exhibit J: | Subdivision Maps |

**II. Defendants' Witnesses**

1. William ("Bill") Freiboth
2. Rosemary Toth
3. Rebecca ("Beckie") Abel
4. R. Scott Pyle
5. Jeffrey W. King, Esq.
6. Charles Roche
7. Christopher Sullivan
8. Denise Ambuhl
9. Maureen Sullivan

## STATUS OF SETTLEMENT NEGOTIATIONS

As a result of the polarized nature of the parties' positions in the 2009 and 2010 Lawsuits, settlement negotiations are futile.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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FROM HORRY COUNTY
Court of Common Pleas

Ralph Stroman, Special Referee

---

Case No. 2009-CP-26-3596
Consolidated with
Case No. 2010-CP-26-11320

---

Ronald Jarmuth — Petitioner

v.

The International Club Homeowners Association, Inc;
Rosemary Toth; and
K. A. Diehl & Associates. Inc — Respondents

---

# PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

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Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
Petitioner, Pro Se



EXHIBIT C

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**SCACR Rule 501 Code of Judicial Conduct Canon 3:** 7, 8, 9, 10, 10, 13, 14, 15

**A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.**

***A. Judicial Duties in General;***

**B. Adjudicative Responsibilities.**

**(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.**

**(2) A judge shall be faithful to the law;**

**(5) A judge shall perform judicial duties without bias or prejudice.**

**(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:**

**(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.**

**SCRCivP Rule 43 Conduct of Trial.**

## RELIEF REQUESTED

**Enter an Extra – Ordinary Writ:**

**(1) Prohibiting the Enforcement of the September 10, 2012 Order of the Special Referee following the trial; and**

**(2) Mandating a new trial before an actual judge from another judicial circuit for the full five days required to conduct the trial.**

## FACTUAL BACKGROUND

**This case is before the Court for a extra – ordinary writ of prohibition and mandamus because of the blatant violation of Canon 3 of the Code of Judicial Conduct by Special Referee Ralph Stroman in his conduct of a trail referred to him. The central issue is his ex-parte receipt from Defense Counsel and use of her post – trial arguments, citations to law, and supposed evidence and testimony never actually made by her during the conduct of the trial, and his word for word adoption of her 49 page proposed findings of fact and conclusions of law without giving Plaintiff an opportunity to controvert any of it – even after receipt of a written objection to this violation of judicial canons. The secondary issue is the special referee's insistence on prematurely terminating the trial at the end of three days, the stated reason being that the special referee decided to use days four and five for personal business, depriving Plaintiff of an opportunity to present witnesses noticed and subpoenaed for testimony at trial, and depriving Plaintiff of an opportunity to present entire counts of his complaint. In addition the special referee refused to allow Plaintiff to open the case (allowing Defense Counsel to open the case) and deprived Plaintiff of an opportunity to present closing arguments – to sum up his case. The Special Referee totally ignored his obligation to make the declaratory judgments demanded in the complaint as to the application of the South Carolina Non-Profit Corporation Act to the conduct of home owner association**

affairs, ignored the issue of the lack of horizontal privity and equitable interest in many matters, ignored the issue of the distinction between true covenants touching and running with the land versus personal service contracts, and ignored claims against a co-defendant, the KA Diehl Management company for Defamation. The implications of The Act was argued by Plaintiff at trial with supporting evidence and witness testimony. The case was tried before a relatively large audience of home owners who, together with Plaintiff have come to the conclusion that there is an over-whelming appearance (from the comparison of the contents of the special referee's order to the uncontroverted evidence, testimony, and case law offered at trial) that the special referee has suffered an intellectual infirmity, is ignorant of the law or has no regard for it, is biased, or worse that the judicial process has been tampered with.

In addition the special referee allowed "trial by ambush" in as much as he allowed Defense Counsel to enter one fifth of her exhibits into evidence despite the fact that they were never identified or shown to Plaintiff until the very minute the trial began, and that none of Defense Counsel's exhibits were given to Plaintiff in the form used at trial and none were ever given to Plaintiff in discovery in paper form as demanded by Plaintiff.

The case below was initiated to obtain a judicial remedy to the widespread disregard in South Carolina to the rule of law reflected in the South Carolina Non-Profit Corporation Act (Title 33 Chapter 31 of the Code) under which every non-condominium related homeowner association in South Carolina is incorporated. The problem is compounded by provisions in covenants and developer practices which are diametrically opposed to the mandates of the law. The problem of wide-spread disobedience to the provisions of The Act and a lack of enforcement is facilitated by the fact that millions of dollars in profits (in Horry County alone) are gained by the

homeowner association management industry and by that sector of the legal community that serves this sector. The home owner association management industry is totally unlicensed and unregulated and individual companies (such as K.A. Diehl, a defendant in the case at bar) often illegally represents themselves as "property managers" which is a strictly regulated term which is exclusively preserved for the licensed and regulated realty industry. The blatant violation of clear provisions of the statute, such as the mandates that no individual can be forced to become or remain a member of a non-profit corporation, that in year first of a non-profit corporation / homeowner association's existence there must be elections by the home owner members for board of director positions with no interference by developers; that members of the board of directors may not include appointed non-members; and that the bylaws of a home owner / non-profit corporation must be chosen by the membership or the incorporator, not by a developer years before the non-profit comes into existence. The developer and management company industry rely on the general ignorance of the law by home owners in general and the confusion caused by the existence of home owner association statutes in all neighboring states (where many homeowner members come from) – but not in South Carolina.

The problem is well known to the Legislature which in the past has considered, but never enacted, legislation which would distinguish non-profit home owner associations from other non-profit corporations. The legislature, in the past, resolved similar needs for distinguishing legislation for condominium apartments (Title 27 Chapter 31) and for time shares (Title 27 Chapter 32). In March, 2009 the Senate Judiciary Committee, and in particular the subcommittee on the issue under the able leadership of Senators Ford, Mallow and Martin considered Senate Bill 30, "The South Carolina Homeowners' Association Act" which would have become a Chapter 52 of

Title 27 of the Code. The Committee held public hearings on the proposed legislation. Plaintiff's testimony to the Senate Judiciary Committee on March 19, 2009 began with the words:

> "We have more control over who can give you a haircut and how he must do it than over an industry which controls billions of dollars in real estate and millions of dollars of annual revenue flow."

With the legislature being at an impasse on the matter (largely over the self-funding provision which would have provided the Consumer Affairs Department with a stream of income independent of the legislature), the industry remains subject to the provisions of Title 31 of Chapter 33 under which homeowner associations were incorporated

In the case at bar Defense Counsel used every artifice to discourage the case from coming to trial and to obstruct access to evidence. For more than two and a half years Defense Counsel and developers, properly subpoenaed for documents, did not provide a single item sought in discovery, and when discovery finally occurred the developers admitted they had destroyed the evidence they had earlier admitted the existence of. The trial court declined to enforce the obligation of the Defendants to provide financial documents in the native form which was a key to explaining the hundreds of thousands of dollars apparently missing from the home owner association accounts, nor to force the defendants to produce (non-privileged) email between board members.

The case was finally scheduled for trial January 17, 2012. Two separate judges of the 15th Judicial Circuit: Hon. Judge Larry Hyman, and Hon. Judge Benjamin Culbertson, both stated that the case would never actually come to trial – although it would appear on the non-jury docket – ostensibly because Plaintiff asserted that the trial would take up to five full court days. The out – of – court depositions of some of Plaintiff's witnesses occupied three fast paced days of testimony and part of a fourth – and not all of the named witnesses were deposed pre – trial. The

actual trial which began on Wednesday, August 8, 2012 – to the extent it continued before the special referee terminated it Friday August 10, 2012 for his convenience and not because it had reached it's natural end – took three days beginning at 9:30 AM each day and continuing until approximately 6:00 PM with a short break each day for lunch. Most of this consisted of Plaintiff's fast – paced presentation with the Defense Counsel largely sitting mute, and not controverting Plaintiff's testimony, arguments, or evidence when used at trial.

The case had been referred to special referee Ralph Stroman at the suggestion of Defense Counsel with the explicit understanding that Mr. Stroman would try the case for five days. The August 8, 2012 start date was selected by Mr. Stroman to allow for five trial days demanded by Plaintiff and provisions had been made to make the court room available Saturday and Sunday August 11th and 12th, and for court personnel to be in attendance. The Order of Reference explicitly provided that the trial would continue until it had reached it's natural completion – it did not set a trial day limitation.

The procedural issues surrounding the not so subtle violation of due process and the judicial canons should be sufficient on their own to support an extra – ordinary writ of prohibition to the enforcement of the special referee's order and to mandate a new trial, using a judge assigned from another judicial circuit for this purpose.

There are additional issues which the Supreme Court is asked to be attentive to, such as findings based on outright fraudulent references to the evidence, to the testimony and to the law. Obvious examples include:

* The order citing to a January 29, 1999 Deed to the Golf Course (Plaintiff's Exhibit # 544) and fraudulently claiming that Plaintiff presented it as the deed to the Pebble Creek sub-division, signed the same day (Plaintiff's Exhibit # 545). The Special

**Referee's order (written word for word by Defense Counsel) fraudulently claimed that Plaintiff had introduced two different copies of the subdivision deed, whereas at trial Plaintiff introduced only the Pebble Creek Exhibit in the context that it was dated ten days before the covenants were declared and not including a book / page reference to the covenants, thus making the covenants inapplicable due to no equitable interest or horizontal privity. Plaintiff never referred to the golf course deed at all during trial. However, at trial Defense Counsel waved the golf course deed around – but did not hand it to the special referee – falsely claiming that it was another Plaintiff subdivision deed with a book / page entry hand written in (Plaintiff at trial stated that such a hand written entry would be an alteration of the deed after signing because a book page would not have been known until ten days after signing when the covenants were recorded, and that the exhibit was not the subdivision deed)**

* **The Defense Counsel written special referee's order stated that a Horry County letter from it's staff attorney dated April 16, 2009 stated that the HOA's covenants relating to streets were enforceable when the actual letter stated that the staff attorney had not even read the documents and that the county chose to "express no opinion as to what rights, if any, the HOA may have in this regard". The special referee's order ignored the other letter from the County, in evidence, dated April 24, 2009 where the County wrote that "Pickering Drive and International Club Drive are both owned and maintained by the county". The letter went on to say that what the HOA owns (and pays taxes on) is a non-road parcel of land. This renders the special referee's dependence on the April 16, 2009 letter to resolve ownership of the roads fraudulent on it's face.**

* **The special referee's order on page 12 made the finding of fact and conclusion of law that Amendment #1 to the covenants identified "The International**

Club Association", Inc as "The Association" with rights and obligations under the covenants which is what Plaintiff began his case with and argued in his complaint and at trial – and which thus deprived the Defendant HOA of any standing under the covenants to controvert most of the issues at trial, and without standing to assert a counter – claim based on the covenants, The special referee's order then made findings of fact and conclusions of law which depended on "The Association" being the defendant "International Club Home Owners Association". The Notes to Canon 3, Section B, Adjudicative Responsibilities includes the text:

> A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

There is no doubt that the special referee violated Canon 3, and that the violation directly infringed on Plaintiff's constitutional due process rights. The violation is so blatant it is not just the appearance of a violation of the Canon, it is the indisputable fact of it.

Together with the fact that the Defense Counsel largely sat mute through the case has the appearance that the special referee (Defense Counsel) order was written pre-trial and was a foregone conclusion no matter what happened at trial which brings the judicial process into disrepute within the community at large.

* In coming to conclusions relating to involuntary membership in the HOA, involuntary participation in the Amenity Center, and involuntary use of a cable tv contract (to which the HOA has not an actual party) the special referee's order cited to provisions in Title 27 Chapter 31 (under which condominium apartment HOA's are chartered), instead of Title 33 Chapter 31 under which the HOA was incorporated (which makes such participation voluntary), which on it's face creates the appearance of intellectual infirmity by the special referee, or in the alternative the appearance of fraud

**and bias.**

*** The special referee's order concluded "that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement." However, a civil suit filed in the same courthouse by the Defendant IHOA against the Golf Course was introduced into evidence which claimed that the Golf Course had not paid any assessments in 2011 or 2012 and for only one month in 2010, and uncontroverted Defendant General Ledgers were introduced at trial going back to 2004 which showed that the Golf Course has never paid more than a fraction of what it owes. This juxtaposition between the evidence read into the record by Plaintiff at trial – and heard by the homeowners observing the trial – and the special referee's order creates the appearance in the community of bias and fraud by the special referee and outright fraud.**

**GROUNDS**

**1. The conduct of the trial by Special Referee Ralph Stroman is tainted by extra ordinarily blatant violations of SCACR 501 Code of Judicial Conduct Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently; specifically violations of "*A. Judicial Duties in General*"; "B. Adjudicative Responsibilities. (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required; (2) A judge shall be faithful to the law; (5) A judge shall perform judicial duties without bias or prejudice. (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: and (8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.**

**The specifics set forth in "Factual Background" above" creates the appearance – from the sheer number and significance of the departures from accepted standards and rules of procedure for the conduct of trials – that the special referee acted with improper and biased motive and decided that Plaintiff's rights of due process are of no consequence, and by the third day that the special referee decided to abandon even the illusion of a fair trial by ending it before it was finished and by skipping closing and the opportunity to rebut or controvert proposed findings of facts and conclusions of law drafted for the special referee's signature by Defense Counsel.**

**2. The forty eight page Order written in it's entirety by Defense Counsel and adopted, word for word by the Special Referee Ralph Stroman is tainted by an extra ordinarily blatant violation of SCACR 501 Code of Judicial Conduct Canon 3 as stated in the "Factual Background" set out above, in that the special referee did not permit Plaintiff to controvert the proposed order which is a direct violation of the judicial canon; in that in adopting it the special referee for some reason chose to ignore the proceedings, testimony, evidence and the law when he signed the order which is a violation of the provision in the canon that the judicial officer must be true to the law; in that it allowed the Defense Counsel – in effect – an ex-parte trial because the special referee allowed and depended on material (arguments, citations to case law, citations to evidence, and alleged testimony) never offered at trial where Defense Counsel sat mostly mute; and in that the order contains fraudulent representations of the contents of evidence and testimony and cites to inapplicable statutes; in that it totally ignores controlling law (the South Carolina Non-Profit Corporation Act) and controlling legal concepts (privity, equity, true covenants v personal services contracts, the statute of frauds); in that it provides to the defendant a course of action (and it an award) which belong to the Architectural Review Board which the special referee has found is separate**

from the Defendant HOA; in that the order fraudulently depicts attorney fees spent seeking dismissal of the case as money spent to defend the covenants; and in the most outrageous evidence of the appearance of judicial bias or incompetence, finding that the defendant HOA is not "The Association" named in the covenants which strips the defendant of any standing in this case, but never the less making findings that depend on the Defendant HOA being "The Association" named in the covenants. The Order totally ignored the Declaratory Judgment demands in the Complaint which was the controlling aspect of the case, which if the special referee was true to the law was fatal to the defendant.

There is the blatant appearance that the outcome of the trial and the order itself was pre-ordained before it ever began and that the special referee was and is biased or worse. This is particularly obvious because the order refers to many areas of the case which Plaintiff did not argue at trial – because the special referee cut Plaintiff off at the end of the third day of what was supposed to be a five day trial, giving the appearance that the order was written before the trial began and assuming that Plaintiff would actually argue all the areas stated in his Pre – Trial Brief.

When the special referee adopted the entire text of Defense Counsel's Order, which included alleged facts, citations of law, citations to evidence, citations of cases, and citations to statutes never presented by either side at trial, it constituted the independent "investigation of facts" explicitly prohibited in the notes to the Canon, as well as advocacy for the Defense. The notes to Canon 3, B, Adjudicative Responsibilities, states that

> "A judge must not independently investigate facts in a case and must consider only the evidence presented."

## LEGAL ARGUMENTS

### Standing and Entitlement to Relief

The Petitioner is the party Plaintiff to a case in the Court of Common Pleas in the Fifteenth Judicial Circuit where a trial was held before a special referee whose conduct of the trial and of the preparation and issuance of the final order reflect extra – ordinary violations of the canons of judicial conduct and the rules of procedure for the conduct of a trial. Petitioner's constitutional rights under Article 1, Declaration of Rights, Section 3, Due Process of the South Carolina Constitution have been violated. Petitioner's rights under SCRCivP Rule 43 Conduct of Trial to offer closing argument, and to open and close the trial, have been violated. Petitioner's SCRCivP Rules 26 and 37 right to exclude from the trial any document which the Defendant / Respondent did not provide him in discovery has also been violated. Petitioner's right to have a trial where the judge does not violate the Canons of Judicial Conduct has been violated, particularly Canon 3.

### Original Jurisdiction in the South Carolina Supreme Court

The Supreme Court has original jurisdiction to hear this matter and to issue remedial writs through Article 5 Courts, Section 5 (Jurisdiction of Supreme Court) of the South Carolina Constitution, through Section 14-3-310 (Original jurisdiction of Supreme Court) of the Code; and through SCACR Rule 245 (Original Jurisdiction of Supreme Court).

The Supreme Court has exclusive domain to enforce the obedience to the judicial canons and to issue remedies where the appearance of violations are evident.

### EXTRAORDINARY CIRCUMSTANCES FOR DIRECT APPLICATION

The case below is extra – ordinary in nature, irrespective of the misconduct by the special referee in the handling of the trial and the issuance of the order, because if

obedience to the clear mandate of the South Carolina Non-Profit Corporation Act was the rule of law in this case, and if the unambiguous findings of the appellate courts relating to privity and equitable interests and true covenants running with the land versus personal service contracts was applied, it would have wide spread implications in the totally unregulated home owners association management industry and bringing the practices of the industry into compliance with the law would force massive changes of practice. There has been a not too transparent attempt to keep the matter from ever coming to trial and when that could not be avoided, to avoid an honest adjudication on the merits.

It was more than two and a half years before the Petitioner was able to be heard on discovery motions to compel filed months after the case was filed (when the Defendants and the developer non-parties refused to produce any documents). It was more than three years after discovery was sought before obviously discoverable documents, such as a full range of financial documents, were produced. On two different occasions (two) different Judges of the Circuit Court stated in open court that the case below would never be tried, ostensibly because it was a non-jury trial lasting at least three days (per Defense Counsel) and probably five days (per Petitioner / Plaintiff). The case came up on the trial roster on those three occasions, with Plaintiff present with all subpoenaed witnesses and over seven hundred exhibits for evidence, and never actually proceeded to trial.

Defense Counsel then made an unusual offer that if the case was tried before Special Referee Ralph Stroman, the Defendant would pay for the Special Referee's charges, for the cost of the court reporter, and for any other expenses or charges such as for court attendants. Petitioner took the precautionary step of directly contacting Mr. Stroman to obtain his commitment to conduct a five day trail, and to determine when

Mr. Stroman's schedule could accommodate this. The actual order of reference, with the trial date, was prepared by Defense Counsel, incorporating Petitioner's text providing that the trial continue until it was completed.

When Mr. Stroman reneged on this commitment (and the implication of the order of reference) to conduct a five day trial, terminating it after three days (and subtracting a portion "up front" for Defense to present a part of it's case before Plaintiff had an opportunity to open) he rejected the very reason the case had been referred to him – to obtain a five day trial.

On September 19, 2012, nine days after the Special Referee signed his order September 10, 2012), Petitioner filed a motion for a new trial citing and giving specific examples of the gross violations of the Canons and of the Rules of Procedure, and by implication, Petitioner's constitutional rights. On September 27, 2012, the Master in Equity issued a letter stating that the Motion for a New Trial would be heard on October 24, 2012 – before Special Referee Ralph Stroman, who Petitioner accused of bias and violation of the Judicial Canons. The letter also stated that, despite an explicit provision in the Order of Reference requiring the Defense Counsel to pay the Court Reporter in all proceedings (with the exception of an appeal) after reference, the Master in Equity required Petitioner to pay the Court Reporter's charges, which Petitioner suggests is indicative of the biased mind set where the Special Referee is very publicly asked to declare that his actions have the appearance of severe violations of the judicial canons and the appearance of bias.

Petitioner suggests to the Supreme Court that given the circumstances, the proper consideration of the appearance of violation of judicial canons and trial procedures should be before this Court, which has reserved to itself the oversight of judicial conduct.

**Efforts Made to Give Notice and to Secure Relief**

**At the end of August 10, 2012 at approximately 6:00 PM (a Friday) the third trial day, the special referee told the parties that he was ending the trial and that they should provide him with Briefs, which should closely follow the presentation at court, so that the special referee could use it to augment his notes; and also a proposed order. It was Petitioner's understanding that nothing new would be allowed. The material was due August 20, 2012, which was when Petitioner / Plaintiff received Defense Counsel's draft order, which was not even remotely notes about what was presented at trial, being rather an ex-parte presentation of new material to remedy Defense Counsel's failure to put on a case at trial, or at least to sit largely mute through Plaintiff's presentation of his case. It was also clearly an attempt to avoid being subject to impeachment and challenge as to the new material (whose infirmities are discussed, in part, supra). On August 21, 2012, the next day, Petitioner hand delivered to the special referee — and filed a copy with the court ("clocked") a letter which objected to the Defense Counsel draft Order in that it was mostly completely new material never presented at trial, that Petitioner was being deprived of an opportunity to controvert or oppose, and that it fraudulently mis-represented the evidence, testimony, cases, and law actually addressed at trial. Petitioner suggested that the special referee obtain a copy of the transcript of trial so as to be able to independently exclude all new material – which Petitioner asserted was almost all of the draft order. Petitioner pointed out that much of the draft was out and out fraudulent, but suggested that the special referee look into this for himself. The special referee, being on actual notice that he was obligated per the judicial canons to provide Petitioner at least an opportunity to controvert the new material, and to exercise special care in considering it – on the record in open court – ignored the cautionary. The only alteration that the special referee made to the material**

from Defense Counsel was to add his signature and the date.

As stated supra, on September 19, 2012 Petitioner filed a Motion for a New Trial.

## CONCLUSIONS

The Supreme Court has Jurisdiction to Issue A Writ of Prohibition and Mandamus and has supervisory responsibility and authority for the conduct of judges or those acting in a judicial capacity.

There is the over whelming appearance that the special referee has violated provisions of the judicial canons and has shown bias towards the Petitioner.

The conduct of the special referee operated to deprive Petitioner of due process rights to a fair trial.

The conduct of the special referee and it's procedural ramifications are sufficient cause to order the prohibition of the order of reference, the prohibition of the enforcement of the order entered by the special referee, and to mandate the conduct of a new trial before a judge of another judicial circuit.

The Writ should be issued forthwith.

October 2, 2012 /s/ Ronald Jarmuth

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
Petitioner, Pro Se

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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**FROM HORRY COUNTY**
**Court of Common Pleas**

**The Hon. Ralph Stroman, Special Referee**

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**Case No. 2009-CP-26-3596**
**and**
**Case No. 2010-CP-26-11320**

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**Ronald Jarmuth** — **Petitioner**

**v.**

**The International Club Homeowners Association, Inc;**
**Rosemary Toth;**
**K. A. Diehl & Associates. Inc. and**
**The Court of Common Pleas Fifteenth Judicial Circuit,** — **Respondents**

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# REPLY TO RETURN TO PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

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**Ronald Jarmuth**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**Petitioner, Pro Se**



**EXHIBIT D**

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**B - Exhibits Related to Waste Management Service Agreement Illustrative of Fraud by Defense Counsel and Judicial Officer**

## INTRODUCTION

The case below is procedurally in "never never land". Neither the Circuit Court nor the Court of Appeals has the authority nor procedures in place to inquire into deliberate misconduct by the judicial officer presiding over a trial when it is alleged that there is a violation of Canon 3 of the Judicial Canons (SCACR Rule 501) as is present here. Such inquiry and authority to act as appropriate is reserved to the Supreme Court itself. There is no clear guidance in the rules governing post – trial procedure as how to proceed when a party files motions for Judgment Notwithstanding the Verdict (SCRCP Rule 50), Amendment of Findings by the Court (SCRCP Rule 52), or for a new trial (SCRCP Rule 59) alleging not only misconduct by the Defense Counsel (SCACR Rule 407) but joint fraudulent action with the appearance of corruption involving violations of the Judicial Canons, SCACR Rule 501 Canon 3.

While this Petitioner has not been served (by the Court) the Recusal of Special Referee Hon. Ralph Stroman, the inclusion of the Special Referee's October 17, 2012 Order as an Exhibit to the Return makes it clear that the aspect of the Petition demanding that future proceedings at the trial court level not be handled by the Special Referee is moot. That, however, has the procedural implication that the Rules of Civil Procedure provide no guidance as to who will hear Petitioner's Post-Trial Motions to Amend and for new Trial. It is Petitioner's understanding that the applicable rules all assume that the judicial officer who presided over the trial will preside over the hearing of the motion, but he is now gone from the case. It is appropriate that the Supreme Court utilize this Petition to provide procedural guidance, since the Supreme Court is the source of the civil rules.

The case arrived before the Special Referee only because successive judicial

officers refused to commence with an actual trial, despite the fact that it appeared on the trial roster every other week beginning in January of 2012 through July of 2012. The reason given was that no jury demand was made and it was obviously at least a three day trial, per Defense Counsel, and at least a five day trial per Petitioner. In fact the trial went three days from approximately 9:00 AM to 5:30 or 6:00 PM and there were more witnesses to be heard and matters to be argued when the trial was arbitrarily terminated by the Special Referee, who stated that (despite him having agreed to hear the case on Saturday and Sunday for days four and five) he had pressing personal matters. Petitioner was denied the opportunity to close as set forth in SCRCP Rule 43 in which he would critique Defendants' case. Petitioners perspective is that this occurred after Petitioner had presented an over-whelming factual and legal case to which Defense Counsel sat largely mute; the appearance was that going further could only make it worse for the Defendant. At the end of day 3 Petitioner had additional named witnesses who had not been heard and matters in the complaint not yet presented. Petitioner was not wasting the Court's time; the Special Referee at the end of Day 3 mentioned to the entire court that Petitioner's presentation was among the most highly organized and effective he had ever heard. It was closely scripted by Petitioner in the interest of judicial economy. At the end of Day three the Special Referee did not announce any tentative findings of fact or conclusions of law, and magically Defense Counsel came up with a forty eight page Final Order densely packed with facts, cases, and law (little or none of which were presented by Defense Counsel at trial) which magically matched the Special Referee's thinking 100 percent, word for word. The Special Referee was on notice (clocked with the Clerk of Court) that the draft order of Defense Counsel was filled with fraud and Petitioner urged the Special Referee to consult the exhibits and transcript so as to independently "judge". Petitioner

also used that vehicle to remind the Special Referee, on the record, that consideration of these new matters post trial was not permitted and demanded an opportunity to be heard on these as provided in Canon 3. The violations of the Canons and the ethical rules are documented in the Petition and Complaint.

If somehow procedural and substantive hurdles are surmounted and a new trial is ordered (below), then guidance to the lower court is needed so as to bring the case to trial. The issues of law and the issues of fact are so inter-twined that involving a jury, it seems to Petitioner, would be problematic. In effect anyone who has a substantive case and does not request a jury trial in the interest of judicial economy is penalized by being denied a trial in the normal course of events.

It is salient that in the Respondents' return they have never denied any of Petitioner's allegations. They ask the Court to ignore Defense Counsel's obvious involvement and reward said attorney's obvious misconduct. Every issue posed to the Special Referee can be laid at the hand of defense counsel.

## GROUNDS

## JURISDICTION

Respondents argue that because Courts with the authority to issue extra – ordinary writs have on occasion declined to issue such writs, that somehow this modifies the constitutional and statutory authority of the South Carolina Supreme Court to entertain the underlying Petition. The handling of petitions is a matter of fact. Jurisdiction is a matter of law. Jurisdictional authority creates an entitlement to be heard on the merits. Respondents are clearly attempting to avoid a review of the mater on the merits by mis-applying concepts of adjudication to concepts of jurisdiction. There is clear jurisdictional authority and the Petition should be heard on the merits.

Respondent cites to SCACR Rule 240(c) demanding an affidavit. The rule,

however, provides for submission of documents or affidavits. That being said, Petitioner has cured this by providing an affidavit upon information and belief as to what misdeeds merit the Court's intervention. This is Exhibit B to this Reply. At Exhibit A is Exhibit A to Petitioner's Motion which Respondent artfully failed to attach. It provides detailed additional information as to the alleged misdeeds and this Court can draw it's own conclusion why the Exhibits to the Motion were omitted by Respondent.

MERIT

The standard for judicial misconduct is not the fact of it but the appearance. The alleged misconduct is on such a large scale and so blatant that the appearance goes beyond bias or judicial incompetence, it rises to the level of the actual fraud and the appearance of inappropriate collusion by Defense Counsel and the Special Referee.

There are numerous instances of fraud. Petitioner cites an obvious one not particularly subject to interpretation as an example of the rest: The "Waste Management Service Agreement cited by the Special Referee in his final order – or more accurately fraudulently cited by Defense Counsel and blindly adopted by the Court.

In his final order The Special Referee cited to a fraudulent document to support his finding that the Defendant HOA had a valid garbage removal contract with Waste Management Industries. That fraudulent representation originated with Defense Counsel Henrietta Golding.

On Page 4, Paragraph 11 of the Special Referee's Final Order it states: "By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection." Exhibit B-1.

In here letter to the Special Referee dated August 20, 2012, Defense Counsel Henrietta Golding wrote:

> "Initially I had inserted references to the exhibits numbers; however, normally Final Orders do not include references to exhibit numbers

therefore I decided to remove the references." Exhibit B-2.

There is no document dated May 31, 2001 in evidence which explains Defense Counsel's decision not to cite exhibit numbers. The lack of an exhibit number for the May 31, 2001 contract would have flagged it as a fraudulent insertion.

In discovery, Defendant never provided any document dated May 31, 2001. As the trial began Defense Counsel Golding dropped a binder of her trial exhibits (Exhibit B-3, pg 55 listing Exhibit 5) on the Plaintiff table which trial exhibit she had never been served on Plaintiff – which Plaintiff immediately protested to the court, on the record, that this was "Trial By Ambush" and demanded the exclusion of it all. The Court refused to act. Plaintiff, busy at trial, had no time to examine the documents – exactly as Defense Counsel intended which was an issue raised by Plaintiff on the record and which the special referee refused to act on.

The description of Exhibit 5 is "Waste Industries, Inc. Service Agreement with International Club HOA dated May 24, 2001.

On October 6, 2011, Defense Counsel gave Plaintiff an electronic copy of the document which is the same as Defense Exhibit 5. In the October 6, 2011 production it was labeled by Defense Counsel as "3753-3754 Waste Industries Contract" and on the bottom right those numbers are repeated (Exhibit B-4). Exhibit 5 / Bates 3753-3754 is dated May 31, 2001 and is a Service Agreement signed by Kelly White, an employee at the time of Capital Consultants Management Corporation, to service "3" "96" gallon garbage cans at "CCMC 3009 Church St Myrtle Beach, SC 29577" with a phone number of "946-5300". This was and still is the address and phone number of Capital Consultants Management Corporation ("CCMC"). The premises is located miles from the housing development. CCMC was never the registered agent for the Defendant IHOA and the Defendant never produced in discovery any contract between the IHOA

and CCMC.

The IHOA was incorporated on March 1, 2001 sixty days prior to the putative Waste Management Contract (Exhibit B-5). Per the records of the Secretary of State through January 1, 2003 the registered agent was the Incorporator Ken Grover (who was not the Declarant of the Covenants nor the Developer) with offices from March 1, 2001 through January 1, 2003 at "11883 Plaza Drive; Murrells Inlet, SC 29576". On that date the new registered agent and new offices of the IHOA became "K A Diehl & Associates; 9751 Moose Park #8; Murrells Inlet SC 29576".

Defendant's Exhibit #5 was never mentioned as the contract at trial, never shown to the special referee at trial nor to Plaintiff, and never brought to the court reporter to be marked as evidence. In short, no contract was in evidence at trial to support the finding of the special referee.

Furthermore, neither CCMC nor Kelly White had any capacity to sign a contract for the IHOA and the service was to benefit CCMC not the homeowners nor the offices of the registered agent.

The first meeting of the putative Board of the IHOA was held on September 10, 2002 in the offices of KA Diehl. In discovery no document with an earlier date was produced by Defendants. Thus in May 2001 there was no IHOA board which could have authorized the signing to the putative Waste Management Service Agreement and there is no minutes of the board approving such a contract.

Conclusion: The finding relating to the waste management contract is based on fraudulent and fabricated evidence and is itself blatantly fraudulent. It supports a conclusion of the appearance of corruption of the judicial officer by Defense Counsel in violation of the Judicial Canons by the Special Referee and the ethical rules of practice by Defense Counsel.

**SCACR RULE 240**

**The rule has been complied with by the filing of an Affidavit.**

**RECUSAL OF JUDICIAL OFFICER WHO PRESIDED AT TRIAL PRESENTS A PROCEDURAL QUANDARY**

**Petitioner's trial court Motion can not be heard by the judicial officer who tried the case – because he has recused himself. It appears that the applicable rules for amending or altering or granting a verdict despite the judgment all presume the judicial officer with direct involvement in the case will be the one who will preside. Only he has access to his trial notes and the reasons beyond what he entered in the final order so as to be able to reconsider what he wrote – but in this instance the judicial officer wrote nothing himself and, based on the contradictions between what is in the order and the over 700 exhibits and the black letter guidance of the Non-Profit Corporation Act, there is the appearance that he did not even bother to read the deposition transcripts of the evidence books. That would have required an enormous effort because the depositions which were supposed to be used as if testimony was taken at trial, ran three and a half days of intense direct and cross examination. Because the trial testimony was likewise at a fast pace, the total investment in post-trial time would have been several weeks during which the Special Referee could not have conducted any other business. However, upon information and belief, the Special Referee did not take such a period of time off from his other work involving foreclosures. While the Special Referee can never be questioned directly by Petitioner in this regard, the Court is invited to secure the record of his billing for time spent. Post-trial "pondering" time would have been billable and Petitioner is of the belief that little or no such time was billed, supporting Petitioner's belief and the belief of all others who read the order after having sat through the trial that the Special Referee abandoned considering the case perhaps because of the enormous effort required, and for some reason simply opted in favor of**

whatever Defense Counsel presented – despite this being an enormous miscarriage of justice.

## NO RELIEF AVAILABLE AT TRIAL COURT LEVEL

The judicial officer who heard the case and who would hear trial court level post-trial motions has recused himself. The precedents examined by Petitioner deal with pre-trial recusals. Any other judicial officer is "foreign" to the thinking of the court and can only speculate in addressing the motions – which Petitioner believes is not the intent of the procedure for securing a new trial or amendment of findings.

As has been stated the issue of judicial misconduct, rather than simply misconduct by the opposing side, is not one which the trial court or the court of appeals is procedurally situated to address. The Order in question is forty-eight (48) pages. At Exhibit A is Petitioner's Exhibit A to this trial court motions. The problems are so pervasive that it takes eighty four (84) pages with single spaced comments simply to identify the problem areas, On August 20, 2012 Petitioner filed a two hundred thirty two (232) page single spaced list of cases cited, exhibits presented, and summary of arguments made (taken from Petitioner's script) per the Special Referee's request to provide same to match it up with the judicial officer's notes. The large size reflects the breadth of issues, each of which were directly addressed without any waste of time – but there are so many each of which were mishandled by the Special Referee that the only court that has the resources to handle a botched order dealing with such breadth and depth is the trial court in a new trial.

## CONCLUSION

The Supreme Court has Jurisdiction to Issue A Writ of Prohibition and Mandamus. Because the underlying issue arises from the appearance of judicial and attorney misconduct, the later of which was not denied in respondent's return, it is

**appropriate for the Supreme Court to intercede.**

**Petitioner has satisfied the minimal procedural requirements needed to place this issue before this Court.**

**Such a Writ is appropriate on the merits.**

**The Writ should be issued forthwith.**

**October 22, 2012**

**Ronald Jarmuth**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**Petitioner, Pro Se**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

**FROM HORRY COUNTY**
**Court of Common Pleas**

**The Hon. Ralph Stroman, Special Referee**

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**Case No. 2009-CP-26-3596**
**Consolidated with**
**Case No. 2010-CP-26-11320**

---

**Ronald Jarmuth** — **Petitioner**

**v.**

**The International Club Homeowners Association, Inc;**
**Rosemary Toth;**
**K. A. Diehl & Associates. Inc.; and**
**The Court of Common Pleas,** — **Respondents**

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## PROOF OF SERVICE

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**I certify that on October 22, 2012 I served Petitioner's Reply to Respondents' Return to Application for A Writ of Prohibition and Mandamus with exhibits as follows:**

**On the Clerk of the Supreme Court by sending 7 Original copies (one unbound) postage prepaid, addressed to The Honorable Daniel E. Shearous, Clerk of the Supreme Court; 1231 Gervais Street; Columbia, South Carolina 29201-3206;**

**- continued -**

**On Respondents International Club Homeowners Association Inc, Rosemary Toth, and K.A. Diehl by United States First Class Mail, postage prepaid, addressed to their attorney of record, that being Henrietta U. Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164**

**On the Attorney General of South Carolina; PO Box 11549; Columbia, SC 29211-1549 by mailing him one copy by United States First Class Mail ;**

**On the Court of Common Pleas of the Fifteenth Judicial Circuit, by First Class United States Mail addressed to the Clerk of Court of the Court of Common Pleas of the 15th Judicial Circuit; 1301 Second Ave; Conway, SC 29526-5209.**

**October 22, 2012**

**Ronald Jarmuth**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**Petitioner, Pro Se**

RECEIVED
OCT 23 2012
McNAIR LAW FIRM, P.A.

# The Supreme Court of South Carolina

## ORDER

The following matters are dismissed pursuant to *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991), because no extraordinary reason exists to entertain them in this Court's original jurisdiction:

1. *Ronald Jarmuth v. The International Club Homeowners Association, Inc.* Petition for Writ of Prohibition and Mandamus dated October 2, 2012. Appellate Case No. 2012-213097.

2. *Catrell Davis a/k/a Kendell White v. State of South Carolina.* Letter to the Court received May 31, 2012. Appellate Case No. 2012-212949.

3. *Scott W. Hahn v. State of South Carolina.* Petition for a Writ of Mandamus dated September 28, 2012. Appellate Case No. 2012-213108.

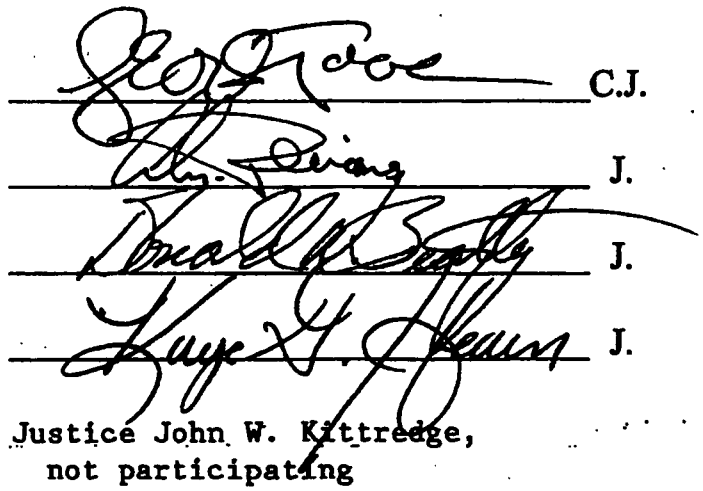
4. *Vincent Rice.* Letter to the Chief Justice dated October 3, 2012. Appellate Case No. 2012-213128.

5. *Christopher Williams, et al.* Petition dated October 10, 2012. Appellate Case No. 2012-213150.

6. *Ottis J. Smith.* Letter to the Clerk of Court dated October 10, 2012. Appellate Case No. 2012-213151.

7. *Ismail Dickerson.* Letter to the Court dated September 16, 2012. Appellate Case No. 2012-212976.

IT IS SO ORDERED.



C.J.

J.

J.

J.

Justice John W. Kittredge,
not participating

Columbia, South Carolina

November 1, 2012

CC: Henrietta U. Golding, Esquire
Alicia E. Thompson, Esquire
Ronald Jarmuth
Arthur Kerr Aiken, Esquire
Daniel Edward Johnson, Esquire
Catrell Devaun Davis
Scott W. Hahn
Vincent Rice
Christopher Williams
Otis J. Smith
Michael O'Brien Nelson, Esquire
Michael A. Timbes, Esquire
Ismail Dickerson

COPY


| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | CIVIL ACTION NO.: 09-CP-26-3596 |
| Ronald Jarmuth, ) | |
| ) | |
| Plaintiff, ) | |
| ) | |
| vs. ) | ORDER OF RECUSAL |
| ) | AND SENDING CASE |
| The International Club HOA, et al, ) | BACK TO CIRCUIT COURT |
| ) | |
| Defendants. ) | |

Plaintiff Ronald Jarmuth, a self-represented litigant, has made post-trial motions and has mailed several letters to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, with copies to defense counsel and the undersigned requesting that Judge John preside over all post trial motions in this matter instead of the undersigned who served as the trial judge. Specifically, Mr. Jarmuth makes what I consider to be unfounded and general accusations that this Court is biased against him and has committed other acts of misconduct in the trial of this matter. While not admitting any bias towards Mr. Jarmuth, and in fact, wholeheartedly denying any such bias and/or misconduct, this Court finds and concludes that it is in the interests of justice and judicial economy that I recuse myself from further involvement in this matter and that the matter be sent back to the Circuit Court for further proceedings.

I, THEREFORE, FIND AND CONCLUDE that this matter be referred back to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, for further proceedings in this matter.

AND IT IS SO ORDERED.

FILED
HORRY COUNTY
2012 OCT 17 PM 1:28
MELANIE HUGGINS-WARD
CLERK OF COURT

**EXHIBIT F**

RALPH P. STROMAN
Special Referee for Horry County

Oct 17, 2012

McNAIR
ATTORNEYS

August 20, 2012

Henrietta Golding

hgolding@mcnair.net
T (843) 443-3003
F (843) 443-9137

**VIA HAND DELIVERY**

Honorable Ralph P. Stroman
c/o Horry County Master-in-Equity's Office
1301 Second Avenue
Conway, SC 29526

Re: ***Ronald Jarmuth v. The International Club HOA, et al.***
**Civil Action No. 2009-CP-26-3596; and**
***Ronald Jarmuth v. The International Club HOA***
**Civil Action No.: 2010-CP-26-11320**

Dear Judge Stroman:

In accordance with your instructions, enclosed is the proposed Final Order submitted on behalf of the Defendants. All the facts set forth in the attached Final Order are supported either by an exhibit or exhibits or trial testimony. Initially I had inserted references to the exhibits numbers; however, normally Final Orders do not include references to exhibit numbers therefore I decided to remove the references. However, if you want the exhibit numbers referenced I will be glad to do so.

If you have any questions or changes relating to any matter(s) set forth in the enclosed proposed Final Order, please do not hesitate to contact me.

Yours truly,

**McNAIR LAW FIRM, P.A.**

Henrietta Golding

HUG/dmb
Enclosures
cc: Clients
Ronald Jarmuth
Email: ronaldjarmuth@hotmail.com

McNair Law Firm, P. A.
Founders Centre
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577

Mailing Address
Post Office Box 338
Myrtle Beach, SC 29578

mcnair.net

**EXHIBIT G**

**Ronald Jarmuth**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**
**ronaldjarmuth@hotmail.com**
**August 21, 2012**

**Honorable Ralph P. Stroman**
**c/o Horry County Master-in-Equity's Office 1301 Second Avenue**
**Conway, SC 29526**

**Re:** ***Ronald Jarmuth v. The International Club HOA*** **Civil Action No. 2009-CP-26-3596; and** ***Ronald Jarmuth v. The International Club HOA*** **Civil Action No.: 2010-CP-26-11320**

**Dear Judge Stroman:**

**Today I am in receipt of a copy of the Defendants' material which was submitted, as was mine (yesterday) in deference to your order from the bench on August 10, 2012 to submit a "Brief and Proposed Order". I observe that the Defendants' material lacks a Brief. This egregious non-complying omission I respectfully suggest should rule out consideration of what the Defendants did finally offer the Court in written form.**

**I am not arguing the contents of anything stated what in the Defendants filed as their final submission. It is my understanding that the opportunity to present evidence, cite to cases and law, and to argue a case opens and closes with the trial. There is clearly no opportunity post trial to contest any new matter raised post trial, and I am carefully not doing so.**

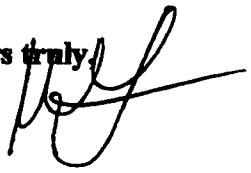
**That being said, it appears to me from reading the Defendants' material and considering mine that there are two entirely different visions of what was before the court at the trial – even as to what issues were or were not argued.**

**In anticipation of this I insisted (and provided the text) that the Consent Order of Reference explicitly provide that the IHOA Defendant (or more exactly, their insurance company) pay all the costs of the court reporter.**

**It is my suggestion that the Court utilize this opportunity to order the Transcript of the Trial from the Court Reporter at the (by consent) expense of the Defendant to resolve the question of exactly what was testified to, what issues were argued, what was included in the arguments, what cases and law were cited at trial, and what evidence was submitted either before or during the trial.**

**I simply do not recognize from being present at the trial much of what is in the Defendant's proposed Order, but at this point I believe it is for the Court and not me to make this determination.**

**Yours truly,**



**Ronald Jarmuth, Plaintiff Pro Se**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**cc: Defendants through counsel Henrietta Golding**
**hgolding@mcnair.net**

**RECEIVED**

AUG 2 7 2012

McNair Law Firm, P.A.

EXHIBIT I

**Evidence that Supports the Findings**

| Finding of Fact Supported by the Evidence | Evidence Supporting Finding of Fact |
|---|---|
| Para. 8: "With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration."<br><br>p. 23-24: "I find that the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments." | 1. Defendants' Ex. No. 4, The First Amendment:<br><br>Para. 2: "The Property set forth and described in Exhibit A, which is attached hereto and incorporated herein by reference, is hereby subjected to the Declaration. Such Property (the "Multifamily Parcel") is being conveyed by the Declarant to International Club Villas, LLC, a South Carolina Limited Liability Company. The Declarant hereby grants to International Club Villas, LLC, all of its rights contained in the Declaration to develop Multifamily Parcel and create thereon units and recreational amenities and subject such areas to Multifamily Associations."<br><br>Para. 4: "Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restriction on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel."<br><br>Para. 9: "The Declarant hereby waives all easement rights reserved in Article IV, Section 4.10, Section 4.11, Section 4.12, Section 4.16, and Section 4.17."<br><br>Para. 11: "The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25, and Section 7.31 of the Declaration."<br><br>2. Deposition of Ronald Scott Pyle:<br><br>p. 46, ll. 20-25:<br>Q. What did you mean by the word waive in the various parts of number one?<br>A. I'm sorry. What parts?<br>Q. In paragraphs 12, 11, 9, you use the word waives. What did you mean by the word waive?<br>A. That we waived it.<br><br>p. 47, ll. 1-22:<br>Q. What do you mean, can you give me a synonym<br>for the word waive, an alternative word with the |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence: | Evidence that Reasonably Supports Findings: |
|---|---|
| | same meaning and effect?<br>A. Can you give me one?<br>Q. Delete.<br>A. No.<br>Q. How is that different from deleted?<br>A. Because I think earlier in the document we actually deleted something, and we used the word delete.<br>Q. How is --<br>A. Isn't there a delete somewhere in the document?<br>Q. Yes, there is, in paragraph four.<br>A. So in paragraph four of section 3.7 of the declarations hereby deleted in its entirety. So deleted is completely different.<br>Q. What do you mean when you use the word waived?<br>A. Waive, to not apply in this situation. How about that, yeah, to not apply in this situation?<br>Q. That's fine. That's fine.<br><br>3. Testimony of Jeffrey King, Esq.:<br><br>p. 873, ll. 18-25<br>Q: One of the matters in question before The Court is whether a waiver in that amendment one is equated to deletion and I'm asking you, do you have anything to offer us regarding that question?<br>A: I'm familiar with the language you're talking about, and I'm not of the opinion that waiver deleted it for the entire subdivision.<br><br>p. 874, ll. 1-5<br>Q: And that's based upon what?<br>A: The -- an interpretation of the document under contract interpretation rules.<br><br>p. 875, ll. 24-25<br>A: 7.2 states that the -- or I'm sorry, this --there is a statement that Section 7.2 shall<br><br>p. 876, ll. 1-25<br>not apply to the developer or any designated builder unless specified to the contrary by the developer.<br>Q: Why then would he have to waive his own rights to something -- why would he have to waive an obligation which does not exist to him?<br>A: Because he was transferring that property to |

| Findings of Fact Supported by the Evidence | Evidence Supporting Findings of Fact |
|---|---|
| | another person who would be subject to that if he did not waive it.<br>Q: Who was he transferring the property to at that time?<br>12 A: I don't recall. It was being transferred to another owner, so that owner would want it to be waived so they wouldn't be subject to it.<br>Q: Doesn't it say or builder and doesn't amendment one and subsequent amendments grant all these subsequent builders to develop a status and doesn't it say that people develop a status only subject to this as well?<br>A: There is some language in some of these that grants other entities developer status as to their parcel, right.<br>Q: Given that, I'm still trying to figure out why the, the declarant of amendment one would use the word, "Waive," if it doesn't apply to the<br><br>p. 877, ll. 1-8<br>developer unless he meant it to apply to everybody in the covenants.<br>A: Because the lawyer for the entity buying the property wanted to make sure it was properly documented so they wouldn't have to explain that later.<br>Q: Do you have any factual basis for that?<br>A: Practice and fourteen years.<br><br>4. <u>Testimony of William Freiboth:</u><br><br>p. 893, ll. 20-25<br>Q: Okay. But the end result, we don't need to read it out, Mr. Freiboth, but the end result was which amendment to the Declaration waived the ARB requirements as to The Villas?<br>A: I believe it was the same one.<br>Q: The first one?<br><br>p. 894, l. 1, 15-18<br>A: Yeah.<br>Q: Other than Mr. Jarmuth, has any other homeowner ever contested the existence of the ARB, to your knowledge?<br>18 A: No. |

| Findings of Fact Plaintiff Alleges Are Not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | 5. Deposition of Rosemary Toth:<br><br>p. 30, ll. 12-25, p. 31, ll. 1-5<br>BY MR. JARMUTH:<br>Q. Paragraph 9, declarant hereby waives paragraph 11, the declarant hereby waives.<br>A. Okay.<br>Q. Paragraph 12, the declarant hereby waives.<br>A. And the declarant is who.<br>Q. Who do you think it is?<br>A. Who do I think it is? Was that a question, Mr. Jarmuth?<br>Q. Yes. Isn't that actually the developer?<br>A. I would think so.<br>Q. Who had the authority to amend the covenants at that time?<br>A. It would be the developer. And when you read this, to my eyes this reads specifically for the multifamily homes. Horizontal property regime is what I think of them in my mind. And this took away their obligation for having to deal with an ARB or parking, because their parking is different than single family homes. |
| Para. 8: "This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D., LLC, except that Plantation A.D., LLC continued as the owner of the roads and streets in the Community." | 1. Defendants' Exhibit No. 7, Second Amendment: p. 2, 1st para.1: "AND, D.R. Horton, Inc. acknowledges that Plantation A.D., LLC currently owns most of the roads and streets within the International Club P.U.D. and it is hereby agreed that Plantation A.D., LLC may at its option transfer title to said roads in the International Club Homeowner's Association or any successor property owner's association, at such time as Plantation, A.D., LLC deems appropriate."<br><br>2. Plaintiff's Ex. No. 556, Deed from Plantation A.D., LLC to DR Horton, Inc.: Plantation AD maintained ownership of roads in the Community, including a portion of International Club Boulevard. DR Horton acquired Tracts 2 & 3 as reflected on Plat Book 189 at Page 154, and later developed portions of those tracts as Pickering Drive and International Club Boulevard.<br><br>3. Defendants' Plat Ex. G, Plat of Tract 2 & 3 filed in Plat Book 189 at Page 154 |

| Findings of Fact Claimed Not Supported by the Evidence | Evidence Supporting Findings |
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| | 4. Plaintiff's Ex. No. 458, Plat of Tract "I-2" filed in Plat Book 169 at Page 116<br><br>5. Defendants' Plat Ex. A, Plat of 9.79 and 5.42 acres filed in Plat Book 158 at Page 155 |
| Para. 10: "In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowner." | 1. Plaintiff's Exhibit No. 316, Minutes of November 16, 2006 Meeting of Board: p. 2, VI.: "A motion was made by Mr. Flynn seconded by Mr. Knaffle to authorize the formation of a Transition Ad Hoc Committee comprised of seven (7) homes with the committee to be in for a four (4) month period commencing in January 2007, and further to adopt the Transition Committee Charter as presented...The motion carried unanimously."<br><br>2. Plaintiff's Ex. No. 318, Minutes of December 4, 2006 Special Meeting of HOA Board: p. 1, II: "Management stated that the sole purpose of this meeting is for the Board to appoint the Transition Committee members...After much conversation, a motion was made by Mr. Walsh, seconded by Mr. Knaffle to appoint the following individuals to the transition committee...Management will arrange a Transition Committee meeting after the First of the year to get the committee organized. The Board requested that all of their recommendations and/or reports be provided to the Board no later than March 31, (sic.) 2007. The Board stated that transition is currently scheduled to occur sometime in June."<br><br>3. Deposition of Rosemary Toth:<br><br>p. 43, ll. 13-24<br>Q. Wasn't the charter for the transition committee approved November 16, 2006?<br>A. Wasn't the what?<br>Q. The charter for the transition committee –<br>A. The charter.<br>Q. -- was it approved November 16, 2006 or thereabouts?<br>A. I have no idea.<br>Q. Didn't you join the transition committee in 2007? |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | A. Yes. I don't remember what charter date was. |
| Para. 10: "According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected." | 1. Plaintiff's Ex. No. 320, Minutes of September 19, 2007 Annual Meeting of HOA Members: p. 2, VI: "Pat stated that the primary purpose of the Annual Members' Meeting is to allow the Membership to elect the Directors of the Association. He reported that there will be 5 seats with staggering terms to be decided by the new Board. The candidates for these seats are..Ronald Jarmuth—249 Pickering Drive—Pebble Creek."<br><br>2. Plaintiff's Exhibit No. 334, Minutes of September 17, 2008 Annual Meeting of HOA Members: p. 2, VI: "Ms. Toth stated that the primary purpose of the Annual Members' Meeting is to allow the Membership to elect the Directors of the Association. She reported that there are two seats that will be expired at the end of this meeting...With that, Chairman Toth again announced the candidates for the seats as: ...Ronald Jarmuth, 249 Pickering Drive." |
| Para. 11: "By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection." | 1. Defendants' Ex. No. 5, HOA's contract with Waste Industries, Inc. signed May 31, 2001 by Kelly White Association Manager<br><br>2. Defendants' Ex. No. 3, Declaration:<br>p. 7, Section 3.1: "...The Association shall be authorized but not required to provide the following services: (k) To provide any and all services necessary or desirable in the judgment of the Board of Directors of the Association to carry out the Association's obligations and business under the terms of this Declaration. Specifically the Association shall have the authority and right to provide for garbage collection and cable TV services for each unit within the Subdivision and to assess each unit for the cost thereof."<br><br>3. Plaintiff's Testimony:<br><br>p. 139, ll. 19-25<br>Q: Is it not a fact that you, as a property owner in the International Club, you receive trash pickup service through this Defendant homeowners association, yes or no?<br>A: No. |

| Findings of Fact Improperly Asserted as Not Supported by the Evidence | Evidence Supporting Findings of Fact Challenged |
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| | Q: You do not receive any trash pickup?<br>A: From my understanding, if I explain, Waste<br><br>p. 140, ll. 1-3<br>Management has a contract with International Homeowners Association to pick up garbage cans. I never put my garbage can out.<br><br>4. Maureen Sullivan's Testimony:<br><br>p. 711, ll. 5-9<br>Q: Have you personally ever asked for the Waste Management service to be provided?<br>A: No. I was delighted to find out that they were included when we made the decision to move here. |
| Para. 12: "D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006." | 1. Defendants' Ex. No. 19, Right of Way Easement over portion of International Club Boulevard<br><br>2. Defendants' Ex. No. 20, Right of Way Easement over portion of International Club Boulevard and Pickering Drive<br><br>2. Plaintiff's Ex. No. 556, Deed from Plantation A.D., LLC to DR Horton, Inc.<br><br>3. Defendants' Plat Ex. G, Plat of Tract 2 & 3 filed in Plat Book 189 at Page 154<br><br>4. Plaintiff's Ex. No. 458, Plat of Tract "I-2" filed in Plat Book 169 at Page 116<br><br>5. Defendants' Plat Ex. A, Plat of 9.79 and 5.42 acres filed in Plat Book 158 at Page 155 |
| Para. 14: "On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with parties being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use turbine pumps and ponds to irrigate the Community Common Areas." | 1. Defendants' Exhibit No. 11, Golf Course Agreement dated October 3, 2003:<br><br>p. 3 (numbered 80), §5:<br><br>"**IRRIGATION.** HOA shall be entitled to tie into the Golf Course's irrigation system and use the water and pumping system for the purpose of irrigating the main entrance, amenities site, and International Boulevard in the International Club for a period of four (4) years beginning at the effective date of the agreement. HOA shall pay to the Golf Course the amount of One Hundred and Fifty and no/100 ($150.00) Dollars per month |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | during this period for the sue of such system and water used. If for any reason, the HOA is no longer able to use said water and pumping system or said water and pumping system becomes inoperable, then HOA shall no longer be required to pay monthly fee stated herein."<br><br>p. 3 (numbered 80), §6:<br><br>"**REAL PROPERTY.** Within seven (7) days of this Agreement, the Golf Course shall convey the real property described in the attached Exhibit 'A', free and clear of all liens to the HOA. This conveyance shall be evidenced by a General Warranty Deed with property stamps affixed thereto and recorded in the records of the ROD for Horry County."<br><br>p. 4 (numbered 81), § 7:<br><br>"**PONDS.** Within ninety (90) days of this Agreement, the Golf Course shall convey a recordable, perpetual, nonexclusive, assignable easement to the HOA for maintenance and repair of the two Ponds at the International Clubhouse Entrance, with shall included enlargement and excavation, all as more particularly described in the attached Exhibit 'B'."<br><br>2. Defendants' Ex. No. 12, Minutes of January 13, 2004 HOA Board Meeting:<br>p. 2, IV(E):<br><br>"Water Usage Contract: Chairman Brown stated that the agreement between the International Club Property Owners Association and the International Club Golf Course has been executed. An executed copy will be mailed to the Association office."<br><br>3. Defendants' Ex. No. 16, General Warranty Deed from Golf Course to HOA recorded in Deed Book 2771, Page 1480 |
| Para. 15: "In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community. These properties, as well as other | 1. Defendants' Ex. No. 54, Quit Claim Deed from DR Horton to HOA filed in Deed Book 3406 page 1694 on June 19, 2009<br><br>2. Testimony of William Freiboth: |

| Findings of Fact Which Allegedly Support the Verdict | Evidence Which Allegedly Supports the Finding |
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| areas in the Community, are landscaped by the Defendant HOA. The Defendant HOA irrigates these Common Areas with water provided by the Golf Course." | p. 918, ll. 18-24<br>Q: And what did the Association do with that land before it granted the easement to Central Electric Power?<br>A: That's really our front entrance and we landscape it quite extensively.<br>Q: And who now landscapes that property?<br>A: We do.<br><br>p. 938, ll. 8-13<br>Q: Now, if the irrigation -- paragraph five provides irrigating this area, a relatively long stretch of road, which was owned by D.R. Horton, who benefited by the irrigation portion of that agreement?<br>A: I, I believe that there would be three parties.<br><br>ll. 20-25.<br>20 A: The first, obviously, the perspective homeowners would benefit, as they do today now that we -- that people resell; second, the owners who live here and want a beautiful entrance, a grand entrance, would benefit; and third, the commercial golf course that pays us a lot in<br>p. 939, ll. 1-4<br>assessments, that's their main entrance, that's what their customers are going to see when they come. The Villas and Cambridge are right on that street. |
| Para. 17: "The Amenity Center is maintained by the Defendant HOA for its members who have a single family subdivision or who live in a multi-family development that does not have separate amenity facilities. According to Section 6.5 of the Declaration, members in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA."<br><br>Para 18: "One neighborhood in the Community is a development known as the Glens. The Glens is a townhome community. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as | 1. Defendants' Ex. No. 3, Declaration:<br>p. 15, Article VI, Section 6.5:<br><br>"Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) and may be collected on a monthly, quarterly or annual basis, except that the Developer shall have the right, at its sole discretion, to create multi-family associations within the subdivision which will contain separate amenities. In such case the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."<br><br>p. 3, Article I, Section 1.18:<br><br>"**Multi-Family Area** shall mean and refer to any portion of the Subdivision **designated as such by the Developer** in which common elements are |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Finding |
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| paid the assessments for use of the Amenity Center, because the Glens does not have a separate amenity facility." | owned by either the Owners or Units in such Multi-Family Area as tenants in common or by the Multi-Family Association composed of such Owners pursuant to the Horizontal Property Regime or other multi-family legal structure within the Subdivision..." (emphasis added).<br><br>2. Testimony of Maureen Sullivan:<br><br>p. 658 ll. 10-21:<br><br>Q. Are you a homeowner in the International Club?<br>A. Yes I am. I live in the Glens.<br>Q. And have you ever been on the Board of the Homeowners Association?<br>A. Yes, I have.<br>Q. And that's the International Club Homeowners Association?<br>A. Yes, as well as the Glens Homeowners Association.<br><br>p. 662, ll. 22-25, p. 663, ll. 1-13<br><br>Q. And as a homeowner in the Glens, do you have access to any of the amenities at the International Club?<br>A. Absolutely. We are considered to be the same rights and obligations, financial obligations, as single-family owners.<br>Q. Have you paid assessments to the Homeowners Association for the use of the amenity center?<br>A. Absolutely. We we pay two sets of assessments to the Glens. We have one to the Glens Homeowners Association, which takes care of the irrigation and maintenance and reserve funding for those items in the Glens. We also pay the Master Association for the right to use the amenity center, the pool, the landscaping, all other Master Association expenses.<br>Q. I am giving you what has been marked as Defendants' Exhibit Number 14. Can you identify that for the record?<br>A. Yes. This is the marketing material that was provided to us by D.R. Horton when we came to visit the Glens, my husband and I, in the spring of 2005, and it identified that we would have the right to use the pool and the amenity center, and it identified us as single-family attached townhomes |

| Findings of Fact Not Supported by the Evidence | Citations to Record Demonstrating Findings Not Supported by the Evidence |
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| | with fee simple ownership.<br><br>p. 667, ll. 3-10<br>Q: Ms. Sullivan, I'd like to compliment you to start with on the gracious behavior Mr. Butryn stated, but looking on to other pertinent issues, you said the seller, D.R. Horton, made representations to you about your eligibility to use the amenity center. When did you buy the house from Horton?<br>A: We bought -- we closed in September of 2005.<br><br>p. 699, ll. 12-14<br>A. ...I brought along something that I had enacted as President of The Glens Homeowners Association... |
| Para. 19: "Plaintiff utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012." | 1. Testimony of Maureen Sullivan:<br><br>p. 664, ll. 16-25<br><br>Q. And have you ever seen Mr. Jarmuth at the socials at the amenity center?<br>A. Yes, I have. I have seen him at the First Friday socials back in 2009, at ice cream socials, with I am assuming, family members, children, at the pool.<br>Q. What about in 2010 and 2011?<br>A. I believe it was in the summer of 2011 that Mr. Jarmuth was at the pool with some young children, I assume, with family members.<br><br>2. Deposition of Rosemary Toth:<br><br>p. 49, ll. 6-9<br><br>BY MR. JARMUTH:<br>Q. Didn't I personally bring that to your attention at board meetings?<br>A. You probably did. I can't remember whether it was you or anyone else.<br><br>3. Plaintiff's Ex. No. 355, Minutes of March 12, 2009 Board Meeting: p. 1, III: "Homeowner Ronald Jarmuth announced that he had sent a letter of 15 questions to the Board along with proposed Ethics. He made a motion to enforce Robert's Rules of Order. Attorney O'Dea noted that this motion is improper in this setting (Board meeting)." |

| Findings of Fact Plaintiff Alleges Are Not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | 4. Defendants' Ex. No. 25, Warranty Deed from Cheryl Essex to Ronald Jarmuth filed October 23, 2006 in Deed Book 3178 at Page 180<br><br>5. Defendants' Ex. No. 30, Email from Ronald Jarmuth to Beckie Abel dated June 23, 2008: "On the web blog I mentioned that the light in the club house men's room has been burned out for some time and that the shower control is not working properly."<br><br>6. Deposition of Peter Pizzi:<br><br>p. 1, ll. 10-15<br><br>DEPOSITION OF: PETER PIZZI<br>DATE: Tuesday, March 27, 2012<br>TIME: 9:55 a.m. through 11:00 a.m.<br>LOCATION: International Club Amenity Center, 1551 International Club Boulevard, Murrells Inlet, South Carolina<br>TAKEN BY: Attorneys for the Plaintiff(s) |
| Para. 22: "...Further, the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners." | 1. Testimony of Beckie Abel:<br>p. 1001, ll. 13-25<br>Q: You've heard testimony about a members list. Do you recall the communications Mr. Jarmuth sent to you asking for members' information?<br>A: Yes. I think it was around election time, and he wanted members' information. I provided him a list that just provided the names of the homeowners and their International Club address. I -- because of the Privacy Act, we're not allowed to give out phone numbers and email addresses without that homeowner's approval.<br>Q: Did Mr. Jarmuth ask for the emails and the personal phone numbers of all the members in the International Club?<br>p. 1002, ll. 1-6<br>A: He did.<br>Q: And was there a letter sent to Mr. Jarmuth, saying that he was asking for too much information with respect to the emails?<br>A: I can't remember if there was a letter, but there was communication.<br><br>p. 1013, ll. 1-5<br>In 2009, you require a voter list which included mailing addresses, telephone numbers, and also |

| Findings of Fact Claimed Not Supported by the Evidence | Evidence Relied Upon to Support Claim |
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| | arrears status. This was information that we were not going to provide to you because the attorney recommended it.<br><br>2. Testimony of Maureen Sullivan:<br><br>p. 680, ll. 24-25<br>Q: Have you ever in your capacity as a Board member had occasion to ask K.A. Diehl for a<br><br>p. 681, ll. 1-<br>list of members?<br>A: No, it was on the website. We have a community directory on the website, so it was right there. If I needed to know where, you know, someone on Seville Drive, you know, there was someone on Seville Drive, I knew their name, but I didn't know their number, I wanted to send them a Christmas card, I could go to the community directory on the website and I could put in either the street and get all the list of the people on the street or I could put it in by name and get their address, so it was all there. I had no reason to ask K.A. Diehl to provide me with a list, I had access to a list as a homeowner.<br><br>3. Defendants' Ex. No. 35, Email from Beckie Abel to Ronald Jarmuth dated August 8, 2008:<br>"In the interest of saving money, I am emailing you the resident telephone directory for the owners that we currently have in our system." |
| Para. 24: "...The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010." | 1. Testimony of William Freiboth:<br><br>p. 932, ll. 8-19<br>Q: Let's talk about those returned benefits to the homeowners. What do you mean by the returned benefits?<br>A: Well, the, the front entrance was, was our property. We, we granted an easement and got some money and -- as a benefit of that sale and we returned some of the money to the homeowners.<br>Q: Is that the fifty-five thousand so dollars you sent to the homeowners at seventy-five dollars a head?<br>A: I think it was fifty thousand, and it was seventy-five, yeah.<br><br>2. Testimony of Maureen Sullivan: |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | p. 704, ll. 6-17<br>Q: And what was the justification of distributing to each homeowner seventy-five dollars?<br>A: We felt that was a fair amount. We felt that--we looked at different ways to accomplish this. We could've just given a credit to every homeowner's account, but you're not really feeling that, you know, it's one thing to get a check for seventy-five dollars and go to the mall and buy your kids' a new pair of sneakers or go out to dinner. A credit on the account, we didn't know would have the same impact. |
| Para. 26: "In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set be installed on the side of Plaintiff's home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission when it issued its determination of no reasonable cause on December 11, 2009." | 1. Defendants' Ex. No. 58, Jarmuth's Application for Swing Set in Side Yard dated July 21, 2009<br><br>2. Defendants Ex. No. 59, Notice of Disapproved Request from ARB dated August 5, 2009 to Jarmuth for Swing Set<br><br>3. Defendants' Ex. No. 60, Email from John White to ARB members dated August 5, 2009: "The ARB has reviewed an application from Mr. Ronald Jarmuth. This application was to request the installation of a childrens swingset...Every existing swing set was located in the rear of homes. The installation of a swingset on the side of a home which is visible to the street and infringes on other homeowners enjoyment of their property is prohibited."<br><br>4. Defendants' Ex. No. 63, SC Human Affairs Commission Determination of No Cause dated December 11, 2009<br><br>5. Testimony of William Freiboth:<br><br>p. 895, ll. 22-25<br>Q: And is that application requesting that the swing set be set on the side of Mr. Jarmuth's house?<br>A: "To be erected on the right side of my house."<br>Q: And was that application approved?<br><br>p.896, ll. 1-10<br>A: I believe it wasn't.<br>Q: And why?<br>A: I believe that we don't approve applications on the side of the house. |

| Findings of Fact Plaintiff's Allegations Supported by the Evidence | Evidence Tending to Support Findings |
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| | Q: Look at Exhibit 59.<br>A: Okay. It was, request denied based on it being on the side of the home visible from the street and, and, and infringing on the homeowners enjoyment of their property, and that they don't do that for other homes.<br><br>6.Deposition of William Freiboth:<br><br>p. 109, ll. 2-25<br>Q. And hasn't the HOA, through some entity, approved a swing set on the right side of a house owned by Robert Sobczyk, S-o-b-c-z-y-k?<br>A. It's my understanding, because I was then on the board, that a swing set was approved, but it was inspected and judged in that site to be at the rear of the house. Right, left is not -- rear is what we looked at.<br>Q. Isn't that house the same floor plan as my house?<br>A. The house doesn't have the same siting at all.<br>Q. Is it the same floor plan?<br>A. Don't know.<br>Q. And isn't that swing set along -- adjacent to the bedrooms, where mine was supposed to be?<br>A. Again, all I can say is that it was viewed as being in the rear of the property, not easily seen from the street, if at all.<br>Q. Is it your statement that you can't see that swing set clearly from the street?<br>A. I would say that the person driving by wouldn't notice it if it was placed where it was supposed to be.<br><br>7. Deposition of Rosemary Toth:<br><br>p. 104, ll. 22-25<br><br>Q. You wrote to the South Carolina Human Rights Commission that the covenants do not allow swing sets in side yards. Is that exclusion part of the covenants?<br>A. You know, without the covenants in front of me, I can't remember, Mr. Jarmuth. But I want to state that every case has always been taken on case-by-case basis. I have never seen any<br><br>p. 105, ll. 1-25, p. 106, l. 1 |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | prejudice at the ARB level, ever, whether it be youor anyone else. But there are no swing sets in thecommunity that are located in a side yard visiblefrom the street, given permission or --<br>Q. Are you aware of the swing set erected by Robert S-O-B-C-Z-Y-K?<br>A. Robert Sobczyk, yes.<br>Q. And isn't it a fact that it's visible from the cul-de-sac on which his house is located?<br>A. Not to my knowledge.<br>Q. Isn't it a fact that's on the same side of his house relative to where I proposed to put my swing set?<br>A. Every decision is made on a case-by-case basis. And the positioning of his home on his lot is totally different than your home on your lot. His is, for all intents and purposes to the common man, to the back of his house because it's the back side. And you can't see it from the street and you can't see it from the back, even. I mean, there's woods back there, trees. |
| Para. 27: "In the fall 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/stone addition to his side yard along the property line. The Defendant ARB issued a Notice Violation requiring the Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation...Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation." | 1. Defendants' Ex. No. 82, Violation Notice No. 1 to Jarmuth from Julie Case on behalf of International Club HOA for brick stone addition to side yard dated September 27, 2010<br>"Please be advised the following covenant violation has been noted at your residence for which a $50 fine has been added to your association account in accordance with the ARB Guidelines...This violation requires: Please submit an application for the exterior modification of the landscape be with curbing as well as the brick/stone addition to your side yard."<br><br>2. Defendants' Ex. No. 83, Jarmuth's application for the fence and brick foundation dated September 30, 2010 |
| Para. 28: "The Plaintiff has refused to remove the brick foundation as required by the Defendant HOA, and as a result, he is being fined $100.00 a month. The Plaintiff has refused to pay the monthly fine and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00." | 1. Trial Testimony of William Freiboth:<br>p. 903, ll. 8-24<br>Q: Now, as a result of the Board of Directors affirming the disapproval issue by the ARB, was any fines assessed to Mr. Jarmuth?<br>A: He would have the -- as specified in the Architectural Guidelines, he would have a hundred dollar a month fine, which is separate from his original fine, which was install -- starting a project |

| Findings of Fact Which Are Not Supported by the Evidence | Evidence Which Does Not Support Findings |
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| | without prior review of the plans.<br>Q: Now, you said that there was a brick foundation.<br>A: Yes.<br>Q: Was there a ruling by the ARB that the brick foundation had to be removed?<br>A: There was, and it was an integral part of his fence project, and we asked that it be removed.<br>Q: And was that in the ARB notice to Mr. Jarmuth that he needed to remove the brick foundation?<br>A: Yes, it was.<br><br>p. 904, ll. 7-9, 13-22<br>Q: And to date, has Mr. Jarmuth removed that brick foundation in his yard?<br>A: No, he's refused.<br>Q: As a result of Mr. Jarmuth not removing that brick foundation, has the Homeowners Association assessed any fines?<br>A: Yes, we have.<br>Q: And what are the fines that had been assessed against Mr. Jarmuth?<br>A: Well, the fifty dollar plus the hundred dollar a month. I don't think I have the right number in front of me, but it's about twenty-three hundred dollars at this point.<br><br>p. 907, ll. 15-18<br>Q: And how much in fines does Mr. Jarmuth owe today for failing to abide by the ARB directives?<br>A: Two thousand, three hundred and twenty-six dollars. |
| Para. 30: "The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorney's fees to seek Plaintiff's compliance with the Declaration." | 1. Defendants' Ex. No. 62, Check from HOA to McNair Law Firm P.A. in the amount of $2,500:<br><br>2. Defendants' Ex. No. 79, Check from HOA to McNair Law Firm P.A. in the amount of $2,500:<br><br>3. Testimony of William Freiboth:<br><br>p. 907, l. 25<br>Q: Now, in addition to the Association paying two<br><br>p. 908, ll. 1-5<br>thousand, five hundred dollars to enforce the swing set regulations, did the Association also have to pay two thousand, five hundred to enforce the covenants in this action?<br>A: Yes, we did. |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | p. 909, ll. 9-13<br>Q: So how much in attorney's fees has the Homeowner's Association paid to the McNair Law Firm to enforce the covenants with respect to Mr. Jarmuth?<br>A: With those two checks, five thousand dollars. |
| p. 10: "The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer." | 1. Defendants' Ex. No. 105, Articles of Incorporation for HOA filed by Ken Grover<br><br>2. Deposition of Ronald Scott Pyle:<br><br>p. 7, ll. 16-22<br>Q. What is the relationship between Plantation A.D., Suntech Management and ABD?<br>A. As I said before, ABD Development, Inc. was a member of Plantation A.D., LLC of which I am the president of ABD Development. Suntech Management, Inc. for a season was the management company for Plantation A.D., LLC.<br><br>p. 28, ll. 9-17<br><br>Q. This is from Plantation A.D. by Suntech Management, Inc. At the time were you an officer of Suntech Management, Inc.?<br>A. I was.<br>Q. Do you recognize who the vice-president of Suntech was at the time?<br>A. I do.<br>Q. Who was that, please?<br>A. Ken Grover. |
| p 17: "William Frieboth testified that the funds were collected in accordance with the agreement. As a result, I find that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement." | 1. Testimony of William Freiboth:<br>p. 916, ll. 10-24<br>Q: Now, have you reviewed the accounting records of the Homeowners Association to determine if the golf course has paid all the assessments due to the Homeowners Association?<br>A: Under the golf course agreement, yes.<br>Q: And has the homeowner, excuse me, has the golf course paid all the assessments that are due to the Association?<br>A: Yes.<br>Q: There was reference to a lawsuit that was brought for collection of assessments. Has that lawsuit been resolved with the golf course?<br>A: Yes. |

| Findings of Fact Plaintiff Alleges [illegible] Supported by the Evidence | [illegible] |
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| | Q: And that was just recently, within the last week?<br>A: Yes.<br><br>1. Defendants' Ex. No. 99, TOPS Financial Transactions for the Golf Course July 31, 2002 through December 17, 2010<br><br>2. Defendants' Ex. No. 100, Jenark Resident Transaction Report for International Club, LLC, Golf Course, December 31, 2010 through the present<br><br>3. Defendants' Ex. No. 101, Summary of International Golf Course Accounting Records |
| p. 23: "Additionally, the Horry County Zoning Department has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would conflict with the covenants." | 1. Defendants' Ex. No. 92, Letter from Janet Carter dated September 13, 2011:<br><br>para. 4: "Horry County does not enforce the HOA's covenants and restrictions, but we do our best not to issue permits that would be in conflict with any HOA Covenants and Restrictions when we are made aware of such restrictions in advance." |
| p. 29: "Also, the President of the HOA testified that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA." | 1. Testimony of William Freiboth:<br><br>p. 900, ll. 19-25<br>Q: Now, there was previous discussion or evidence introduced with respect to other fences that are in the International Club subdivision. Do you recall that testimony?<br>A: Yes.<br>Q: Now, with respect to other fences and the photographs that were introduced, are those<br><br>p. 901, ll. 1-9<br>privacy fences?<br>A: Privacy fences around a deck.<br>Q: Are privacy fences permitted in the covenants?<br>A: Yes, they are.<br>Q: Now, was there also photographs of a fence around the property line at one location?<br>A: Yes.<br>Q: And was that fence in existence before 2005? |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | A: Yes.<br><br>2. Deposition of Rosemary Toth:<br><br>p. 83, ll. 12-24:<br><br>Q. Isn't it a fact that the first house there on the left at the corner has a rear yard fence which goes along Pickering, back through the property line, along Castle Bridge, back to the rear property line, across a entire rear property line, and then back towards Pickering along the left property line?<br>A. That fence is there, and it was put in by the developer, Charles Flynn. Any fence that you see in the development that doesn't follow the guidelines as we know them, if you look, they were put in by the developer long before I had anything to do with it. |
| p. 30: "Beckie Abel, the Defendant HOA's property manager, testified that the ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. No until his applications for a swing set and subsequently his 6 foot fence were denied did he claim the ARB waived its right to enforce Article VII." | 1. Testimony of Beckie Abel:<br><br>p. 999, ll. 24-25<br>Q: Are you familiar with the ARB of the International Club Homeowners Association?<br>p. 1000, 1-9<br>A: I am.<br>Q: How long has that entity, the ARB, for the International Club been in existed?<br>A: I believe, also, it was – it started in 2002.<br>Q: And since 2002 to the present, can you quantify the number of applications that the ARB has processed through those many years?<br>A: It must be in the thousands by now, probably around fifty or sixty a year.<br><br>2. Defendants' Ex. 71, Approval of Palms<br><br>3. Defendants' Ex. 78, Approval of Bench<br><br>4. Defendants' Ex. 85, Approval of Flower Bed |
| p. 31: "Plaintiff's proposed fence was denied because it was to be situated in the front yard and close to the property line." | 1. Testimony of William Freiboth:<br><br>p. 900, ll. 1-9<br>Q: And why was this, Mr. Jarmuth's request to install the fence with a brick foundation, why was that denied?<br>A: Direct conflict with the covenants. |

| Findings of Fact Supported by the Evidence | |
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| | Q: And what was the direct conflict with the covenants?<br>A: I believe that we wouldn't install anything, any permanent structure within the, within the side setback.<br><br>p. 901, ll. 10-20<br>Q: Was there also fencing -- other than that one fence, do you have knowledge of other fences in this six hundred plus lot unit community being on the sidelines, on the boundary lines?<br>A: No.<br>15 Q: With respect to fences in the front yards of the units in International Club, are those permitted?<br>A: No.<br>Q: To your knowledge, are there any fences in the International Club community in the front yard?<br>A: To my knowledge, no.<br><br>2. Defendants' Ex. No. 83: Plaintiff's Application for fence<br><br>Plaintiff admits in his Post-Trial Motions that "some of it was in the front yard." Exhibit "A", p. 40. |
| p. 31: "The ARB is the body that determines the fines and their assessment." | 1. Testimony of William Freiboth:<br><br>p. 892, ll.15-21<br>Q. And what is the responsibility of the ARB?<br>A. The ARB has the authority to look at--, to write, and, and enforce architectural guidelines, homeowners submit external modification requests to the ARB. So they can write and enforce, they can do their own procedures, and, and other matter related to their scope.<br><br>p. 953, ll. 5-14<br>Q: Now, in conjunction with this fence business, is it your contention that I'm getting a fine because I never bothered to appeal this decision?<br>A: You're getting a fine because you refuse to remove it and you cited that we weren't an entity that had any authority over it, nor did the ARB. It's still there and all we're doing is enforcing the Architectural Guidelines that have been there -- that aspect has been there since the earliest guideline available. |

| Findings of Fact Plaintiff Alleges Are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | p. 963, ll. 6-25<br>A: We're actually arguing about the wrong part of the covenants as I told you once before. This is a procedure for the Board of Directors, not the Architectural Review Board. We're wasting time on this. The actual applicable statement for the Architectural Review Board is in 7.2 of the covenants. It's not in the bylaws. It's in the covenants and the actual applicable statement, which this is, "Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to the Architectural Review Board and owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder." You're misconstruing Section 13 as, as the -- for the Architectural Review Board. It's for the Board of Directors, and it would override the authority given to the Architectural Review Board in the covenants if<br>you construed it that way.<br><br>2. Defendants' Ex. No. 80, Architectural Guidelines:<br>p. 1, Section I, para. 1: "The Architectural Review Board ("ARB") is appointed by the Board of Directors of International Club for the purposes of ensuring the compatibility of design among the single family and multifamily homes..."<br><br>p. 8, Section (V)B:<br>"Penalties/Fines—Architectural Guideline Violations<br>1. Failure to submit a required modification request up to $50.00 per occurrence or modification...<br>2. Failure to submit a required modification request within two weeks after being fined per VB.1 above up to $100.00 per month until the modification is submitted and approved.<br>3. Installations that are not in compliance with the approved plan will result in a fine of $100.00 per month until it is in compliance win an approved submission." |
| p. 32: "Also, to comply with Plaintiff's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a | 1. Plaintiff's Testimony:<br><br>p. 795, ll. 23-25<br>At a March 6, 2012 ARB, ARB meeting referred to |

| Findings of Fact Asserted to be Supported by the Record | Citations to Record Supporting Findings |
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| deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application." | in my Plaintiff's 643, two ARB members were present. That may be a<br><br>p.796, ll. 1-6<br>problem with the quorum. One is the husband of co-Defendant Rosemary Toth, another problem with proceeding, who has clearly a conflict of interest on, on this ARB approval process. One other person refused to identify himself, also present...<br><br>2. Testimony of William Freiboth:<br><br>p. 906, ll. 20-25<br>Q: And what is Exhibit 97?<br>A: It's a letter to Mr. Jarmuth from one of our assistant -- our assistant manager.<br>Q: And what's the date of that letter?<br>A: March 16th, 2012.<br>Q: And what is the purpose of the letter?<br><br>p. 907, ll. 1-12<br>A: It's to inform Mr. Jarmuth that the -- that ARB has deferred consideration until his present ARB violation is remedied by removing the brickwork and that his account needs to be brought current.<br>Q: And is that deferring the consideration with respect to the request he made for the palm tree in February of 2012?<br>A: Yes.<br>Q: And to your knowledge, did Mr. Jarmuth appeal that letter, decision of deferral? Did he request an appeal to the Board of Directors?<br>A: Not to my knowledge. |
| p. 32: "Plaintiff was informed that he could appeal but he specifically chose not to appeal." | 1. Testimony of William Freiboth:<br><br>p. 902, ll. 13-25<br>Q: Now, to your knowledge, did Mr. Jarmuth appeal the denial of the fencing to the Board of Directors?<br>A: No. I expected him to, and he never did.<br>Q: And as a result of Mr. Jarmuth not appealing the denial of the fences, was he entitled to any type of hearing by the Board of Directors?<br>A: We expected, after his denial, that he would want to have a hearing, and in the denial letter, it, it literally said, "That your fence is denied unless you successfully appeal this denial to the Board of |

| Findings of Fact Plaintiff Alleges are not Supported by the Evidence | Evidence that Reasonably Supports Findings |
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| | Directors." So I was expecting there, there would be an appeal.<br><br>p. 904, ll. 10-12<br>Q: And did Mr. Jarmuth appeal the request by the ARB that he remove the foundation?<br>A: No.<br><br>2. Defendants' Ex. No. 87, Plaintiff's letter to the Board of Directors dated October 11, 2010:<br><br>p. 3, para. 4: "I reserve my right to take parallel recourse at law or in equity, since by disputing the authority of the HOA in this matter I am disputing the necessity of an 'Appeal'." |

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>Ronald Jarmuth<br>Plaintiff<br><br>vs.<br><br>The International Club Homeowners Association, Inc., et al<br>Defendants | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br><br>Civil Action No. 2009-CP-26-3596<br>consolidated with<br>Civil Action No. 2010-CP-26-11320<br><br>PLAINTIFF'S POST-TRIAL BRIEF SUPPORTING PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION RULE 50, RULE 52, RULE 59, RULE 60 |

# BRIEF SUPPORTING PLAINTIFF'S POST-TRIAL MOTION FOR RELIEF

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1. A Memorandum summarizing Plaintiff's September 19, 2012 post-trial motion is attached and incorporated by reference, said motion seeking and stating the grounds for relief from the Special Referee's September 10, 2012 order.

APPLICABLE THRESHOLD OF PROOF

2. The applicable standard and threshold of proof which Plaintiff has to meet is very low:

a. That it is more likely than not that the facts are favorable to Plaintiff.

b. That if ambiguity exists it must be resolved in favor of the Plaintiff, in favor of the free use of property, and likewise against a developer or Declarant'.

> "[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken et al, S
>
> "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902
>
> "Deed restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land." -- Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dism'd); *Davis v. Huey,* 620 S.W.2d 561, 565 (Tex. 1981).
>
> "Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." -- Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).
>
> ... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later

developed been foreseen by them at the time when the restriction was written. - Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007.

c. The burden is on the defendant to prove the satisfaction of all elements of contracts at issue Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588 (1948): and every one of the essential elements must be proved Cash v. Maddox, 265 S.C. 480, 220 S.E.2d 121 (1975): (1) capacity; (2) statute of frauds ([i] identify what is contracted; [ii] identify the parties to the contract; [iii] state that it is a contract for goods or services; [iv] state with absolute certainty all the essential terms of the agreement. "Every essential element must be expressed in the writing for the contract to meet the Statute of Frauds" Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975)) ; (3) acceptance of terms; (4) consideration ["In order that there may be consideration, there must be mutual concessions." Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961)].

d. Where the terms of a covenant or a contract are contradicted by the language of a statute, even where the contract is freely entered, the contract is void: Statute of Frauds in the Conflict of Laws / Basic Rule of Validation: " validating or invalidating LAW is always given preference by the courts over the intent of the parties stated in a written document." – Restatement Second Conflict of Laws.

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## DECLARATORY JUDGEMENT

**Covenants and Conduct Pre-empted by Statute**
**Declaratory Judgment Demanded in Complaint**

3. The Covenants do not apply to Pebble Creek because they were not effective as a matter of law unless filed and indexed prior to the sale of Pebble Creek by Plantation AD and because Plantation AD had no equitable interest in Pebble Creek when Plantation signed and filed the Covenants.

a. Law.

SC 30-07-010 Recording Essential to Validity Pl #209
All deeds of conveyance of lands, ... or charging or encumbering it,
... all contracts for the purchase and sale of real property, ...
... generally all instruments in writing conveying an interest in real estate required by law to be recorded ... are valid so as to affect the rights of subsequent creditors ... or purchasers for valuable consideration without

**notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court ...**

**30-7-20 .Manner and form of recordation of contract affecting... real property. The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, ... shall be upon the record of the recorded mortgage or other written instrument ... giving the names of the parties thereto and the date and the book and page where such instrument is recorded. Pl #262**

**30-9-10 Indexes to records of registry. To the records of the registry, reference shall be had by means of two indexes, both containing the year of registry, names of parties, record and page, the alphabetical arrangement of one being according to the names of the parties who executed the writings and of the other according to the names of the parties to whom they were executed.**

**30-9-30. Filing of written instruments concerning real or personal property; false or fraudulent documents.**
**(A) ... each clerk of court ... in this State shall keep a record, in the office in which he files all conveyances, mortgages, judgments, liens, contracts, and papers relating to real and personal property required by statute to be kept by him, by entering in the record the names of the grantor and grantee, ... or other parties to the written instruments, date of filing, and nature of the instrument immediately upon its lodgment for record. The filing is notice to all persons, sufficient to put them upon inquiry of the purport of the filed instrument and the property affected by the instrument. ...**

**30-9-40 Requirement and effect of indexing of instruments filed for recording.**
**The register of deeds or clerk of court ... shall immediately upon the filing for record of any deed, mortgage, or other written instrument ... enter it upon the proper indexes in his office, which constitute an integral, necessary, and inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever, ...**
**The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record, but the recordation of a deed, mortgage, or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes.**

**The Restatement Third of Servitudes states that when a covenant is imposed it most be in writing and final form and to be enforceable proven that the document presented was**

**the document agreed to at sale. The Covenants fail at this point.**

**b. Facts.**

**(1) Plantation AD LLC sold Pebble Creek, where Plaintiff's house is situated, to Sunbelt Associations on January 29, 1999 Pl #543. The deed was notarized ("Probate") that same day and payment was rendered that day. On that day there were no covenants or other restrictions of record filed in the office of the Clerk of Court for Horry County applicable to Pebble Creek – nor to the larger area of the Murrells Inlet Golf Plantation ("MIGP") from which Pebble Creek was carved. There is no evidence or testimony that Plantation AD had created any draft covenants for MIGP. While the deed to Pebble Creek states that Pebble Creek "is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation", there were no such covenants or restrictions at the time. The sentence in the deed goes on to say "which are recorded in Deed Book _____ at Page _____" but these blanks, which must be complete as a matter of law (if such covenants, were they to exist, are to apply per the Statute of Frauds) are blank – because on January 29, 1999 there were no such covenants or restrictions.**

**(2) On February 8, 1999, ten days after Pebble Creek had been sold, R. Scott Pyle filed a set of Covenants for MIGP with the Recorder of Deeds at Deed Book 2117 Page 1353. They were never indexed to Pebble Creek, which on February 8, 1999 was no longer part of Plantation AD's Murrells Inlet Golf Plantation.**

**(3) Sunbelt, the owner of Pebble Creek as of January 29, 1999, never took any act to ratify the Plantation AD covenants and never filed or indexed Plantation's covenants to Pebble Creek.**

**(4) As is discussed in the next section, at the time of filing the Covenants themselves never subjected any land to it's terms.**

**(5) The "Declaration" of the Covenants explicitly states that the area which could be subjected to the Covenants (Pl #547) did not immediately subject any land in MIGP to the covenants but that individual areas of MIGP "may, in Developer's sole discretion, ... by subsequent amendment hereto, may be subjected to this Declaration". This is the view adopted by Defense Counsel and the Special Referee when the Court found that The Enclaves and The Fairways, which are part of "Exhibit B" are not subject to the Covenants and are not required to participate in the HOA. This interpretation is**

**consistent with what Plantation and it's successor DR Horton did when, by Amendment #4 on December 29, 2004 (Pl #561), Horton attempted to subject The Villas (which were sold by Plantation AD May 9, 2000 to International Villas LLC) to the covenants. On May 9, 2000, through Amendment #1 to the Covenants, Plantation attempted to subject Pebble Creek to the Covenants FOR THE FIRST TIME – even though Plantation had no equitable or horizontal privity in Pebble Creek for over a year. The language of Amendment #1 is**

> **"The property set forth and described in Exhibit A, which is attached hereto, and incorporated herein by reference, is hereby subjected to the Declaration."**

**There was no exhibit attached to Amendment #1 [1] which means that Amendment #1 does not satisfy the Statute of Frauds as to specificity. Exhibit A to the covenants includes Pebble Creek, the vacant multi-family area now known as "Ballycastle", the Golf Clubhouse tract, and the Golf Course itself.**

**(6) Neither of the parties disputes that through Amendment #1 Plantation AD renamed the PUD "International Club" but nothing previously filed and indexed to "MIGP" was re-indexed to "International Club". The covenants were never indexed to Pebble Creek.**

**(7) On April 29, 2003 Plantation AD sold most of it's remaining land in MIGP / International Club to DR Horton and on that day filed Amendment #2 to the Covenants (Pl #555). On page 2 of the Amendment Plantation AD explicitly with-held from Horton as successor developer the right to subject two area of Exhibit B (to original Covenants, Plat Book 160 Page 79 Pl #454) to the covenants, these being The Enclaves and The Fairways, which are on Exhibit B to the original covenants. This supports the argument that additional amendment specifically subjecting an area to the covenants is required and that the filing of the covenants was "informational".**

**(8) On March 29, 2004 (Pl #559) Horton, using the same language as Plantation AD had used in Amendment #1, subjected all of the areas described in Exhibit A and Exhibit B of the Covenants which was not in Pebble Creek and which is not The Enclaves**

or The Fairways to the Covenants. This includes all of the multi-family areas built by Horton and all of the single family homes built by Horton. If these were included with the initial covenants then later inclusion by amendment would not have been necessary.

(9) At trial Peter Pizzi and Michael Butryn testified that they purchased their homes in Pebble Creek, just like Plaintiff's vertical predecessor Cheryl Essex, prior to Amendment #1 [2] which attempted to subject Pebble Creek to the Covenants. At trial William Freiboth, current IHOA president, admitted that no effective attempt was made until 2004 to subject The Villas to The Covenants - four years after The Villas had been sold by Plantation AD . This could not subject The Villas to the Covenants.

(10) Sunbelt was not made a "Designated Builder" by Plantation AD in any amendment to the covenants nor in the Deed. If the Covenants applied to Pebble Creek than Sunbelt would not have been allowed to build a single home or do any landscaping without an ARB approval. Sunbelt never applied for any ARB approval – ever. A year after the sale when Plantation AD filed Amendment #1 it designated International Club Villas LLC as a designated builder. Every builder in the PUD – except Sunbelt / Pebble Creek -- was identified through an Amendment to the Covenants as a "Designated Builder".

c. Discussion.

(1) Since The Covenants were filed and indexed on February 8, 1999, ten days after Pebble Creek was sold to Sunbelt, as a matter of law the covenants, if they arguable subjected anyone to the covenants at that time, were ineffective against purchasers prior to that date -- Pebble Creek -- and through Sunbelt Associates to it's successors, including Plaintiff.

(2) The deed to Pebble Creek did not satisfy statutory requirements as to specificity such as to legally invoke any covenants of record.

(3) The subsequent name change of the PUD without re-indexing the covenants to International Club is a legal impediment to enforcing it against property owners in

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[1] Amendment #1 is in Deed Book 2258 Pages 1453-1454. The next page, Deed Book 2258 Page 1455, is the first page of the deed from Plantation AD LLC to International Club Villas LLC which means that no separate Exhibit was filed with Amendment #1.
[2] September 27, 2001 Sunbelt to Cheryl Tucker Essex, the lot which is now owned by Plaintiff.

**International Club.**

**(4) The ambiguity in Amendment #1 by the Declarant forgetting to include an Exhibit A must be resolved in favor of the free use of property. There is no clear citation in Amendment #1 as to whether a separate Exhibit or Exhibit A of the original Covenants was intended. IN EVERY INSTANCE in subsequent amendments where additional land was subjected to the covenants, an Exhibit A was attached to the amendment itself.**

**(5) The requirement for proper indexing and filing before covenants are effective was stated in Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (citing Bradley v. Guess, 165 S.C. 161, 163 S.E.2d 466 (1932)) –**

**(6) The Restatement Third of Servitudes imposes a requirement beyond having horizontal privity when Covenants are declared and that is the issue of Notice.**

**(7) In Arcadian Shores Homeowners v Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 the Court held that "(1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;",**

**d. Declaratory Judgment which should be rendered.**

**(1) Pebble Creek is not subject to the Covenants filed by Plantation AD as to Murrells Inlet Golf Plantation on February 8, 1999.**

**(2) The Villas is likewise not subject to those Covenants.**

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**4. The Covenants do not apply to Pebble Creek because the Declarant did not have any horizontal privity or equity in Pebble Creek at the time he actually attempted to subject Pebble Creek (and The Villas Condominiums) to the Covenants.**

**a. Case Law. All cited at trial. Perpetuated in Plaintiff's Brief filed August 12, 2012.**

> **"South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants" -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)**
>
> **There must be privity of estate between the parties to the covenant. Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 907-08 (1978). "We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity.**

The loss of Plantation's equitable interest and horizontal privity occurred "when there was an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court asserted: that in interpreting the sale the terms are limited to what is written on the deed itself. The court wrote that the terms do not include any "secret purpose or intention on the part of one of the parties, stored away in his mind ... ". Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) which was an appeal from Horry County.

Additional supporting cases where it was held that privity in property is required so as to subject property to initial burdens through covenants or to impose additional burdens through covenant amendment:

Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,;368 S.C. 342; 628 S.E.2d 902

Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

Hardy v. Aiken 631 SE 2d 539, 369 SC 160 - SC: Supreme Court, 2006

Arcadian Shores Homeowners v Cromer, 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007

Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).

Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex.App.-- Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ;

Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

The Restatement Third of Servitudes requires that the Declarant have horizontal privity at the moment of the Declaration.

On Page 942 of Black's Law Dictionary, First Edition, privity is defined Pl# 89 as being an equitable interest in property simultaneous to the exercise of some property right in that same property. There must be a "mutual interest in the same property" for two parties to be bound by a property related agreement. For Covenants to be effective and binding the grantor and grantee must have a simultaneous interest in the property when a Covenant is declared.

**b. Facts.**

**(1) Plantation AD sold Pebble Creek to Sunbelt Associates (Pl# 545) (January 29, 1999) ten days before the Covenants (# 547) were filed on February 8, 1999. Because of the language of the covenants, which stated that subjecting any property to the covenants would require an amendment, the filing of the covenants did not actually subject any individual lot to the provisions of the covenants.**

**(2) Plantation AD attempted to subject Pebble Creek to those covenants through Amendment #1 on May 10, 2000 (Pl #551) but this was more than a year after Plantation had lost any privity / equity in Pebble Creek.**

**(3) Plantation AD sold the property which is now The Villas condominiums to The International Club Villas LLC on or about May 10, 2000.**

**(4) DR Horton, the successor to Plantation AD, attempted to subject The Villas to the covenants through Amendment #4 (# 561) on December 28, 2004. This was more than four years after Plantation AD had sold it and thus Horton had horizontal privity such as to be able to subject The Villas to the covenants in 2004.**

**(5) The "International Club PUD Master Land Use Plan filed by the Developer (Pl #461) with and approved by the Horry County Planning Commission June 19, 2003 omits the Pebble Creek area from the PUD indicating that the Developer recognized that the PUD no longer included Pebble Creek. This was the first PUD land use plan filed with the County after Pebble Creek had been sold.**

**c. Declaration that should be made.**

**(1) Because of a lack of privity at the time the covenants were stated and because of a lapse of over a year from the time the Declarant ceased to have an equitable interest in Pebble Creek, Pebble Creek is not subject to the covenants.**

**(2) For the same reasons, the lapse between ownership and declaration in this instance being over four years, The Villas is not subject to the covenants.**

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**5. SECTION 33-31-205 Requirement for Initial Board of Directors and Successors to be Elected, not appointed.**

**a. Statute:**

**SECTION 33-31-205. Organization of corporation.**

(a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at a call of a majority of the incorporators:
(i) to elect directors and complete the organization of the corporation; or
(ii) to elect a board of directors who shall complete the organization of the corporation.

b. Facts.

(1) March 1, 2001 - the IHOA was incorporated. Pl # 552 HOA Articles of Incorporation with the Secretary of State.

(2) The Articles of Incorporation for the IHOA states that it was incorporated per SC 33-31-202 of the South Carolina Non-Profit Corporation Act which made it subject to that Act. Paragraph 1 of the document.

(3) IHOA's Legal Name as filed with the Secretary of State is exactly as follows, "International Club Home Owners Association"; nether "LLC" or "Inc" are not part of it's legal name but the Secretary of States lists that "Inc" is the IHOA's "associated type".

(4) The Defendant IHOA is a "mutual benefit corporation"; paragraph 3 of the incorporating document.

(5) The Defendant IHOA has members; paragraph 4 of the document.

(6) Paragraph 8 of the Articles did not state any of the options provided for (SC 33-31-202) for governance of the IHOA. The Declarant wrote as the corporation's purpose that it is a "Homeowners Association" which has no special meaning under South Carolina law, since the South Carolina legislature declined to enact a Homeowners Act .

(7) SC Code 27-31 et seq, the Horizontal Property Act, does not apply to the IHOA since per SC 27-31-30 the incorporating documents must so state and must also plead the particulars enumerated by SC Section 27-31-100 – and Section 27-31 is not refereed to at all in the Covenants nor in the incorporating documents. The dependency of the Special Referee on Section 27-31 et seq (and by Defendants' Counsel) is legally erroneous.

(8) The HOA has not filed any document that it is doing business as any alias.

(9) Options which were <u>not</u> selected when incorporating the IHOA. These were required to be stated in the document filed with the Secretary of State, not in any covenant:

SC 33-31-202 (c) The articles of incorporation may set forth:
(1) the purpose for which the corporation is organized which may be, either

**alone or in combination with other purposes, the transaction of any lawful activity;**
**(2) the names, addresses, and zip codes of the individuals who are to serve as the initial directors;**
**(3) provisions not inconsistent with law regarding:**
**(i) managing and regulating the affairs of the corporation;**
**(ii) defining, limiting, and regulating the powers of the corporation, its board of directors, and members, or any class of members; and**
**(iii) the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;**
**(4) any provision that under this chapter is required or permitted to be set forth in the bylaws.**

**(10) The sole Declarant for the Association was "Ken Grover; paragraph 9 of the Articles. Ken Grover was not the Declarant of the Covenants which contain what is purported to be the Bylaws of the Defendant Association. The Declarant of the Covenznts was Plantation AD.**

**(11) The Articles did not name any initial directors.**

**c. APPROPRIATE DECLARATORY JUDGMENT:**

**(1) HOA operations are strictly governed by the South Carolina Non-Profit Corporation Act and all default provisions are applicable since no optional variation was stated in the Articles of Incorporation. Conflicting provisions of the Covenants or Bylaws are void.**

**(2) The HOA lacks legal capacity to enter into any contract under anything but it's exact legal name.**

**(3) Per SC 33-31-205 all the initial directors must be elected at the time and in the manner specified by law and the organization of the corporation must be completed at that time, not seven years later.**

**(4) Since no director was elected until September, 2007, all acts of the prior directors, who were appointed by the Developer, are void and of no effect.**

**SECTION 33-31-205. Organization of corporation.**
**(a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting ... (i) to elect directors and complete the organization of the corporation;**

**(5) Because "organization of the corporation" includes adoption of bylaws, any Bylaws adopted prior to incorporation by someone who was neither the incorporator nor**

an initial director are null and void.

> SECTION 33-31-304. Ultra vires. (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by derivatively.

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6. SECTION 33-31-206 HOA Bylaws are void.

a. Applicable statute Plaintiff's # 548,

> SECTION 33-31-206. Bylaws.
> (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
> (b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

b. Facts.

(1) Bylaws Invalid. Every act of R. Scott Pyle in regard to the covenants was in his capacity as President of Plantation AD ("PAD") which corporation was the owner of the Murrells Inlet Golf Plantation (PUD). PAD and not Pyle is the Declarant of the Covenants and of Amendment #1. Ken Grover, in his individual capacity, was the incorporator of the International Club Homeowners Association Inc. Per SC 33-31-120 no corporation has the legal capacity to incorporate a non-profit corporation in South Carolina and the Articles of Incorporation can only be signed by an officer of the non-profit (if it already has officers) or by an individual acting as incorporator. Per that statute, if someone asserts a capacity other than an individual incorporator, that capacity must be stated. Ken Grover never stated any such capacity other than as individual incorporator. Per SC 33-31-140 (23)(a) the PAD is ineligible to be a member of a non-profit corporation because it is not a "person", and likewise the Golf Course is not eligible to be a member and neither is entitled, as a matter of law, despite the covenants or bylaws,

to vote [3] or hold office in the HOA directly or through a representative. The statutes state that rights under the bylaws to appoint a director do not give the holder of those rights membership or vote in the non-profit corporation. Through at least September, 2007 the developer and the golf course were both voting, exclusively holding office, and through their appointees exercising powers of board members in defiance of the pre-emptive provisions of law.

(2) No board of directors, neither the initial illegal board nor a subsequent one, has adopted the Bylaws under which the HOA operates.

(3) The incorporator of the IHOA, Ken Grover, did not adopt the Bylaws of the IHOA. R. Scott Pyle, in his capacity as President of PAD, which has no legal connection to the IHOA, filed the putative IHOA Bylaws. In deposition and trial testimony both R Scott Pyle and the IHOA's expert witness, King, testified they had not read the bylaws or the covenants.

c. Declaratory Judgment mandated by law:

That the Bylaws set out in Exhibit C of the Covenants are not legally effective bylaws of the defendant IHOA.

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7. HOA Bylaws can only be adopted using Statutory Amendment Procedures/

a. 33-31-206 applies to the initial meeting and the decisions of the board at that initial meeting. Only the initial board may simply adopt bylaws.

b. If bylaws are not adopted at the initial meeting, they must be chosen by the members using the procedures specified for Amendment. The implication is that with initial Bylaws, members can choose to not join if they do not like the bylaws. Where there are existing members and no bylaws, the membership must agree on what will govern them as members.

c. Declaratory Judgment: Since there are no legally effective bylaws, the

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[3] Property owners of units subject to the covenants are entitled to vote on amendments to the covenants – including corporations owning units. Such corporate property owners are not eligible to be members of a non-profit corporation, to vote in it's affairs, or through an employee who himself is not eligible to be a member, to control the operations of a non-profit corporation.

membership must adopt bylaws using the provisions of the South Carolina non-profit corporation act which apply to amendment of Bylaws.

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8. SC 33-31-206(b) Bylaws of a Non-Profit Corporation Are Strictly Limited to the Regulation of the Operation of the Corporation and may not constitute Covenants Restricting the Free Use of Property.

a. Law.

SC 33-31-206(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

b. Facts.

(1) The Bylaws of the Defendant IHOA contains provisions purporting to control the use of property which the non-profit corporation does not own and to impose obligations towards the IHOA by any person found on non-HOA property within the PUD. It also purports to grant the IHOA rights to control the behavior of anyone on non-HOA property, whether a member of the HOA or not.

(2) The statute limits bylaws to procedural provisions relating to the "affairs of the corporation", and does not grant a non-profit corporation quasi-governmental authority to regulate the private affairs or conduct of citizens under the mantle of the Bylaws or authority derived from the Bylaws. Non-members not standing on IHOA property are beyond the reach of a non-profit corporation. When non-members are on IHOA property, the rights of the IHOA towards such persons are limited to those of an ordinary property owner.

d. Declaration Requested:

That any provision of the IHOA Bylaws or IHOA rules which relates beyond the explicit affairs of the HOA and beyond conduct on IHOA property are ultra-vires and void.

**9. SC 33-31-206(b) Only Bylaws and not Property Covenants may control the operation of a South Carolina Non-Profit Corporation and only Bylaws adopted in the manner specified by statute are valid..**

**a. Law.**

**(1) SECTION 33-31-206. Bylaws.**

> **(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.**
> **(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.**

**SC 33-31-206 provides that only the Bylaws properly adopted shall govern the operation of a South Carolina non-profit corporation; that they must be consistent with the law, and that their provisions are limited to the governance of the association. The HOA Bylaws in use were neither adopted by the incorporator of the HOA nor by any board.**

**(2) The HOA's covenants were not adopted according to any provision of the statute relating to bylaws. Covenants are explicitly contractual agreements between contracting parties stating what their limiting obligations (what they may not do) on their own property and rights they hold as to what they can elect (optionally) to do on someone else's property.**

**(3) No individual has ownership rights in a non-profit corporation and such non-profits can not issue stock. Only people can be members or officers of a non-profit corporation.**

**(4) Acts of the HOA undertaken under the purported authority of Bylaws which have not been legally adopted are ultra-vires as a matter of law:**

> **SECTION 33-31-304. Ultra vires.**
> **(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by derivatively.**

**b. Facts.**

**(1) The HOA Bylaws were not legally adopted but instead were stated by R Scott Pyle who had no authority under the statute to enact bylaws for the HOA**

(2) The Covenants purport to decide who can be a member of the IHOA, how voting shall occur, and attempt to control the operation of the non-profit corporation. The covenants state that the Golf Course has 50 votes but as a matter of law a for-profit corporation can not be a member of a non-profit corporation and unless the Articles provide otherwise, may not vote in the operation. The articles of incorporation do not grant the Golf Course this right.

(3) The IHOA has no vertical privity to anyone who ever had horizontal or equitable privity in the property of any homeowner. The IHOA has not been declared a successor Developer and thus can not have "vertical privity developer rights".

(4) The Covenants purport to being able to require the IHOA to establish certain committees, For example, to establish an Architectural Review Board and to expend money for it's operation. A covenants is a contract for land and can not do this.

c. Appropriate Declaratory Judgment:

(1) That any provision of the Covenants which relates to the operation of the HOA non-profit corporation is ultra-vires and pre-empted by law. -- Statute of Frauds in the Conflict of Laws; Basic Rule of Validation

> A validating or invalidating LAW is always given preference by the courts over the intent of the parties stated in a written document.

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10. SC Code SECTION 33-31-401 Only Contracts and Acts of the Defendant HOA in it's legal name are intra-vires and enforceable.

a. Law.

> SECTION 33-31-401. Corporate name.
> (b) a corporate name must be distinguishable upon the records of the Secretary of State from the name of any other corporation, or partnership [doing] business in South Carolina
> (c) A corporation may use a name that is not distinguishable .. if: (1) the other corporation consents to the use in writing

**b. Facts.**

**(1) Through 2010, all Defendant's Official Acts were in the Name of the International Club Property Owners Association, Inc.**

**(a) The "International Club Property Owners Association" is a non existent corporation and not a legal alias for the IHOA..**

**(b) As recently as May 5 2010 (Pl # 370) a year after this lawsuit was filed, the Defendant HOA was titling the minutes of the meetings of it's Board of Directors as "Board of Directors Meeting Minutes" of the "International Club Property Owners Association, Inc".**

**(2) Through the end of 2008, the Defendant IHOA was requiring homeowners to pay assessments to (and was cashing checks made out to) the "International Club Property Owners Association" (ICPA).**

**(3) There is no such entity registered with the South Carolina Secretary of State and no "doing business as" document related to the ICPA filed with the Horry County Clerk of Court or with the South Carolina Secretary of State. The cable contract also included the fraudulent statement that the International Club Master HOA was the "sole owner" of the premises to be provided cable television service.**

**(4) Cable Contract In name of the "International Club Master HOA" – a non-existent entity.**

**The IHOA purports to be bound by contracts signed in the name of or on behalf of or by persons with an official capacity stated as relating to "The International Club Master HOA (Owner)" (ICMHOA) – October 20, 2003 cable contract (Pl #302) between ICMHOA and Horry Telephone Cooperative (HTC) signed by Doug Brown in the capacity as the ICMHOA "President" of the ICMHOA and as owner of the property to be provided cable service. Neither the IHOA nor the ICMHOA nor Doug Brown ever owned a residential unit in the PUD. Use of the name ICMHOA to bind the IHOA violates the statute of frauds.**

**(5) General Lack of Approval by Board of Directors of Contracting Authority until 2011.**

**There is no notation in the minutes of any meeting of the Board of Directors of the ICPOA or the IHOA (title of minutes) authorizing anyone to enter into any particular**

contract until late in 2011. No document exists binding the IHOA or it's members to the Waste Management or Cable TV contracts; i.e., neither the IHOA nor the homeowners nor any legally designated representatives of same ever entered into either of those contracts. Prior to the September 2007 IHOA Board election, there were no legally seated IHOA Board members and as such no such IHOA Board member acted "intra-vires" when signing any contract for the IHOA. Any such contract was "ultra-vires".

(6) IHOA has no rights or obligation under the original or amended covenants. The name of the HOA specified as having rights through the Covenants (Plaintiff's #547) is the "Murrells Inlet Golf Plantation Association, Inc" (MIGPA) and this is the corporation to which homeowners owe, to the extent permitted by law and to the extent that the covenants are binding after considering horizontal and equitable privity at the time of declaration that said covenants are binding on property. MIGPA exists (Articles of Incorporation with South Carolina Secretary of State, Pl# 568) and claims to be the HOA with rights and obligations under the covenants. MIGPA has not attempted to collect assessments until this litigation is settled. It has not maintained common property in the PUD because it does not own any. The Special Referee found that Amendment #1 to the Covenants changed the controlling HOA to the "International Club, Inc" (page 12 of the Order).

(7) An argument can and has been made by the Defendants that Amendment #1 (Pl #551) to the Covenants designated a different non-profit corporation Arguendo that this is valid, the successor corporation is the "International Club Association, Inc" (ICA). ICA exists (Articles of Incorporation with South Carolina Secretary of State, Pl #570) and, prior to merger into MIGPA (Articles of Merger filed with South Carolina Secretary of State, Pl# 571), claimed to be the HOA with rights and obligations under the covenants, thus those claims were inherited by MIGPA. ICA merged into MIGPA on April 4, 2011 making MIGPA "The HOA" under the covenants either through merger or because it held such capacity all along. Plaintiff so testified at trial. An analysis of name changes showing that it was impossible to transpose "Murrells Inlet Golf Plantation Association" into "International Club Home Owners Association" was introduced and addressed at trial (Pl# 567). It was shown that using the logic advocated by Defendants the ICA became the HOA under the covenants.

**(8) At trial it was demonstrated (Pl# 567) that it is impossible for the IHOA to be the HOA with rights and obligations under the Covenants. There was no attempt at trial to refute this and to show legal capacity for the IHOA under any theory relating to the Covenants. In the final order a new theory was injected for the first time - that being that because the IHOA maintained property the IHOA owned, somehow that altered the Covenants and created a contract between homeowners and the IHOA. This argument violates the Statute of Frauds. The logic of name transformation was not challenged by Defense Counsel.**

**(9) On Page 12 of the final order – which reflects the position adopted by it's author, defense counsel, the Court made the following finding of fact upon which all of it's follow-on conclusions of law must reconcile themselves to (and they do not, thus the factual basis for all conclusions of law in favor of the IHOA are in error):**

> **"The Declaration Recitals, as amended, state:**
> **"The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C". " (underlining added)**

**(10) This finding of fact relates to what changes the Special Referee concluded Amendment #1 (Pl #551) enacted. To reiterate, ambiguity must be resolved against the Declarant, in favor of the Plaintiff, and in favor of the free use of property. A strict construction standard, the Statute of Frauds and the "more likely than not" standard applies to the interpretation of contracts and findings of facts in this case and everything points to the fact that the Defendant IHOA has no authority under the covenants..**

**(11) On Page 11 of the Final Order the Special Referee made a conclusion which is contradicted by his finding of fact IF "present name" means the IHOA -- since no name transposition theory [4] / formula applying Amendment #1 can possibly support changing the name from "Murrells Inlet Golf Plantation Association" to International Club**

Homeowners Association, Inc". Defense Counsel wrote without explanation, and the Special Referee adopted the following language on Page 11 of the Order, not supported by any facts or law:

> "The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name." [5]

(12) ICA was merged into MIGPA on March 7, 2010, by filing the appropriate documents with the South Carolina Secretary of State (Pl #571) and filing a copy with the Horry County Recorder of Deeds. This placed the world on notice of the succession of rights from ICA to MIGPA.

c. Declaratory Judgment.

(1) That no act or contract entered into in a name other than the IHOA can legally bind the IHOA nor derivatively bind members of the IHOA.

(2) Act or contract entered into without authority perpetuated in the minutes of the Board are ultra vires – see next section.

(3) That The Murrells Inlet Golf Plantation as successor to the International Club Association Inc is the HOA named in the Covenants as amended and is the only HOA with rights and obligations under the Amended Covenants and to whom homeowners subject to the Covenants owe obligations.

11. Invalidity of Acts of Board of Directors taken Without a Vote of the Board recorded in the Minutes of the Board.

a. Law and Bylaws.

SECTION 33-31-821. Action without meeting.

(a) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

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[4] Amendment #1 says that wherever the phrase "Murrells Inlet Golf Plantation" is found in the covenants, it shall be replaced by "International Club". Starting with the name "Murrells Inlet Golf Plantation Association, Inc" and applying this formula leads to "International Club Association, Inc" (ICA). There is no way the phrase "Homeowners" can get inserted using the authority of Amendment #1.

[5] The Special Referee did not clarify whether this meant ICA or IHOA.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.
(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

SECTION 33-31-824. Quorum and voting.
(a) Except as otherwise provided in this chapter, the articles, or bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. In no event may the articles or bylaws authorize a quorum of fewer than the greater of one-third of the number of directors in office or two directors.
(b) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless this chapter, the articles, or bylaws require the vote of a greater number of directors.

33-31-1601(a) Permanent Records
(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized by Section 33-31-825(d).

Bylaws Article 4 BOARD OF DIRECTORS
Section 10. Quorum. A majority of the number of directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

Section 11. Powers.
(1) To suspend the voting rights and right to use of the Common Areas, Recreational Amenities and other facilities by a member during any period in which such member shall be in default in the payment of any Assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty (60) days for infraction of published rules and regulations;

Section 13. Rule Making
13.2 Authority and Enforcement.
13.3 Procedure.
Except with respect to the failure to pay Assessments, the Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner or other occupant of the Subdivision for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:
13.3.1 Written demand to cease and desist from an alleged violation
13.3.2 Within two (2) months of such demand, ... written notice of a hearing to be held by the Board in executive session.

13.3.3 The hearing shall be held in executive session of the Board of Directors pursuant to the notice and shall afford the alleged violator a reasonable opportunity to be heard.

Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any.

SCREvid Rule 803 Hearsay Exception
(10) Absence of Public Record or Entry. [It is sufficient to submit] testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry

It is clear from the statutes and the bylaws that "no act or decision" of the HOA is legally effective unless and until there is a record in the minutes of the board of directors that a majority of the members of the board voted in favor of the contract or disbursement. It is also clear that no board member has authority to bind the HOA or disburse HOA money without approval by the board as a whole, at a meeting, with a quorum, perpetuated in the minutes of the board.

Under the HOA Bylaws only the Board has authority to impose any restriction, suspension, fine or any action at all for non-payment of assessments or violation of covenants or "published rules and regulations".

b. Facts.

(1) Through November, 2011, with the exception of November 2005 for 2006, [6] there is no record in the minutes of the meetings of the Defendant HOA Board of Directors for the approval of a single contract: including but not limited to the KA Diehl management contract, the golf course agreement, the cable contract, the garbage contract, nor the grounds maintenance contract. Thus through November 2011 almost all HOA disbursements were not approved as required by statute and the purported Bylaws.

(2) Prior to September, 2007 there is no record of a vote by the Board to select a replacement director to fill the term of a director who has resigned. In point of fact there is no record that any of these early directors, none of whom were elected by the membership, ever resigned and Plaintiff testified that none of them were homeowners and thus none of

[6] The 2006 Diehl, Landscape, Pool Mazintenance, and Janitorial contracts for 2006 were approved November 14, 2005.

**them were members of the IHOA – and thus ineligible to hold office. Replacements just "popped up". After September 2007, replacements for resigned directors is evidenced by vote of the remaining board on the minutes.**

**(3) From at least as far back as November, 2004, as evidenced by the Board Minutes, there have been committees appointed by and reporting to the Board at quarterly Board Meetings. The Transition Committee, which came into being in 2006, had a charter from the Developer, DR Horton, and not from the Board. It's members were appointed by Horton. Through at least November, 2011, no member of ANY committee was appointed by Act of the Board as reflected in a vote perpetuated in the minutes.**

**(4) The first version of the Architectural Review Board (ARB) Guidelines was adopted January 18, 2005 by act of the Board perpetuated in the minutes. They were NOT enacted by independent action of the ARB. There is no record that any ARB actually existed in 2005. The June, 2005 amendment of the ARB Guidelines was made without Board approval (not in the minutes). Per the November 2005 Board minutes, the ARB requested for permission to propose ARB guideline changes which were approved in November, 2005 by the Board. Per the Board minutes, the January 2007 amendment of the ARB Guidelines was made without approval of the Board on the minutes. According to the March 11, 2008 Board minutes, Defendant / (then) Board President Rosemary Toth personally ran the ARB and unilaterally, without approval by the Board, announced changes to the ARB Guidelines she had made (effective April 2008). The April, 2008 ARB Guidelines, unilaterally adopted by Rosemary Toth, was the Guidelines used by the ARB when Plaintiff submitted his "Swing set" Application on July 21, 2009 and likewise was the authority used when the ARB, led by Rosemary Toth, used them as authority to deny Plaintiff's "Swing set" application (denial dated August 5, 2009 but postmarked August 19, 2009). The May 5, 2012 Board minutes noted that Defendant Rosemary Toth had appointed (on her own) new ARB members, There is no record in Board minutes of even mentioning the July 2010 ARB Guideline changes unilaterally made by Rosemary Toth for the ARB. The July 2010 ARB Guidelines, not approved by the Board, are the ones used to refuse to approve Plaintiff's landscaping, and fence. The November, 2011 Version / Revision of the ARB Guidelines was not approved by the Board or even mentioned in the minutes. It was the version in effect when Plaintiff's Palm Bed extension was requested**

February 27, 2012 and rejected March 16, 2012.

(5) There is no allegation that Plaintiff has ever been in default on assessments. It was admitted at trial by Board President William Freiboth that the HOA Board never held a hearing relating to any alleged violation of Rules or Covenants by Plaintiff. The refusal to act on Plaintiff's application to extend a palm bed because of an alleged violation of a rule has exceeded the 60 day limit stated in Bylaws Article 4 Section 11 (1). Every sanction, including the counter-claim to collect fines, was taken without the hearing mandated by the Bylaws.

(c) Discussion.

(1) Most Actions of Board taken Outside of Board Meetings without vote of the Board and not reflected in minutes.

An action which is not reflected in the minutes of a board meeting is an "Action Without Meeting. SC 33-31-821 (Action without meeting) makes it clear that no such action is effective until "when the last director signs ... written consents .. included in the minutes filed with the corporate records reflecting the action taken."

(2) An action taken at a board meeting requires a notation in the minutes describing the action and the vote. SC 33-31-824 (Quorum and voting) states that an "act of the board" requires "the affirmative vote of a majority of directors present" as perpetuated by the minutes.

(3) Article 4 Section 10 of the HOA's putative Bylaws requires that "Every act or decision done or made" requires "a quorum for the transaction of business" and the affirmative vote of "a majority of the number of directors present at a duly held meeting at which a quorum is present".

(4) The absence of a record in the minutes of proper board approval for an action is evidence that the act was taken without approval and is ultra-vires.[7] SC Code 33-31-1601(a) (Permanent Records) requires that the "permanent records" of a non-profit corporation "shall" include in the minutes "a record of all actions taken" "by the members or directors" and as well as all actions taken by committees ... (and) directors" when authority to individually act is somehow bestowed by the Articles of Incorporation or Bylaws – and no such authority exists and the minutes do not reflect any official individual

**act of a director.**

**(5) Per the Statute of Frauds (lack of capacity) and the Basic Rule of Validation (failure to comply with pre-emptive mandate of law) any contract or act of the board which violates a procedural mandate of the statutes or the bylaws is ultra-vires and void.**

**(6) Counter-Claim Procedurally Invalid – SC Statute & IHOA Bylaws.**

**The IHOA has not exhausted the administrative remedies it's own purported Bylaws require prior to imposing any sanction, restriction of rights, or fine upon Plaintiff.**

**(a) ARB Fines.**

**(i) <u>If the ARB is a creature of the IHOA</u>, it has no authority to independently impose any fine, restriction or sanction. No fine, restriction, or other sanction by the Counter-Plaintiff IHOA upon Plaintiff actually exists such as to be an enforceable obligation until a hearing has been held.**

**(ii) <u>If the ARB is not a creature of the IHOA</u>, then any alleged sanction, fine, or other demand by the ARB is not within the personal jurisdiction of this Court because the ARB is not a party in this action.**

**(iii) On May 16, 2012, before the Hon. Judge Steven John, the Court declined to grant Plaintiff an amendment to his Complaint which sought to join the ARB as a separate party defendant (which would have positioned the ARB so that it could have asserted a counter-claim).**

**(iv) The ARB does not and never did own property and has no vertical privity to enforce any rights or obligations owed to someone who at some time had horizontal and equitable privity in Plaintiff's property. The matter of the effect of such privity or lack thereof was amply argued at trial and no such privity was claimed for the ARB or the IHOA by Defense Counsel at trial – or even in the final order. IF the ARB is a creature of the IHOA, per the Bylaws, only the Board may impose sanctions – after hearing. IF the ARB is not then any claim by the ARB against Plaintiff must be ignored because the IHOA lacks the capacity to assert a claim against Plaintiff by or on behalf of a non-party.**

**(b) IHOA as originator of fines or suspension of rights.**

**(i) The IHOA's purported bylaws (Article 4 Section 13.3, Procedure) states that**

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**[7] Actually, the burden is on the IHOA to show that the approval of any action is to be found in the minutes.**

> **"the Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed"**

**The procedure is (1) notice of and (2) actual conduct of a hearing. The procedure goes on to state that (Section 13.3.3)**

> **"Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any."**

**This section has three important procedural mandates which were ignored by the IHOA which invalidate the IHOA's counter – claim [8] against Plaintiff, Arguendo that it has standing to assert it:**

**(1) No claim is "mature" until notice and hearing have occurred, which they did not as proved by the absence of same in the minutes of the board, all of which are in evidence;**

**(2) notice of this shall be posted in the minutes – and no notice is found in the minutes;**

**(3) the results and sanctions flowing from the meeting must be posted in the minutes and there is an absence of same in the minutes (SCRevid).**

**Any counter-claim which the Defendant IHOA may advance in this matter can only flow from such a hearing perpetuated in the minutes. Further, per SC Law, every official act of the IHOA must be recorded in the minutes showing that the matter came up at a meeting of the board, that there was a quorum, the action proposed, and the approving vote. The record and action of the board requirement is present in both the Bylaws and the Law.**

**(d) Declaratory Judgment and Findings of Fact and Conclusions of Law.**

**(1) No Act of the HOA, including contracts and disbursements, fines, suspension of rights of homeowners, appointments to committees, are enforceable and all such acts are ultra-vires.**

**(2) The counter – claim of the IHOA against Plaintiff is unenforceable either**

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**[8] The entire counter-claim is based on the assertion that the IHOA has a valid claim against Plaintiff which matured through the procedures of the Bylaws and Covenants and which relate to an alleged violation of rules relating to landscaping changes. This includes both**

**because (a) it is a not a cause of action of the Defendant but is a claim of the ARB, over which the Court has no personal jurisdiction, or (b) because the cause of action does not satisfy the procedural requirements of the SC Non-Profit Corporation Act and / or the Bylaws the IHOA claims to operate under.**

**(3) No acts of the Developer either directly or through his non-elected appointees to the board are enforceable, even if the "record and vote" requirements of Board Meetings was met, when the board's membership consisted of appointees of the Developer because these board members were not members of the IHOA, were ineligible to hold office and were not duly elected. The Court affirms that only persons can be members of a non-profit corporation, only members can vote or hold office in a non-profit corporation, only owners of property in the PUD can be members of the IHOA, and that no board member prior to September, 2007 individually owned property in the PUD nor was any such person elected by the members or as a successor, elected by the board.**

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**12. The Covenant's Requirement to Join and remain a member of the HOA is Contrary to Law.**

**a. Law.**

**SECTION 33-31-601. Admission.**
**(b) <u>No person may be admitted as a member without his consent</u>.**

**SECTION 33-31-620. Resignation.**
**(a) A member may resign at any time.**

**SECTION 33-31-612. Member's liability to third parties.**
**A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation.**

**b. Discussion.**

**(1) Rule of Validation.**

**(a) There is no alternative stautory authority under which a requirement in a covenant to join a non-profit corporation incorporated under Code 33-31-et seq can be found. The statute advanced by Defense Counsel and adopted by the Special Referee is inapplicable by it's very language because the statute states an intent to limit itself to**

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**the alleged fine and the cost of suing to cause the violation to cease and desist.**

condominiums: The Horizontal Property Act (Sec 27-31-30) states that the owners must explicitly state in writing their intent to submit the property to the Act citing the statute with the specific information enumerated in Sec 27-31-100. Sec 27-31-40 states that the Act applies to Apartment buildings. Sec 27-31-90 has the additional attribute of stock ownership in the enterprise; and under the non-profit corporation act, under which the particular IHOA was incorporated, there is no ownership rights in the corporation and no stock. Particularly fatal is the election of the IHOA to incorporate under Sec 33-31 et seq, not 27-31 et seq (for which it is ineligible anyway). In Defense Counsel's proposed Order, adopted by the Special Referee, the following Section is cited as the authority to compel membership (on Page 19 of the Order):

> SECTION 27-31-190. Expenses shall be shared.
> The co-owners of the apartments are bound to contribute pro rata in the percentages computed according to Section 27-31-60 toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.

The Special Referee / Defense Counsel mis-applied this inapplicable statute and took the statute out of context. They quoted the last sentence of the statute

> No co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.

(b) The contractual requirement in the Covenants requiring every homeowner in the area described by the PUD to join a South Carolina non-profit corporation violates the applicable statute and there is no alternative "saving" statute. Further, the notes of (printed) Page 4246 of the SC House (of Representatives) Journal, Tuesday, April 12, 1994 states a specific intent that under no circumstances may inhabitants of South Carolina be required to join a non-profit corporation, that such membership is and always will be voluntary and temporary.[9] The House of Representatives also wrote that it is it's specific

[9] For comparison, the Bylaws of the South Carolina Administrative and Regulatory Law Association:
Procedures for Becoming a Member. Persons wishing to become members shall submit a membership application and a check for dues. The Board of Directors shall review each application and direct the Treasurer to accept or reject the application. (33-31-601)
Resignation of a Member. A member may resign at any time. Failure to pay annual dues

**intent that inhabitants not be forced to join a non-profit corporation just because they live someplace – which is the major criteria for membership in the PUD's HOA under the covenants and under the IHOA's Bylaws. The House wrote relating to 33-31-601, Admission:**

> **"Subdivision (b) prevents corporations from admitting people as members unless they consent to becoming members. Consent may be express or implied. For example, consent may be implied by acceptance of membership benefits knowing that the benefits are only offered to members.**
>
> **Corporations sometimes name people as members without knowing or having the ability to identify individual members. For example, a corporation's bylaws may provide that "all poor people within one mile of city hall are members entitled to vote for directors." ... As a result of section 6.01, the above bylaw provision simply authorizes poor people in the area to become members. Before they became members they would have to apply for or consent to joining by attending a meeting, voting or otherwise evidencing consent. Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(21)**

**(c) The Covenant and Bylaws make membership permanent and proide no mechanism to resign. This is specifically invalidated by SC Code 33-31-620(a) and there is no "saving" statute under the Rule of Validation. Just as with the statute that individual can not be compelled to join without their consent, as a matter of law they can resign at any time, being responsible only for those personal charges they incurred while a member. As will be discussed below, they can not be held liable after resigning for the expenses or debts of the non-profit corporation, only the additonal costs the non-profit corporation incurred because of the individual acts of a person while a voluntary member. The House of Representatives intent on the matter was stated in the Printed Page 4251-4252 1994 Tuesday, April 12, 1994 SC House Journal:**

> **Section 6.20(a) sets forth the basic right of a member to resign from a nonprofit corporation at any time. A nonprofit organization cannot force a person to belong to it. ... Under section 6.20(b) a person may be liable for obligations incurred or commitments made prior to the resignation.**

**(d) Argument that Use of Amenity Center and Ongoing Assumption by HOA of maintenance responsibilities for Common Area created a contract.**

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**by October 1 is deemed a resignation of membership for the year of unpaid dues. A member may be reinstated commensurate with nonprorated payment of the annual dues as**

This argument is contrary to the Statute of Frauds. The putative contract is indefinite, certainly beyond one year; there is no voluntary exchange of consideration; there are no specifics as to what services are to be rendered and at what price; and importantly, as to the maintenance of cmmon property and the Amenity Center, all that can be said is that the IHOA maintained property it owned. No contract was created. This argument was advanced in the Special Referee's Final Order as follows (Page 7):

> "The Plaintiff has utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012 "

No evidence was submitted at trial to support this and Plaintiff contested this. The testimony of Defense Witness Maureen Sullivan was that she recalled a single instance prior to the lawsuit in 2009 where Plaintiff brought several foster children to the pool. Her recollection was that Plaintiff attended several socials at the Amenity Center prior to 2009 to which non-homeowners were admitted as well. As to the depositions, the complete testimony adduced from William Freiboth was that the depositions were taken at the Amenity Center upon his invitation and for the convenience of the witnesses, who are all homeowners in the PUD. This did not create a contract which satisfiees the Statute of Frauds.

(2) Conflict of Laws.

Where the terms of a covenant or a contract are contradicted by the language of a statute, even where the contract is freely entered, the contract is void. As is stated in the Restatement of Contracts, Conflict of Laws / Basic Rule of Validation, a "validating or invalidating law is always given preference by the courts over the intent of the parties stated in a written document." – Restatement Second Conflict of Laws.

c. Declaratory Judgment.

(1) No one can be forced to join a non-profit corporation incorporated under the South Carolina Non-Profit Corporation Act.

(2) Anyone who voluntarily joins such a corporation may resign at any time.

(3) A person who voluntarily joins such a corporation is liable only for the

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set in Section 2.03 hereof. (33-31-620)

**incremental expenses incurred by the corporation in rendering goods or services to said person at his request prior to his resignation.**

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**13. A Member Who Resigns Can not be required to make payments to satisfy debts or contractual obligations of the Non-Profit HOA.**

**a. Law.**

**SECTION 33-31-612. Member's liability to third parties.**
**A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation.**

**b. Discussion.**

**(1) Contracts incurred by the corporation fall within the definition of "acts, debts, liabilities or obligations of the corporation." Per the Statute of Frauds a non-profit corporation is without capacity to bind a member for goods or services ordered by a non-profit corporation, whether or not the intent is to resell same to members.**

**(2) The cable tv contract is between the Horry Telephone Cooperative (HTC) and the IHOA.**

**(a) At trial Denise Ambuhl, an officer of HTC, testified that the homeowners are not parties to the cable contract and that it is a bulk contract allowing the IHOA to resell cable tv services. Denise Ambuhl confirmed that the February 27, 2009 letter from HTC's President / CEO / CFO M. O'Neal Miller stating that no homeowner is a customer of HTC is correct and that the IHOA is billed for the number of households the IHOA reports are being served, which means that if a member resigns and / or refuses service, the IHOA is not liable for services which are then disconnected (by HTC).**

**(b) Participation in the HTC / IHOA cable tv contract is also not required from all home owners in the HOA. Those homeowners who live in The Villas (condos) and The Cambridge condos are not required by the IHOA to pay – thus it can not be asserted that the covenants require all homeowners to obtain these services.**

**d. Cable tv service is ambiguously mentioned in the covenants as a service that the IHOA is permitted to offer and there is nothing that says that the HOA must provide it or that homeowners must subscribe to it. An assertion that cable tv participation is mandated is negated as "selective enforcement" and is a "waiver of the right to demand compliance"**

but in reality it is not a proper covenant obligation running with land but a personal service which does not survive sale from one owner to another (Plaintiff is not the original homeowner) and, lacking any terms or even a description in the covenants of the services, term, or price, as the covenants in reality is a contract the cable tv provision fails the Statute of Frauds. The Golf Course, presumably subject to the covenants, is also not required by the IHOA to obtain it's cable tv service through the IHOA.[10] The contract was not approved by the board in the minutes. This contract is strictly between the IHOA and HTC (or more accurately the International Club MASTER Home Owners Association Inc) and does not generate expenses to the IHOA for home owners who resign – if the contract bound home owners in the first place.

(c) The HTC / IHOA Cable Contract is illegal and pre-empted in South Carolina. It is an act in restraint of trade per SC 39-3-10 Pl # 263, Agreements affecting Competition.

> SC 39-3-10. Arrangements, contracts, agreements, trusts and combinations adversely affecting competition or price declared against public policy. All arrangements, contracts, agreements, trusts or combinations ... (b) between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the ... consumer of any such product or article and (c) between two or more persons as individuals, firms, corporations, syndicates or associations that may lessen or affect in any manner the full and free competition in any ... prices in any branch of trade, business or commerce are declared to be against public policy, unlawful and void.

At trial Plaintiff testified that Time Warner refused to provide cable service to Pebble Creek because the existence of the IHOA / HTC contract prevented Time Warner from ever achieving a profitable critical mass of customers. Plaintiff also entered into evidence a Dish TV Advertisement which offered alternate TV Programming for $ 19.95 per month, Pl# 81, far less than the IHOA charges for cable tv. Plaintiff cited these South Carolina statutes and the Special Referee was silent on the matter in his order. The violation of Section 39-3-10 brings with it an explicit civil cause of action under which Plaintiff can recover charges:

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[10] If cable tv is not a personal service but a core function then the golf course should be paying for 50 "service units" since it is to pay, per the covenants, 50 times what a homeowner pays in his assessments. Cable tv service is not billed separate from the genral assessments. The golf course does not pay anything at all to the IHOA.

> **SECTION 39-3-30. Injured person may recover damages.**
> **Any person who may be injured or damaged by any such arrangement, contract, agreement, trust or combination described in Section 39-3-10 may sue for and recover, in any court of competent jurisdiction in this State, from any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise or articles the sale of which is controlled by such combination or trust.**

**(3) Horry County bills homeowners in the unincorporated areas of the county for use of the county's waste management facilities, one of which is a fraction of a mile from Pebble Creek where Plaintiff lives. Payment for this county provided service is mandatory and it provides for homeowners to dispose of everything that Waste Management Services collects and many items the garbage collection does not collect. The use of a private collection service is discretionary, and it comes down to the garbage service hauling a homeowner's garbage to the same ultimate county disposal facility that is the destination of garbage taken by a homeowner to the local collection point.**

**The waste collection contract suffers from the same "waiver" and "covenant vs personal service contract" problems as cable tv. The Villas, The Golf Course, and The Cambridge homeowners do not participate in the Waste Management contract. In addition, as was discussed in the Motion for New Trial (etc), what Defense Counsel and the Special Referee referred to as the Waste Management Contract is a fraudulent document when represented as such, because it provides for three garbage cans to be collected in a Myrtle Beach private office (not even in Murrells Inlet) – and was not approved in the minutes. This contract also does not incur costs to the IHOA for homeowners who resign the IHOA.**

**(4) The contract with the management company, KA Diehl, as exemplified by the 2010 (Pl #383) contract between the IHOA and KA Diehl (the last one defendant provided Plaintiff despite the continuing requirement of discovery) does not reflect incremental costs to the IHOA for services provided to individual homeowners but rather is a fixed rate contract.[11] The resignation of a homeowner does not leave the IHOA with incremental costs attributable to a specific homeowner – assuming that a homeowner is responsible for this debt of the IHOA.**

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[11] **It does not have a rate based on number of households – no "front door" charge.**

(5) The contract for maintenance of the Amenity Center is not a general expense [12] and is merely an expense for maintenance of the IHOA property and is not scaled to usage. The Horizontal Property Act ties an apartment owner's obligation to expenses for common property but the Non Profit Corporation Act does not. The contract for grounds maintenance of the common areas is likewise not scaled to homeowner membership and is fixed thus it is not legally a debt of a departing homeowner. Further, per the unchallenged testimony of Pete Pizzi and Mike Butryn, [13] the vast bulk of this money is spent voluntarily by the HOA to maintain non-IHOA property – property of the golf course and of the county and is thus not even an actionable obligation of the IHOA and thus not a debt of departing homeowners.

(6) At most these contracts can be compared to the contract between a gasoline station and a soda supplier for a vending machine. The local owner has his own deal with the vendor and although gas station customers may benefit from the presence of the soda machine there is no obligation between a customer and the gas station in case the machine operates at a loss – or to buy sodas at all.

(7) Case law summary: Under Section 33-31-612 of the South Carolina Nonprofit Corporation Act, a member of a nonprofit corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation. However, in South Carolina, a court may permit a creditor of the HOA to pierce the corporate veil and impose the liabilities of the nonprofit corporation on the members if (1) the dominant members have failed to treat the entity as a truly separate "legal person" and (2) it would be unjust or fundamentally unfair to protect the dominant members from the plaintiff. In all other cases individual members have no liability.

c. Declaratory Judgment.

(1) Homeowners who resign from an IHOA incorporated under the South Carolina Non-Profit Corporation Act have no liability for continuing general obligations of the IHOA. Plaintiff has no continuing obligation to the IHOA.

(2) Homeowners who resign from an IHOA are not bound by any contract

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[12] It is not charged to homeowners in the condominium areas.

[13] This was substantiated by Pl# 330, The June 25, 2008 study commissioned by the Board analyzing what the IHOA's Grounds Maintenance Budget was being spent on.

**entered into by the IHOA to which the homeowner did not individually agree OR whose terms do not completely satisfy the Statute of Frauds. Plaintiff has no obligation under any contract the IHOA entered into.**

**(3) No homeowner contracted for cable or waste management services in a manner which satisfies the Statute of Frauds. The IHOA / HTC contract is not a contract between the homeowners and HTC. The Covenant is not a legally sufficient contract between Plaintiff and the IHOA on specific cable services, specific costs, specific conditions, or for a specific term. No homeowner individually signed the covenant for it to constitute a legally sufficient contract for services when the covenants were filed. Any services provided Plaintiff by the Defendants was not requested but was supplied whether Plaintiff desired it or not. He was never asked. Plaintiff has no obligation to accept or pay for cable or waste management services under the Defendant's theory that the Covenants created a contract between the IHOA and Plaintiff for the delivery of said services – at Defendant's discretion, because the covenant did not even mandate the delivery of such services.**

**(4) Funds collected in the past from Plaintiff for goods or services he did not specifically request must be returned to Plaintiff by Defendants.**

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**14. The Waiver of Restrictions in Amendment #1 to the Covenants applied to everyone in the PUD.**

**a. Law.**

**(1) Ambiguity must be resolved in favor of the free use of property and against the Declarant. See supra Section 2 for applicable standard of proof.**

**(2) A "Waiver" equates to deletion of a restriction.**

**On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows (Pl #97 and 98) --**

> **"WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.***
> **In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong. A person is said *to* waive a benefit when lie renounces or disclaims it,**

and lie is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

(3) Case law is that an ambiguous restriction is no restriction at all:

"rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902

"Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." -- Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998).

Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

(4) Provisions of Original Covenant (Pl # 547).

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ... any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... "

Article VII, Use Restrictions; Section 7.2, Prior Review of all Plans. Last paragraph:

"Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

(5) Declaration of "Designated Builders" through Covenant Amendments.

**EVERY builder in the PUD was identified as a "Designated Builder" or as the "Developer".** [14]

**Amendment #5 Pl #563 Para 7 named Kinsale a Designated Builder – for Ballycastle.**

**Amendment #1 Pl #551 Para 7 named The Villas developer a designated builder.**

**Amendment #2 Pl #555 Page 2, named Horton as the developer..**

**Amendment #3 Pl #559 Pages 2 and 3, paragraph 5 named Sunbelt as a designated builder.**

**(6) Language of Amendment #1, May 9, 2000, Pl #551.**

> **"WHEREAS the Declarant desires to amend the Declaration in certain particulars; and**
> **WHEREAS the Declarant desires to add additional Property owned by it to the Declaration."**
> **NOW THEREFORE the Declarant hereby amends the Declaration as follows: ...** [15]
> **2. The Property set forth and described in Exhibit A,** [16] **... is hereby subjected to the Declaration ... [The] ("Multifamily Parcel") is being conveyed by the Declarant to International Club Villas ... . The Declarant hereby grants to International Club Villas, LLC, all of its rights contained in the Declaration to develop the Multifamily Parcel ..."**
> **3. There is no "Common Area" ....**
> **4. Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restrictions on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel.** [17]
> **5. The owners of Dwelling Units within the Multifamily Parcel shall not *have* the right to use any Recreational Amenities, if any, owned by the International Club Homeowners Association ...** [18]

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[14] **Except for Sunbelt, the developer of Pebble Creek. See discussion supra.**

[15] **#1 is the name change of the PUD to "International Club".**

[16] **There was no Exhibit A to Amendment #1 filed with the Recorder of Deeds. The "Multi-family Parcel" of Exhibit A to Covenants is the area now called "Ballycastle" which was not the area sold by Planatation AD to International Club Villas LLC. On May 20, 2000 Plantation AD sold "The Villas" land to International Club Villas LLC by deed. The Villas land is at Exhibit B to the original Covenants, not Exhibit A to the Covenants. Plat Book 160 Page 79 Pl # 454.**

[17] **There are two multi-family parcels in Exhibit A to the Covenants: Ballycastle and The Glens. The paragraph is ambiguous. Taken to mean applicable to Exhibit A to the Covenants, this has nothing to do with The Villas.**

[18] **See footnote above. This restriction is being enforced against The Cambridge which is in Exhibit B to the original covenants and is not The Villas..**

**6. The Multifamily Association(s) ... will ... collect and pay Master Association assessments...** [19]
**7. The Declarant hereby designates International Club Villas, LLC, as a Designated Builder ...** [20]
...
**9. The Declarant hereby waives all easement rights reserved in Article IV, Sections 4.10 [easement for utilities], Section 4.11 [easements for walks and trails]** [21], **Section 4.12 [enter onto any unit]** [22], **Section 4.16 [environmental easement]** [23] **and Section 4.17 [wells & effluent]** [24] **of the Declaration.** [25]
...
**11. The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration.** [26]
**12. The Developer hereby waives its rights to enter into and for maintain the Golf Course Easement Area as set forth in Article VII, Section 7.37 (c) of the Declaration.**

**b. Facts.**

**(1) When the Declarant referred to The Villas, as in paragraph 2 of Amendment #1, the language says so ("The Declarant hereby grants to International Club Villas, LLC,").**

**(2) By the language of the original covenants, Section 2.2, plan of development, and the last paragraph of Section 7.2, no restriction applied to the Developer or a Designated Builder. There was no need to "waive" any restriction for The Villas since it was now a designated builder.**

**(3) At the time of Amendment #1, The Villas area was not subject to the**

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[19] **The Villas was not subjected to the Covenants until Amendment #4, December 28, 2004. The Cambridge association follows this provision.**
[20] **This designation meant that The Villas was not subject to any current or future restriction and no waiver was required. This only benefit of this designation is to free a builder from the use restrictions.**
[21] **This easement applied to the golf course, the wetlands, the area along side undedicated roads as well as the mutli-familiy areas.**
[22] **This easement was a right to enter ANY unit to check for covenant violations.**
[23] **Allows enforcement of environmental law on common areas and single family homes, as well as multi-family.**
[24] **Applies to entire subdivision. Gives HOA riparian rights to surface water and right to use it to irrigate.**
[25] **Waived easement at Section 4.10 Covenants applied to single family lots: 5' on the front and side boundaries and 10' on the rear, as well as to multli-family areas.**

**Covenants and was not putatively so subjected until Amendment #4 in December, 2004.**

**(4) Amendment #1 says it has many purposes: change of PUD name, annexation of additional property; identification of designated builders, AND amendment of covenants.**

**(5) There are two other multi-family areas in the PUD which are in Exhibit A to the Covenants: Ballycastle and The Glens, and three other such area elsewhere in Exhibit B which is where The Villas is in the Covenants: Cambridge, The Enclave, The Fairways. Amendment #1 is silent about them. Homeowners in The Glens and The Cambridge have been required to conform to the Restrictions on Use. The Ballycastle has never been built upon and remains vacant.**

**(6) The Horry County Planning Commission approved plans for the PUD as of May 14, 1999 (the last approval prior to the sale of The Villas by Plantation AD, Pl #451) has no ponds in the area designated for (what became) The Villas thus there would be no need to "waive" riparian rights in The Villas multi-family area. The Plat filed with the Planning Commission for the International Club Golf Course, which shows The Villas area as Parcel C, Plat Book 181 Page 89, January 2, 2002 (Pl #460) likewise does not show any ponds in The Villas area.**

**(7) Section 4.12, waived, was the right to enter to check for covenant violations. The Villas was not subject at the time to the covenants and if it was so subjected in the future, it was exempt from provisions of the covenants because the builder was a "designated builder". Clearly these waived sections are superfluous to The Villas.**

**(8) Amendment #1 is clearly both confusing and ambiguous.**

**(9) The entire argument of the Defendants that "waiver" is limited to The Villas depends on Defense Counsel's argument that the ambiguity should be resolved in favor of restrictions on the use of property and in favor of the developer. This is absolutely contrary to case law and to the statutes requiring specifics in placing deed – like restrictions on property. As a matter of law the ambiguity must be resolved with the interpretation that the waivers are general.**

**(10) The waivers are each self-contained. Looking to each there is nothing to**

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[26] **7.2 is the requirement to submit plans to the ARB; 7.4 is fence restrictions; 7.25 is parking; 7.31 Open outdoor storage.**

hint that the waivers are anything less than general. The "wherefore" portion of the Amendment says nothing to hint that the Declarant desires to "free" any particular subset of owners from the restrictive covenants.

(11) The absence of reference to Sunbelt as a designated builder indicates that when Amendment #1 was filed, which is after Sunbelt had begun construction and sale of units, it was never intended that the covenants apply to Pebble Creek anyway. This is further buttressed when considering that the master use plan for International Club, on June 19, 2003 omitted Pebble Creek.

c. Declaration as to Effect of Waivers.

(1) The waivers and deletions of Amendment #1 to the Covenants are general in nature and were not limited to The Villas multi-family area. Each such waiver must be read with the alternative meaning "deleted".

(2) No remedial cause of action is available for violation of any provision of the covenants marked in Amendment #1 as "waived" or "deleted".

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15. Counter-claim of Defendant IHOA is void because it has not exhausted all it's administrative remedies and has not complied with it's own Bylaws.

a. Bylaws claimed by Defendants, Pl #548, February 8, 1999:

"13.3 Procedure.
Except with respect to the failure to pay Assessments, the Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:

13.3.1 Written demand to cease and desist

13.3.2 Within two (2) months of such demand, ... the Board may serve such Owner with written notice of a hearing to be held by the Board in executive session. ...

13.3.3 The hearing shall be held in executive session of the Board of Directors pursuant to the notice and shall afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any."

b. Facts.

(1) Architectural Review Board – an entity of the Defendant IHOA.

On May 16, 2012, the Chief Administrative Judge held a hearing on Plaintiff's motion to amend his complaint, to add the "Architectural Review Board" (ARB) as an additional defendant based on the surprise assertion by the current (William Freiboth) and former HOA presidents (Defendant Rosemary Toth) at depositions that the ARB was not a committee of the Defendant HOA, was not subject to the governance of the Defendant HOA, and operated outside the Bylaws of the HOA. Based on the discussion of the parties or their attorneys at the hearing, the Court ruled from the bench that the ARB was in fact a committee of and controlled by the HOA, thus amendment was not required. Defense Counsel subsequently prepared a follow-on order which Plaintiff did not have an opportunity to comment on, and which omitted this bench decision.

(2) Despite having secured the consolidation of the 2009 and 2010 cases, the IHOA filed separate and identical counter-claims in both cases, which Plaintiff argues was meant strictly to increase the costs of litigation and which could serve no other purposes. Both counter-claims shared the following identical language regarding the role of the Architectural Review Board (ARB). These statements in the IHOA's answers bind the IHOA and state that the ARB is an integral creation of the IHOA, and not a separate entity as the William Freiboth stated at trial and in his deposition. First paragraph number is from the IHOA's "2010 Answer"; second from it's "2009" Answer.

> 29/57. The Architectural Review Board <u>for the Defendant HOA</u> holds the architectural review rights pursuant to the Governing Documents
> 30/58. The <u>Defendant HOA</u> enacted Architectural Guidelines in 2005 and has amended them from time to time.
> 33/61. The Defendant HOA, through <u>its</u> Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines ...

(3) Contradictory Argument by Special Referee / Defense Counsel's in Final Order: The Special Referee's Order stated that the ARB is not a creation or entity of the IHOA, that the ARB not the HOA imposed a $ 100 a month fine, that the ARB as being separate from the IHOA is not subject to the Bylaws of the IHOA which Bylaws prohibit any fine or sanction until after a hearing per the provisions of Section 13.3 of the Bylaws. The Special Referee's Order made the following Conclusion of Law:

> The ARB is a <u>separate Board</u> ... <u>created by</u> Article VII <u>of the Declaration</u>.

> ... Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents ...

(4) Defense counsel misrepresented what the Covenants actually state and the Special Referee did not bother reading the Covenants so as to note the mis-representation. The Covenants actually state that an ARB is an optional creation of the IHOA Board:

> Article III Section 3.1 The Association. The Association shall be authorized but not required to ... (d) To set up and operate the Architectural Review Board ...

Section VII does not create an independent ARB but states it's procedures and specifically identifies the ARB as an entity / creator of the Association:

> Section 7.2. Prior Review of All Plans. ... Provided, however, that upon the Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association. Such Architectural Review Board shall be comprised of not less than three (3) representatives to be appointed by the Board of Directors of the Association

Clearly there was an error of controlling facts by the Special Referee. This is why the judicial canons prohibit entry of proposed findings of facts and conclusions of law without giving the opposing side an opportunity to be heard.

(5) At trial Plaintiff questioned IHOA President Freiboth and confronted Freiboth with Plaintiff's October 11, 2010 Letter to the HOA (Pl #633) "SUBJECT: Putative "Appeal" of October 8, 2010 Disapproval of Fence / Approval of Flower Bed in "County Easement" which at paragraph 3 stated:

> "I invoke what the HOA represents in it's putative Bylaws as Section 13.3, Procedures, which precludes the HOA from taking any further action until it meticulously completes each and every procedure stated therein."

The witness was also questioned regarding the IHOA's answering letter to Plaintiff dated October 21, 2010 Pl #634 which acknowledged receipt of the letter (it refused to refer to it as an appeal) it went on to ignore Plaintiff's demand for an appeal hearing when the IHOA stated "Unless you successfully appeal the ARB decision...". If one casually looks to the procedure of Section 13.3, the HOA is required to schedule the hearing on it's own and no

appeal is necessary. Freiboth was questioned relating Plaintiff's responding letter of October 23, 2010 Pl #635 which read

> "SUBJECT: Your Refusal to Follow Your Purported Rule 13.3 (your putative bylaws) which controls what action your HOA must take following an appeal from a putative ARB decision"
> 4. What must follow. ... b. The "Administrative Appeal" of your Section 13.3. ... your obligation is strictly to obey your own claimed procedure and to schedule a hearing which would require addressing issues ..."

The answer of Mr. Freiboth at trial to the question of why the IHOA Board did not schedule a hearing was first that he did not consider Plaintiff's "appeal" to be serious and upon challenge that such a determination was not in the procedures, Freiboth then claimed that the entire process was an ARB issue. He was unable to state what form an appeal of the ARB refusal of Plaintiff's fence request might be if it was not the hearing by the IHOA per Bylaws 13.3. In point of fact there is no alternative procedure so stated. It is a fact that on several occasions the IHOA Board has held appeals of ARB decisions so this is double-talk. The October 14, 2010 Board letter to Plaintiff was signed "For The Board of Directors" and not for the ARB. Again, the Covenants clearly setup the ARB as an optional creature of the HOA Board of Directors.

c. Declaratory Judgment.

(1) That the Architectural Review Board is a creation of and part of the Defendant IHOA.

(2) That the IHOA may not impose any fine or sanction or restriction of rights on a homeowner prior to holding a hearing which it must schedule in accordance with Section 13.3 of the Bylaws it touts as it's own.

(3) That the IHOA was on notice that it had not followed it's own procedures.

(4) That the IHOA attempted to impose fines and other sanctions in violation of it's own procedures and had not exhausted it's administrative remedies; and that it is prohibited by it's Bylaws from so acting.

(5) That the IHOA made a conscious decision not to hold such a hearing.

(6) That because of these findings Plaintiff is not liable for any fines or other sanctions in favor of the IHOA.

(7) That because of the obviousness of the facts and the HOA's procedures, and

**because the IHOA was on notice of the procedural error, the HOA's conduct in filing a counter – claim is a frivolous proceeding subject to SC Code 15-36 and sanctions should be imposed in at least double the amount the IHOA was seeking from Plaintiff, plus all costs of depositions, transcripts and motions from the time the IHOA filed it's two counter – claims August 20, 2011**

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**16. Counter-claim of Defendant IHOA is void because the IHOA Does Not Have Capacity:**

**a. The Defendant IHOA is NOT the HOA under the Covenants.**

**(1) See prior argument. This is also the finding of the Special Referee in his Order, adopting the position of Defense Counsel. On page 12 of his order the Special Referee made a controlling finding of fact and conclusion of law which reads:**

> **"The Declaration Recitals, as amended, state: "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C"." "**

**(2) The implication of this is that the ARB was not legally constituted because the Covenants give only the HOA it designates the authority to create an ARB and for the Board of said HOA to appoint the members. Any action of a board appointed by Defendant IHOA is ultra-vires and of no consequence.**

**(3) Another implication is that since the Defendant IHOA is not the HOA under the covenants, it lacks standing to advance a cause of action for violation of the covenants.**

**b. The IHOA has no standing to assert a claim by an independent ARB..**

**(1) The Court held that the fines that the IHOA is seeking to collect – payable to the IHOA – are fines from the ARB as an entity independent from the IHOA. This artifice was invented by Defense Counsel to explain why Bylaws Section 13.3 was ignored but it also means that the IHOA has no standing to assert the claim of the "separate and independent ARB". In paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to**

party IHOA:

> "As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00."

(2) The related finding of the Special Referee announced in his Order is:

> The ARB is a separate Board ... created by Article VII of the Declaration. ... Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents ...

(3) The Bylaws do not establish the ARB. The only mention of the ARB in the bylaws is that (Section 11.1.1 Restoration of destroyed condemned land) landscaping plans for a restored areas must be approved by the Developer, the Board, and the ARB; and per Bylaw Section 12.3.6 The HOA must pay the expenses of the Architectural Review Board.

c. Declaratory Judgment which follows this analysis.

In the alternative, The IHOA lacks standing to seek to enforce a fine by the ARB and to sue out the covenants because of any and all of the following:

(1) The IHOA has no standing under the Covenants as it is not the HOA.;

(2) The ARB had no authority to impose a fine since it was not constituted by the HOA designated by the Covenants as amended;

(3) The ARB is a separate entity from the Defendant IHOA and thus the IHOA has no standing to advocate a cause of action which belongs to the ARB.

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17. The Counter – Claim is Void because the restriction on fences and walls was "waived" or because of selective and capricious enforcement or because the Complaint never complained of a "brick wall" or a "brick foundation"..

a. See discussion supra.

b. The requirement of Covenant Section 7.2 to seek prior approval of the ARB was deleted in Amendment #1 of the Covenants. The provision regarding fences, Section 7.4 of the Covenants, was likewise deleted in Amendment #1 to the Covenants.

c. The IHOA selectively and capriciously denied Plaintiff permission to erect a

fence.

(1) Case Law.

> ... extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007 the Court found that the homeowners association waived it's control over fences and other issues. The Court noted that

> "the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

(2) The Court was shown the following pictures to prove the "extensive omissions or variations and that was requested by Plaintiff had already been approved elsewhere in the PUD by the IHOA:

| EXHIBIT | Locations |
|---|---|
| Pl # 2 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 3 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 4 | 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street. |
| Pl # 5 | Right side of 120 Seville - GSWSA 8 foot high wood fence. |
| Pl # 6 | Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive. |
| Pl # 8, # 9, # 10 | Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line. |
| Pl # 12 | Similar fences at 184 Seville. |
| Pl # 13 | Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth. |
| Pl # 14 | Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court. |
| Pl # 15 | Fence at 166 Seville. |

(3) The actual complaint was that (paragraph 32 of the 2010 case counter – claim) "the Plaintiff constructed a brick wall on the property without obtaining the approval of the Defendant HOA or the Architectural Review Board." (same text in 2009 case counter – claim). And in paragraph 37 of the 2010 counter – claim :

> "The Architectural Review Board also demanded that the brick wall be removed from the property ..."

And from paragraph 39 (of the 2010) "Although Plantiff's application for the fence and brick wall were denied ...

**And from paragraph 40 (of the 2010) "The brick wall is a continuing violation of the covenants...:"**

**(4) It was never alleged by Defendants that Plaintiff actually erected a fence, which Plaintiff did not do (although an application to do so was submitted and illegally refused). The Complaint of Defendant is very specific and repeatedly claims with specificity that Plaintiff constructed a "brick wall".**

**(5) The Court was shown the Defendant IHOA's response to interrogatories which proved to the Court that fences and walls are commonly approved throughout the PUD: On March 18. 2011 Defendant responded to Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer: Pl# 604 / 605.**

> **16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.**
> **ANSWER: Listed below are the dates, names and addresses where fences have been permitted:**
>
> **1. February 4, 2004 - Diskin - 505 Crawley Place**
> **2. September 1, 2004 – Bernardo - 182 Pickering Drive**
> **3. September 22, 2004 - Cipriani - 186 Seville Drive**
> **4. September 28, 2004 - Tempelton - 826 Castlebridge Court**
> **5. October 15, 2004 - Buller - 513 Dunham Court**
> **6. February 2, 2005 - Lattig - 208 Whitchurch Street**
> **7. March 8, 2005 - Small - 166 Seville**
> **8. June 13, 2005 - Wronka - 170 Seville**
> **9. August 5, 2005 - Anthony - 831 Castlebridge Court**
> **10. August 16, 2005 - Bergman - 405 Moat Court**
> **11. September 8, 2005 - Sweeney - 704 Hawick Street**
> **12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court**
> **13. March 3, 2006 - Dougherty - 280 Pickering Drive**
> **14. March 6, 2006 - McCray - 805 Castlebridge Court**
> **15. March 6, 2006 - Sconyers - 253 Whitchurch Street**
> **16. March 13, 2006 - Hamden - 230 Pickering Court**
> **17. May 3, 2006 - Walker - 849 Castlebridge**
> **18. May 3, 2006- Zielenski - 1019 Knightsbridge Court**
> **19. July 11, 2006 - Boudreau - 105 Keswick Court**
> **20. October 13, 2006 - Russell - 139 Wicklow**
> **21. October 13, 2007 - Weibel- 252 Marbella**
> **22. April 9, 2007 - Proctor - 174 Seville –**
> **23. June 27, 2007 - Pappas - 501 Turret Court**

24. July 3, 2007 - Benjamin - 627 Locke Court Fences and Playsets
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court
27. January 18, 2008 - Crawford - 521 Tamarindo Court
28. September 22, 2010 - Kinsey - 236 Whitchurch

(6) Plaintiff introduced into evidence and showed the court photos of what Defendant was calling a "brick wall", Pl # 36, which showed that it was nothing more than a row of plant bed edgers which was what was requested in Plaintiff's ARB Application (Pl# 629) and which was approved by HOA (Pl# 631) as they approved the plant bed with brick edgers. Plaintiff also introduced and showed the Court other pictures of elsewhere on Plaintiff's lot where the HOA called the same bricks "landscape edging" and which the HOA had previously approved numerous times and which was also – as "landscape edging" in front of a member of the ARB's house (Pl # 21 – 26; #42), Color Enlargements of these photos were in Poster Board and were handed to the Special Referee to examine. Testimony was "torn" from Freiboth that what was "on the ground" could not possibly have anything to do with a fence or brick wall because of structural reasons. Plaintiff's witness Mike Butryn, who is a contractor, testified as such and that what is "on the ground" is not a fence or a wall.

(7) The Counter – Claim is very specific. It alleges a brick wall was built. It says this over and over. It does not allege landscaping edgers were laid. Such an assertion (that a brick wall was constructed) by Defendants and their counsel is a frivolous claim and should be sanctioned.

(8) There is also the defense for Plaintiff of "necessity". A member of the Defendant HOA' ARB, Jay Cartman, repeatedly drove stakes through Plaintiff's irrigation system along the property line of the "brick wall" – destroying Plaintiff's irrigation system. The Court was shown pictures of Cartman's "No Trespassing" signs – IN PLAINTIFF's YARD and pictures of Cartman trespassing to drive said stakes (caught with a hammer in hand) (Plaintiff # 620 – 625). This also included a picture of a hypodermic needle .left by Cartman on Plaintiff's side yard where his children play, for which several police investigations / reports were made (they took possession of the needles). The HOA refused to do anything about Cartman's "illegal" signs and stakes. The Horry Police recommended the wall as Cartman was considered "erratic and dangerous" since it was

**perpetuated in police reports that Cartman was making threats and gesturing wildly and yelling at Plaintiff's wife when she landscaped on Plaintiff's property.**

**(9) In testimony at trial IHOA President William Freiboth persisted in calling what Plaintiff constructed a "brick wall". Plaintiff called it "landscape edgers". No one called what was on the ground as a "brick foundation". At the end of Plaintiff's presentation relating to the "fence" and "counter-claim" Defense Counsel never contested any of Plaintiff's assertions and never introduced no evidence. Defense counsel did not challenge Plaintiff's witness Mike Butryn, a contractor, when he asserted that what was on the ground was nothing more than landscape edgers and was useless in connection with a fence or wall.**

**(10) Defense Counsel, faced with the laughable contradiction between the complaint's assertion that Plaintiff had constructed a "brick wall" and the photos and testimony, after the trial was over created a new theory never presented at trial: that Plaintiff built a "brick foundation" – Special Referee's Order paragraphs 27 and 28. Per the photos and testimony (of Butryn), the brick edgers could not serve as a "foundation" for anything since there was no paver base and no stability to edgers merely pushed into the soil. In paragraph 25 the Special Referee ordered Plaintiff to remove the "brick foundation" which is impossible because it never existed.[27] Applying the applicable standard, it is more likely than not that Plaintiff had not constructed what Defendant's complaint alleged, a "brick wall" or the new theory introduced at trial, a "brick foundation".**

**d. Declaration Sought:**

**(1) That the denial of Plaintiff's application to install a fence was selective and capricious and that because of the wide variation in fences installed, in every conceivable location on lots, the IHOA had waived it's right to enforce this restriction.**

**(2) That any IHOA action based on the Covenant provision relating to fences is void because that provision was "waived.**

**(3) That the IHOA refusal to approve Plaintiff's fence and landscape edging was**

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**[27] As a matter of discretion, Plaintiff removed the brick edgers but contends it was approved because the ARB approved the brick landscape edgers beginning at the curb and running inwards. Somehow when the edgers got 10 feet in they now were a brick**

selective and capricious enforcement, and that the IHOA had approved the same brick edging only yards away on Plaintiff's property as "landscape edging". The refusal to approve what had been approved for use previously in the same area was selective and capricious.

(4) That no counter – claim was posed stating an issue with "landscape edging" or "brick foundation" but rather that Plaintiff had built a "brick wall" which is not supported by the evidence. The allegation that Plaintiff build a "brick foundation" is not supported by the evidence either.

(5) That for any and all of the aforesaid, no judgment can issue in favor of Defendant on it's counter – claim.

(6) That because it was clear that no "brick wall" was built, the counter – claim constitutes a frivolous proceeding under South Carolina Law, and Defendants shall be assessed a penalty double the cost of Plaintiff's depositions, transcripts, motions, and other court after the date of the filing by Defendant of it's counter-claim on August 26, 2011.

(7) That Plaintiff shall be permitted to erect a fence and adjacent paver edging as requested in his ARB Application dated September 30, 2010, Pl #629.

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18. Defendants Rosemary Toth and HOA through it's Officers Rosemary Toth, William Fletcher, and Jay Cartman Harassed and Stalked Plaintiff.

a. Law.

SECTION 16-3-1700. Offenses Against The Person, Harassment and Stalking. Definitions
(B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and ... would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

(C) "Stalking" means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: ...
(2) assault upon the person or a member of his family;
(3) bodily injury to the person or a member of his family; ...

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foundation.

**(6) damage to the property of the person or a member of his family.**

**SECTION 16-3-1750. Action seeking a restraining order against a person engaged in harassment or stalking; jurisdiction and venue; forms; enforceability.**
**(A) Pursuant to this article, the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking.**

**SECTION 16-3-1830. Availability of other civil and criminal remedies.**
**A proceeding commenced pursuant to this article is in addition to other civil and criminal remedies.**

**b. Facts.**

**(1) Trial testimony and evidence was offered that Jay Cartman, a member of the HOA's ARB and the next – door neighbor to Plaintiff, was part of a campaign by Defendant HOA and it's officers to discourage Plaintiff from exercising his constitutional rights of free speech with regard to the HOA but also to retaliate against Plaintiff and discourage him from continuing his civil suit against Defendants, which is Plaintiff's constitutional right.**

**(2) On October 12, 2010 Plaintiff filed a civil suit against the Defendant HOA in Horry County Magistrate Court, 2010CV261072943 whose allegations included**

**22. The actions of Defendant constitute harassment and tortuous interference with Plaintiff's lawful use of his property.**
**23. Wherefore Plaintiff asks for relief consisting of: ...**
**b. for an Order barring Defendant from any future acts attempting to restrict Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; ...**

**When transferred at Defendant's request to Circuit Court, this case became 2010-CP-26-11320 which has been consolidated into the 2009 case.**

**(3) Testimony was offered by Mike Butryn that Rosemary Toth personally instructed him to "fire" Pete Pizzi from his position on the Buildings and Grounds Committee because Pete Pizzi was seen entering Plaintiff's residence. This was admitted as being a policy chosen by the HOA, by Defense Witness / board member (at the time) Maureen Sullivan.**

**(4) Amendment #1 to the Civil Complaint in Civil Case 2009-CP-26-3596 included the following accusations against the HOA and Toth (Para 91)**

**because the IHOA was on notice of the procedural error, the HOA's conduct in filing a counter – claim is a frivolous proceeding subject to SC Code 15-36 and sanctions should be imposed in at least double the amount the IHOA was seeking from Plaintiff, plus all costs of depositions, transcripts and motions from the time the IHOA filed it's two counter – claims August 20, 2011**

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**16. Counter-claim of Defendant IHOA is void because the IHOA Does Not Have Capacity:**

**a. The Defendant IHOA is NOT the HOA under the Covenants.**

**(1) See prior argument. This is also the finding of the Special Referee in his Order, adopting the position of Defense Counsel. On page 12 of his order the Special Referee made a controlling finding of fact and conclusion of law which reads:**

> **"The Declaration Recitals, as amended, state: "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C"." "**

**(2) The implication of this is that the ARB was not legally constituted because the Covenants give only the HOA it designates the authority to create an ARB and for the Board of said HOA to appoint the members. Any action of a board appointed by Defendant IHOA is ultra-vires and of no consequence.**

**(3) Another implication is that since the Defendant IHOA is not the HOA under the covenants, it lacks standing to advance a cause of action for violation of the covenants.**

**b. The IHOA has no standing to assert a claim by an independent ARB..**

**(1) The Court held that the fines that the IHOA is seeking to collect – payable to the IHOA – are fines from the ARB as an entity independent from the IHOA. This artifice was invented by Defense Counsel to explain why Bylaws Section 13.3 was ignored but it also means that the IHOA has no standing to assert the claim of the "separate and independent ARB". In paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to**

party IHOA:

> "As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00."

(2) The related finding of the Special Referee announced in his Order is:

> The ARB is a separate Board ... created by Article VII of the Declaration. ... Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents ...

(3) The Bylaws do not establish the ARB. The only mention of the ARB in the bylaws is that (Section 11.1.1 Restoration of destroyed condemned land) landscaping plans for a restored areas must be approved by the Developer, the Board, and the ARB; and per Bylaw Section 12.3.6 The HOA must pay the expenses of the Architectural Review Board.

c. Declaratory Judgment which follows this analysis.

In the alternative, The IHOA lacks standing to seek to enforce a fine by the ARB and to sue out the covenants because of any and all of the following:

(1) The IHOA has no standing under the Covenants as it is not the HOA.;

(2) The ARB had no authority to impose a fine since it was not constituted by the HOA designated by the Covenants as amended;

(3) The ARB is a separate entity from the Defendant IHOA and thus the IHOA has no standing to advocate a cause of action which belongs to the ARB.

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17. The Counter – Claim is Void because the restriction on fences and walls was "waived" or because of selective and capricious enforcement or because the Complaint never complained of a "brick wall" or a "brick foundation"..

a. See discussion supra.

b. The requirement of Covenant Section 7.2 to seek prior approval of the ARB was deleted in Amendment #1 of the Covenants. The provision regarding fences, Section 7.4 of the Covenants, was likewise deleted in Amendment #1 to the Covenants.

c. The IHOA selectively and capriciously denied Plaintiff permission to erect a

fence.

(1) Case Law.

> ... extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007 the Court found that the homeowners association waived it's control over fences and other issues. The Court noted that

> "the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

(2) The Court was shown the following pictures to prove the "extensive omissions or variations and that was requested by Plaintiff had already been approved elsewhere in the PUD by the IHOA:

| EXHIBIT | Locations |
|---|---|
| Pl # 2 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 3 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 4 | 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street. |
| Pl # 5 | Right side of 120 Seville - GSWSA 8 foot high wood fence. |
| Pl # 6 | Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive. |
| Pl # 8, # 9, # 10 | Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line. |
| Pl # 12 | Similar fences at 184 Seville. |
| Pl # 13 | Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth. |
| Pl # 14 | Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court. |
| Pl # 15 | Fence at 166 Seville. |

(3) The actual complaint was that (paragraph 32 of the 2010 case counter – claim) "the Plaintiff constructed a brick wall on the property without obtaining the approval of the Defendant HOA or the Architectural Review Board." (same text in 2009 case counter – claim). And in paragraph 37 of the 2010 counter – claim :

> "The Architectural Review Board also demanded that the brick wall be removed from the property ..."

And from paragraph 39 (of the 2010) "Although Plantiff's application for the fence and brick wall were denied ...

**And from paragraph 40 (of the 2010) "The brick wall is a continuing violation of the covenants...:"**

**(4) It was never alleged by Defendants that Plaintiff actually erected a fence, which Plaintiff did not do (although an application to do so was submitted and illegally refused). The Complaint of Defendant is very specific and repeatedly claims with specificity that Plaintiff constructed a "brick wall".**

**(5) The Court was shown the Defendant IHOA's response to interrogatories which proved to the Court that fences and walls are commonly approved throughout the PUD: On March 18. 2011 Defendant responded to Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer: Pl# 604 / 605.**

> **16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.**
> **ANSWER: Listed below are the dates, names and addresses where fences have been permitted:**
>
> **1. February 4, 2004 - Diskin - 505 Crawley Place**
> **2. September 1, 2004 – Bernardo - 182 Pickering Drive**
> **3. September 22, 2004 - Cipriani - 186 Seville Drive**
> **4. September 28, 2004 - Tempelton - 826 Castlebridge Court**
> **5. October 15, 2004 - Buller - 513 Dunham Court**
> **6. February 2, 2005 - Lattig - 208 Whitchurch Street**
> **7. March 8, 2005 - Small - 166 Seville**
> **8. June 13, 2005 - Wronka - 170 Seville**
> **9. August 5, 2005 - Anthony - 831 Castlebridge Court**
> **10. August 16, 2005 - Bergman - 405 Moat Court**
> **11. September 8, 2005 - Sweeney - 704 Hawick Street**
> **12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court**
> **13. March 3, 2006 - Dougherty - 280 Pickering Drive**
> **14. March 6, 2006 - McCray - 805 Castlebridge Court**
> **15. March 6, 2006 - Sconyers - 253 Whitchurch Street**
> **16. March 13, 2006 - Hamden - 230 Pickering Court**
> **17. May 3, 2006 - Walker - 849 Castlebridge**
> **18. May 3, 2006- Zielenski - 1019 Knightsbridge Court**
> **19. July 11, 2006 - Boudreau - 105 Keswick Court**
> **20. October 13, 2006 - Russell - 139 Wicklow**
> **21. October 13, 2007 - Weibel- 252 Marbella**
> **22. April 9, 2007 - Proctor - 174 Seville –**
> **23. June 27, 2007 - Pappas - 501 Turret Court**

24. July 3, 2007 - Benjamin - 627 Locke Court Fences and Playsets
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court
27. January 18, 2008 - Crawford - 521 Tamarindo Court
28. September 22, 2010 - Kinsey - 236 Whitchurch

(6) Plaintiff introduced into evidence and showed the court photos of what Defendant was calling a "brick wall", Pl # 36, which showed that it was nothing more than a row of plant bed edgers which was what was requested in Plaintiff's ARB Application (Pl# 629) and which was approved by HOA (Pl# 631) as they approved the plant bed with brick edgers. Plaintiff also introduced and showed the Court other pictures of elsewhere on Plaintiff's lot where the HOA called the same bricks "landscape edging" and which the HOA had previously approved numerous times and which was also – as "landscape edging" in front of a member of the ARB's house (Pl # 21 – 26; #42), Color Enlargements of these photos were in Poster Board and were handed to the Special Referee to examine. Testimony was "torn" from Freiboth that what was "on the ground" could not possibly have anything to do with a fence or brick wall because of structural reasons. Plaintiff's witness Mike Butryn, who is a contractor, testified as such and that what is "on the ground" is not a fence or a wall.

(7) The Counter – Claim is very specific. It alleges a brick wall was built. It says this over and over. It does not allege landscaping edgers were laid. Such an assertion (that a brick wall was constructed) by Defendants and their counsel is a frivolous claim and should be sanctioned.

(8) There is also the defense for Plaintiff of "necessity". A member of the Defendant HOA' ARB, Jay Cartman, repeatedly drove stakes through Plaintiff's irrigation system along the property line of the "brick wall" – destroying Plaintiff's irrigation system. The Court was shown pictures of Cartman's "No Trespassing" signs – IN PLAINTIFF's YARD and pictures of Cartman trespassing to drive said stakes (caught with a hammer in hand) (Plaintiff # 620 – 625). This also included a picture of a hypodermic needle .left by Cartman on Plaintiff's side yard where his children play, for which several police investigations / reports were made (they took possession of the needles). The HOA refused to do anything about Cartman's "illegal" signs and stakes. The Horry Police recommended the wall as Cartman was considered "erratic and dangerous" since it was

perpetuated in police reports that Cartman was making threats and gesturing wildly and yelling at Plaintiff's wife when she landscaped on Plaintiff's property.

(9) In testimony at trial IHOA President William Freiboth persisted in calling what Plaintiff constructed a "brick wall". Plaintiff called it "landscape edgers". No one called what was on the ground as a "brick foundation". At the end of Plaintiff's presentation relating to the "fence" and "counter-claim" Defense Counsel never contested any of Plaintiff's assertions and never introduced no evidence. Defense counsel did not challenge Plaintiff's witness Mike Butryn, a contractor, when he asserted that what was on the ground was nothing more than landscape edgers and was useless in connection with a fence or wall.

(10) Defense Counsel, faced with the laughable contradiction between the complaint's assertion that Plaintiff had constructed a "brick wall" and the photos and testimony, after the trial was over created a new theory never presented at trial: that Plaintiff built a "brick foundation" – Special Referee's Order paragraphs 27 and 28. Per the photos and testimony (of Butryn), the brick edgers could not serve as a "foundation" for anything since there was no paver base and no stability to edgers merely pushed into the soil. In paragraph 25 the Special Referee ordered Plaintiff to remove the "brick foundation" which is impossible because it never existed.[27] Applying the applicable standard, it is more likely than not that Plaintiff had not constructed what Defendant's complaint alleged, a "brick wall" or the new theory introduced at trial, a "brick foundation".

d. Declaration Sought:

(1) That the denial of Plaintiff's application to install a fence was selective and capricious and that because of the wide variation in fences installed, in every conceivable location on lots, the IHOA had waived it's right to enforce this restriction.

(2) That any IHOA action based on the Covenant provision relating to fences is void because that provision was "waived.

(3) That the IHOA refusal to approve Plaintiff's fence and landscape edging was

[27] As a matter of discretion, Plaintiff removed the brick edgers but contends it was approved because the ARB approved the brick landscape edgers beginning at the curb and running inwards. Somehow when the edgers got 10 feet in they now were a brick

selective and capricious enforcement, and that the IHOA had approved the same brick edging only yards away on Plaintiff's property as "landscape edging". The refusal to approve what had been approved for use previously in the same area was selective and capricious.

(4) That no counter – claim was posed stating an issue with "landscape edging" or "brick foundation" but rather that Plaintiff had built a "brick wall" which is not supported by the evidence. The allegation that Plaintiff build a "brick foundation" is not supported by the evidence either.

(5) That for any and all of the aforesaid, no judgment can issue in favor of Defendant on it's counter – claim.

(6) That because it was clear that no "brick wall" was built, the counter – claim constitutes a frivolous proceeding under South Carolina Law, and Defendants shall be assessed a penalty double the cost of Plaintiff's depositions, transcripts, motions, and other court after the date of the filing by Defendant of it's counter-claim on August 26, 2011.

(7) That Plaintiff shall be permitted to erect a fence and adjacent paver edging as requested in his ARB Application dated September 30, 2010, Pl #629.

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18. Defendants Rosemary Toth and HOA through it's Officers Rosemary Toth, William Fletcher, and Jay Cartman Harassed and Stalked Plaintiff.

a. Law.

SECTION 16-3-1700. Offenses Against The Person, Harassment and Stalking. Definitions
(B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and ... would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

(C) "Stalking" means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: ...
(2) assault upon the person or a member of his family;
(3) bodily injury to the person or a member of his family; ...

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foundation.

**(6) damage to the property of the person or a member of his family.**

**SECTION 16-3-1750. Action seeking a restraining order against a person engaged in harassment or stalking; jurisdiction and venue; forms; enforceability.**
**(A) Pursuant to this article, the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking.**

**SECTION 16-3-1830. Availability of other civil and criminal remedies.**
**A proceeding commenced pursuant to this article is in addition to other civil and criminal remedies.**

**b. Facts.**

**(1) Trial testimony and evidence was offered that Jay Cartman, a member of the HOA's ARB and the next – door neighbor to Plaintiff, was part of a campaign by Defendant HOA and it's officers to discourage Plaintiff from exercising his constitutional rights of free speech with regard to the HOA but also to retaliate against Plaintiff and discourage him from continuing his civil suit against Defendants, which is Plaintiff's constitutional right.**

**(2) On October 12, 2010 Plaintiff filed a civil suit against the Defendant HOA in Horry County Magistrate Court, 2010CV261072943 whose allegations included**

**22. The actions of Defendant constitute harassment and tortuous interference with Plaintiff's lawful use of his property.**
**23. Wherefore Plaintiff asks for relief consisting of: ...**
**b. for an Order barring Defendant from any future acts attempting to restrict Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; ...**

**When transferred at Defendant's request to Circuit Court, this case became 2010-CP-26-11320 which has been consolidated into the 2009 case.**

**(3) Testimony was offered by Mike Butryn that Rosemary Toth personally instructed him to "fire" Pete Pizzi from his position on the Buildings and Grounds Committee because Pete Pizzi was seen entering Plaintiff's residence. This was admitted as being a policy chosen by the HOA, by Defense Witness / board member (at the time) Maureen Sullivan.**

**(4) Amendment #1 to the Civil Complaint in Civil Case 2009-CP-26-3596 included the following accusations against the HOA and Toth (Para 91)**

"c. Intimidation / Harassment with the objectives of
(1) inflicting emotional distress; and
(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;"

(5) None of the material which was mailed to homeowners and non-homeowners (such as renters) who happened to be on the HOA mailing list was known to the recipients and they had no reason to inquire into same. Because access to Westlaw and Lexis is by subscription, most of the information about Plaintiff published by Defendants was unavailable to the homeowners and renters. The multiple and indiscriminate publication constituted an "intrusion into the private life" of plaintiff and equates to harassment and stalking as a matter of law. Whether or not it constitutes defamation, the systematic and redundant publication by mail and email and posting on a web site of the false accusation -- that Plaintiff had been terminated for cause by the FBI and had falsely accused fellow FBI employees of defaming him (none of which was true) -- in the "List of Lawsuits" (which not just a list but included additional negative text) constitutes harassment in the second degree. As a matter of law, per SC 16-3-1830 a civil remedy is available to Plaintiff.

(5) The campaign against Plaintiff included Cartman actually damaging Plaintiff's property (Pl# 620, 621, 622, 623, 625 photos) and threatening emails (Pl# 518). Mention was made about Police Reports (introduced into evidence as Pl #530) and of an investigation by Horry County Police. Although Cartman was present in the courtroom during the trial he was never called by Defense Counsel to rebut this. At Pl #620 was a picture of a hypodermic needle left by Cartman on Plaintiff's yard (one of many) about which police reports were filed after they investigated and took possession; At Pl #621 was a photo of Cartman driving stakes through Plaintiff's irrigation system; at #622 Cartman carrying a saw to damage shrubbery; at # 622 Cartman's stakes through Plaintiff's sprinkler line. At #626 was Plaintiff's September 10, 2010 letter to the HOA complaining about the conduct of Cartman.

(6) Defamatory Speech by IHOA. Louis Astorino testified in his deposition May 25, 2012

Page 23 12 Q. Do you recall the name... Bill Fletcher?
14 A. Yes

**18 Q. Is that the same Bill Fletcher who at times was on the HOA's architectural review board?**
**22 THE WITNESS: Yes.**
**24 Q. What did he tell you about me?**
**Page 24 1 THE WITNESS: That you're a pedophile.**
**Page 28 21 Q. Did a conversation you had with Bill Fletcher occur before or after this letter came out?**
**24 A. It was before.**

**(7) Louis Astorino in his deposition March 27, 2012:**

**Page 22 12 Q. What did any board member or committee 13 member of the HOA say to you regarding your socializing with me?**
**18 THE DEPONENT: They -- I was told, even before the meeting run, that I shouldn't speak to him because he was a pedophile.**
**21 BY MR. JARMUTH:**
**22 Q. Who said that?**
**21 BY MR. JARMUTH:**
**22 Q. Who said that?**
**23 A. My -- a neighbor across the street from me,**
**24 John and Bill Fletcher.**
**25 Q. Is that same Bill Fletcher a homeowner?**
**Page 23 5 BY MR. JARMUTH:**
**6 Q. Where does Bill Fletcher live?**
**7 A. On Pickering.**
**8 Q. Is Pickering in the HOA?**
**9 A. Yeah.**

**(8) Michael Butryn in his Deposition March 27, 2012:**

**5 Q. Can you describe anything anyone said to you regarding having a social relationship with me?**
**9 THE DEPONENT: Yes. Everyone thought that you were my best friend. They said to me that I should stay away from you.**
**...**
**25 As I said to them, that I do not**
**[Page 29 Line 1] socialize with you. No one felt that that was true.**
**4 Q. Around this time, what was Mike Templeton's capacity with the HOA?**
**6 A. I believe Mike was on the board. He was on the board of directors.**
**8 Q. What did Mike Templeton tell you regarding Pete Pizzi at that time?**
**10 A. About Pete, I received a phone call from him. ...**
**15 Mike had called me and said that he met with the board, and that him and Bill Jacques felt that Pete was undermining the board. And as a result, what I should do, because Pete -- I was chairman at the time, committee chairman of buildings and grounds -- Pete -- they said I should get rid of Pete, and I'm the one that should do it because Pete reported to me.**
**...**

[Page 30 Line 25] THE DEPONENT: Okay. From my
Page 31 1 understanding in talking to Mike Templeton, he felt that Pete was undermining the board because the papers that he supposedly carried there, and the fact that they were having difficulties with you, and why would he go to your house.

(8) The testimony of Mike Buttryn and Louis Astorino were repeated at trial and no attempt was made to controvert these statements and no witness was offered to contradict these. Since Templeton and Fletcher were officers of the Defendant HOA, these were statements against interest and excited utterances. At trial no objection to the testimony of Butryn or Astorino were raised by Defense Counsel.

(9) The Statute does not require that the target of the conduct actually suffer emotional distress but that the target believe that it "would cause a reasonaable person ... to fear".[28] Plaintiff reported the threats to the Horry County Police which is evidence that it is more likely than not that Plaintiff had such a belief at the time.

(10) At trial threatening emails were introduced and read the like of which had not been circulated in the PUD community before or since and certainly not relating to Plaintiff. Pl # 531 perpetuated threatening emails that circulated after the IHOA Board began their campaign against Plaintiff. HOA Board Member Maureen Sullivan, who is a neighbor and friend of Aine Hukezalie, testified that neither knew Plaintiff prior to this sequence of events. Plaintiff testified that he has never had any direct dealings with Huckazalie:

From: Aine Hukezalie (ahukezalie@yahoo.com)
Sent: Sun 5/31/09 2:35 PM To: ICbuzz@yahoogroups.com
... why not go door to door and found out just how much stress and anguish he has caused a huge portion of our community. Life is way too short to have someone as negative, vindictive and combative as him. He has finally pushed me to the limit, and I certainly have enough going on without contending with him. I and 25 others are now going to take action against him in person, but come hell or high waters, I will not have a big bully do this to me and my son. How dare he...surely they have medication or clinics for people like him! How dare he cause such pain and stress to people he has not ever even met. Enough is enough!!!

c. Conclusions. The testimony and evidence demonstrated that there were therats against Plaintiff which Plaintiff took seriously, that persons with whom Plaintiff socialized were told (by the HOA Board) not to socialize with Plaintiff, and that the Board

[28] SC 16-3-1700 (C).

**imposed sanctions against persons who disregarded the Board's "isolation" edict and the Board's intent was to harm Plaintiff. In addition, Plaintiff's property was actually damaged by an HOA ARB committee person, Jay Cartman which is within the "Stalking" statute, and additional intimidating and harassing conduct consistied of the hypodermic needles. Fletcher, and Cartman were present at trial and no attempt was made to contradict the assertion that this was part of the IHOA Board / Rosemary Toth intimidation campaign against Plaintiff.**

**d. Finding of the Court which should follow:**

**(1) That the defendants Rosemary Toth and the IHOA unlawfully stalked, harassed, and intimidated Plaintiff and interfered with Plaintiff's social relationships, all for the purpose of retaliating against Plaintiff for the exercise of his constitutional rights..**

**(2) That a sanction and damages in an amount the Court deems fit should be imposed, plus punitive damages as the court sees fit.**

**(3) That an injunction should issue enjoining the Defendants from further harassing or stalking or intimidating Plaintiff.**

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**19. Defendant IHOA, through it's Board Member William Fletcher, defamed Plaintiff,**

**a. Facts.**

**(1) Testimony was offered at trial by Louis Astorino that Mr. William Fletcher, an officer of the IHOA, called Plaintiff a "pedophile" and stated that for this reason Astorino should have nothing to do with Plaintiff. See excerpt from Deposition, above.**

**(2) This conduct is not protected by litigation privilege. The uncontroverted testimony was that the statement, which is defamatory per se, was made with no context at all to any litigation, that no attempt was made by Defendants to controvert the statement nor to prove it true, and that to the contrary, at trial Plaintiff testified that he is a licensed foster parent, which requires a background check where a pedophile history would be disqualifying. Such an accusation is defamatory per se because it can be expected to have a negative impact on social relationships and employment.**

**b. Decision by the Court.**

**(1) The Court should enter a finding that the Defendant IHOA, through it's**

officer William Freiboth, defamed Plaintiff with a statement which would induce outrage in a listener and which is defamatory per se.

(2) The Court should impose a judgment of both direct and punitive damages as it sees fit.

---

20. Co-Defendant K.A. Diehl Defamed Plaintiff /

a. Amendment #1 to Plaintiff's Complaint added K.A. Diehl as an additional defendant – paragraph 89. The Special Referee's Order completely ignored Diehl's culpability for defamation. The complaint went on to say that Julie Case and Beckie Abel are employees of Diehl acting within the scope of their employment. This was never denied by either in their deposition (Case) or trial (Abel) testimony.

b. The Amendment accused Diehl of (Para 91)

"a. Defamation;
b. Invasion of Privacy;
c. Intimidation / Harassment with the objectives of
(1) inflicting emotional distress; and
(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;

c. In paragraph 19 of his Order the Defense Counsel wrote, and it was adopted by the Special Referee without consulting the transcript, that

> "Plaintiff represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory. His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, an attached list of cases, and reported decisions. Since Plaintiff testified that there was nothing defamatory in Ms. Golding's letter, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that the letter was defamatory."

This is not what Plaintiff said. Plaintiff made the point at trial that anything that Golding wrote to her client is privileged – as long as it stays with her clients, the IHOA Board and Rosemary Toth. Plaintiff made the point that re-publication is not subject to the privilege. Plaintiff also stated he was not going to deal with the case summaries extracted verbatim from Westlaw or other such sources, but instead focused on the enclosure to the letter titled "List of Lawsuits Associated with Ron Jarmuth" Pl #515 republished beginning on May 27, 2009 – by Defendant KA Diehl. This document was an original composition and did not

quote court orders - or it contained partial quotes of same - mixed it with absolute lies of a defamatory nature. Plaintiff's witness Jane Pizzi testified that Diehl employee Julie Case testffied that Case admitted republishing the material, which Case admitted at her deposition. Case and Abel signed the transmission documents (Pl #526), 524 which they admitted doing. It was admitted that Diehl published this material on Diehl's web site (Pl #529. and that Abel authored a "Dear International Club Hmeowens" letter May 28, 2009 signing as an employee of KA Diehl. This material was submitted to the Court as Exhibit 4 to the Astorino Deposition of August 11, 2010 and by Order of the Chief Judge Steven John and by agreement of the Special Referee was accepted at trial as if stated during the trial. re-publication.

d. On Page 41 of the Order the Special Referee / Defense Counsel wrote that the defendants are protected by litigation privilege, and at trial Defense Counsel had her witness IHOA Board Member (at the time) Maureen Sullivan testify about the Board receiving the Golding letter. At Julie Case's deposition she did not claim litigation privilege and stated that the only reason she and Abel republished the material, within their scope of duties as Diehl employees, was because the IHOA Board told them to. No litigation privilege was claimed or agrued for them at trial. The same statements were elicited from Beckie Abel at trial. There was no reason for Diehl to anticpate being a party to this or any other case involving Plaintiff and there was no testimony or evidence to this effect – this being a necessary element of litigation privilege, thus this is not available for KA Diehl.

e. On Page 42 of the Order the Special Referee claimed that the letter to homeowners was privileged because ""Communications between officers and employees of a corporation are qualifiedly privileged" – But Julie Case and Beckie Abel are neither officers nor employees of the IHOA and Diehl has no special relationship with the homeowners. On Page 42 the Special Referee attempted to cloak the republication with privilege when he wrote that

> "communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."

There was no testimony or evidence that any homeowner had any corresponding interest or

duty or was able to do anything with this information. It was pointed out at trial that Diehl sent the material to renters who had no litigable interest in the case. The mailing list included anyone who had signed up on the web site and had provided an email address, irrespective of ownership status (Pl 522 & 525) and Abel's testimony at trial..

f. At Exhibits 500 to 536 Plaintiff produced evidence that the material in the "List of Lawsuits" was false in many respects which were of a nature to cast a negative view of Plaintiff.

(1) In #10 the author of the List wrote with the putative authority of a non-existent findings in a court decision that Plaintiff

> "alleged defamation by some of his co-employees at the FBI. He also alleged that their defamations led to the termination of his employment with the FBI."

Butryn, Pete and Jane Pizzi, and Astorino testified that the langauge of this told them that (a) Jarmuth falsely accused FBI co-employees; (b) that Jarmuth was fired for cause from the FBI, and that this must have been a substantial wrong because it is difficult to terminate a career federal employee. Plaintiff's evidence at trial (Pl #511) was that during the time period in question Plaintiff received cash awards for and the highest possible performance rating, that Plaintiff was not terminated but instead continued to serve with various executive departments including Homeland Security, the FBI, and the Department of Defense, and that James Frinzi, the defendant (Pl #512) had never been a federal employee but in fact had been arrested by the Pennsylvania State Police on request of the FBI and that Frinzi had sent or had made defamatory letters and phone calls to Plaintiff's FBI supervisor in retaliation. Plaintiff also testified that he has been a licensed foster parent which means that none of the allegations made by Frinzi and contained in the enclosures mailed by Diehl could be true (background checks). A statement that someone had been terminated for cause by the FBI is defamatory per se and Abel and Case admitted that Diehl made this to 646 addresses per the count provided Plaintiff by the US Postal Service through FOIA and introduced at trial. This number is greater than the number of HOA households which is around 500. Diehl has no asserted nor actual litigation privilege for making this false and defamatory statement.

(2) In #2 on the list the author wrote that Plaintiff had sued "Dr Brian Krolczyk". Plaintiff produced the docket sheet for this case (Pl #507) which showed that

**Krolczyk was not a "doctor" (but this was added by Golding for embellishment and credibility); that Jarmuth was not pro se; and that Krolczyk had been found guilty by the WV State Board of Examiners of Psychologists (Pl #507) of the illegal practice of psychology / impersonating a psychologist / perjury at trial / illegally using materials he was not licensed to use and that WV felt this was so important it was the only time in the history of West Virginia that this sort of matter had been published in the West Virginia (official) state register. Another document (Pl #506) was introduced that showed Krolczyk was placed in the "stop" database in case he tried to bill for mental health services in West Virginia. The testimony of Plaintiff's witnesses is that the false depiction of Krolczyk as a "Doctor" (hence licensed) gave the false impression which impugned Plaintiff's reputation as going around suing medical practitioners for no reason. In fact Krolczyk was caught offering perjured testimony with false credential in an unjustified expert witness capacity. The effect of this mis-representation by the author of the list is cumulative in harming Plaintiff.**

**(3) #3 on the list stated without citation that Plaintiff had sued "Tara Patterson, esquire" which Plaintiff's witness stated they recognized as meainng that Jarmuth had sued (another) attorney. This was another cumulative lie which the author of the list put out to harm Plaintiff's standing in the community. Plaintiff introduced the docket (#512) of the Frinzi case which showed that not only had Jarmuth not sued Patterson, that she was not a party in the case and Jarmuth's testimony was that she had petitioned to get the deposition testimony of Pennsylvania State Police Sergeant Andre Stevens released to her from seal (She was Assistant Pennsylvania State Attorney General) because he admitted destruction of evidence against James Frinzi and she intended to prosecute Stevens. This element that Frinzi had corrupted a Pennsylvania State Trooper was omitted by Golding who could have found it on the federal Pacer. The mis-characterization is a defamation by Diehl of Jarmuth.**

**(4) Relating to #4 "Jarmuth v Reno" for which no case description was given and #6 Jarmuth v Natalia McLemore, also with no case description, Plaintiff produced the FOIA List of Cases (Pl #500 & 505) to show that these were Federal FOIA requests which had not been initially honored; that one names the custodian of records in a FOIA suit, and that Jarmuth ultimately prevailed and obtained the sought records. The author implied by**

omitting comment that these were also unmerited actions, to add another "notch" to maligning Plaintiff.

(5) #12 Jarmuth v Weiss. The author wrote that "Jury found against Jarmuth" when in fact it had never gone to the Jury and that this was the other half of "Weiss v Jarmuth and Fuller" where Jarmuth was represented by the Assistant US Attorney Genearl, resulting in a dismissal of Weiss' complaint, the firing of Weiss for cause – not a pro se action and with a positive set of facts. There was no accusation that Jarmuth was "violating various regulations...". The false representation that a jury had found against Jarmuth and that the case had been decided after trial is injurious to Plaintiff's reputation as Plaintiff's witness' testified they thought on first reading.

(6) 13. Jarmuth v Turetsky relating to a removal from state court. Plaintiff introduced the US Party Case index from Pacer as to Turetsky (Pl #510) and the federal Judgment on the Verdict against Turetsky (Pl #501) to show that Turetsky, not Jarmuth, had attempted removal from state to (Maryland) federal court and that was refused, that Jarmuth had filed an initial (not removed) case in USDC-DC, that Jarmuth was represented in Maryland and DC by Counsel, and that Jarmuth was awarded a judgment against Turetsky after a jury trial which withstood a Bankruptcy filing by Turetsky and an appeal. Defense Counsel Golding, if she acted in good will, would have seen the USDC-DC case as the central case and reported it, which detailed that Turetsky had forged a power of attorney and had stolen some funds from a stock broker account. A full listing would have shown a protective order barring Turetsky from stalking the federal judge.

g. The evidence was that Diehl had not asserted nor justified litigation privilege, that Diehl had republished material originally given the HOA Board and addressed to them, not to the homeowners, and that the material included false and defamatory statements that Plaintiff had been "terminated" for cause by the FBI for falsely accusing his co-workers of defamation. This is sufficient for a judgment in defamation against KA Diehl.

h. Finding which should follow by the Court.

(1) That any republications by KA Diehl are not protected by litigation privilege.

(2) That KA Diehl defamed Plaintiff by publishing, by US Postal Mail (646 pieces Pl #522) and email (354 reached out of 577 (Pl #525) attempted), material about

**Plaintiff which is Defamatory Per Se.**

**(3) A judgment in an amount as determined by the Court should follow reflecting 1000 republications.**

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**21. The IHOA defamed Plaintiff by writing and emailing to homeowners and others the false statement that Plaintiff has been "terminated" for cause by the FBI and that Plaintiff has falsely accused FBI co-employees of defaming him.**

**a. The accusation by the IHOA was stated in the "List of Lawsuits" (Pl #515) that was authored by Defense Counsel Golding but was sent by Golding with the intent that it be seen only by her clients, the HOA Board per the very language of her cover letter (Pl #520). The statement [29] -- under the purported authority of an attorney or a court decision -- that Plaintiff had been "terminated" from a job with the federal government – the FBI -- brings with it the implication that serious wrong must have been found because it is almost impossible, in the public view, to terminate a federal employee with tenure. Such an accusation made widely has a potentially serious negative impact on future employment opportunites for Plaintiff. In addition, the IHOA's republication contained the assertion that Plaintiff had falsely accused his FBI co-workers of defaming him, which brings with it a stigma which also could negaitively affect Plaintiff's future employment and social relationships. The testimony of Rosemary Toth and Julie Case in their depositions and Maureen Sullivan at trial was that neither the IHOA nor KA Diehl had done any fact checking. Such a false accusation is defamatory per se.**

**b. Per the testimony of HOA Board Member Maureen Sullivan the Board made the decision to redistribute / republish the material their attorney sent them. Per the testimony of Diehl employee Beckie Abel and Board member Sullivan, the board chose to use the mailing list / email list that the HOA uses to mail informational material to homeowners. This includes renters and other person who are not owners of record. No attempt was made to filter the mail list so as to mailed only to homeowners. Per the testimony of Beckie Abel, a KA Diehl employee, almost anyone can join the IHOA mail list and web site.**

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[29] **The inclusion of this false accusation in a document titled "List of Lawsuits..." made it**

c. Per the South Carolina non-profit cororation act, no homeowenr was at risk in any way for a judgment which might be entered against the IHOA, since members of a non-profit corporation are not liable for the debts of the corporation. In the event that a judgment was entered against the IHOA, the IHOA's insurance covers such a judgment so that neither the IHOA nor the homeowners were at risk to any extent. There was no demand in the original complaint for any significant monetary damages about which the homeowners need concern themselves. The questions about cable tv service and other contracts could only have resulted in a downward charge or no charge at all, not an increase in charges that the homeowneres need worry about.

d. At the onset of the litigation the 2009 complaint can best be described as a demand for declaratory judgment and for the Court to determine whether acts of prior boards were void for a variety of reasons. The Court was asked to determine how the HOA must conduct business so as to be in compliance with the Non-Profit Corporation Act.

e. The final order authored by Defense Counsel and signed by the Special Referee stated the limits of the Litigation Privilege. On Page 42 of the Order the Special Referee wrote regarding communication between a party to litigation and persons who are NOT parties to the litigation::

> "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." ***Constant v. Spartanburg Steel Prods., Inc.,*** 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

The flaws in applying this as the legal basis for finding that the communication between the IHOA and homeowners, renters, and persons who are neither renters nor homeowners, is that none of the persons to whom the IHOA sent the package had any duty or "corresponding interest" in the litigation. As a parenthetical note, Defense Counsel never raised this argument at trial and never cited to this case. The Special Referee was not permitted as a matter of judicial canon to add this as a basis of defense for Defendants after the trial was over. A judge is not permitted to conduct an independent investigation or advocate for a party. The canons require that before acting on proposed findings of facts

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appear that the accusation was a finding of fact by a court, which it was not.