

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

Crystal Pines Homeowners Association, Inc.

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Petitioner,

Appellants.

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S.C. Supreme Court

APPENDIX

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC..... Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

C/A No.: 2005 CP 32-4364

Crystal Pines Homeowners
Association, Inc.,

Plaintiff,

vs.

Don E. Phillips,

Defendant.

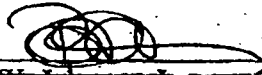
CONSENT ORDER OF REFERENCE

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2007 JUL 20 P 3:41

This matter comes before the Court by way of Plaintiff's request to refer the above-captioned action to the Master-in-Equity for Lexington County. Plaintiff requests an order of reference for the above captioned action in its entirety pursuant to Rule 53, SCRCP. Because the parties have consented to reference to the Master-in-Equity and for good cause shown, the court grants Plaintiff's request. This matter is hereby referred to the Honorable James O. Spence, Lexington County Master-in-Equity, with authority to take testimony arising under the pleadings and to make findings of fact and conclusions of law, and to enter a final judgment in the case. Any appeal therefrom shall be directed to the South Carolina Court of Appeals.

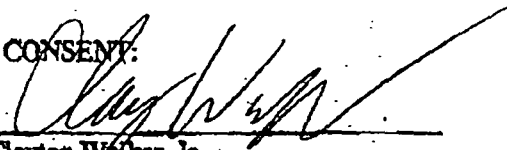
IT IS SO ORDERED.


~~JAMES O. SPENCE~~ BETH CARRIGG
~~CLERK OF COURT~~ CLERK OF COURT
LEXINGTON COUNTY

Lexington, South Carolina

July 17, 2007

WE CONSENT:

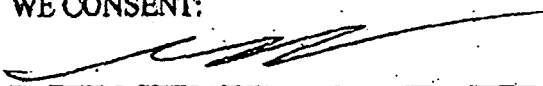

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June _____, 2007

RECEIVED
BETH A. CARRIG
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LEXINGTON, SC

2007 JUL 20 P 3:42

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FILED
2007 JUL 20 P 3:42
BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

COPY

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2009 JAN 20 CA 18-35 2005 CP 32-4364

Crystal Pines Homeowners
Association, Inc.,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Plaintiff,

ORDER

vs.

Don E. Phillips, Crystal Lake Land
Developers, Inc., and Crystal Pines
Yacht Club, LLC,

Defendants.

FACTUAL/PROCEDURAL BACKGROUND

This case is a dispute between a Plaintiff home owner's association (hereinafter "Plaintiff") and Defendant developer (hereinafter "Phillips"). Plaintiff Crystal Pines Homeowners Association, Inc. filed this action against Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC seeking damages for breach of contract and judgment confirming its title to a boat ramp and tennis courts. Don Phillips counterclaimed to require the Plaintiff to enforce the subdivision's covenants. Pursuant to Consent Order of Reference filed July 20, 2007, the matter was tried before the court on September 30, 2008 with any appeal being to the South Carolina Court of Appeals.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

After hearing and observing the testimony and demeanor of the various witnesses, and with due consideration of the evidence and applicable legal authorities, the court makes the following findings of fact and conclusions of law. Harmon v Bank of Danville, 339 S.E. 2d 150 (Ct. App. 1985).

1. FINDINGS OF FACTS

1. On November 14, 1978, E.E. Merchant conveyed a 74 acre tract of land in Lexington County to Crystal Lake Land Developers, Inc. ("CLLD").
2. CLLD then began to develop a residential subdivision on the tract called Crystal Pines.
3. By deed dated May 13, 1981 ("Deed"), CLLD granted certain property within the tract to the Crystal Lake Road Company ("CLRC"). The grant included a conveyance of the roads of the Crystal Pines subdivision ("Roads") to the CLRC.
4. While CLLD conveyed ownership of the Roads to CLRC, it specifically retained the obligation to maintain the Roads. According to Paragraph 11 of the Deed, CLLD agreed to "carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved."
5. Between 1981 and 1986, CLRC served as the de facto homeowners' association for Crystal Pines. On October 4, 1986, CLRC changed its name to the Crystal Pines Homeowners' Association ("CPHOA"). The change was in name only as CPHOA succeeded to the rights and responsibilities of CLRC.
6. The CPHOA, CLLD, and Don Phillips ("Phillips") recognized that CPHOA was the successor to the CLRC.
7. CPHOA was incorporated with the South Carolina Secretary of State on June 30, 1997.
8. CLLD continued to sell lots of land in Crystal Pines for residential development. On June 16, 1997, CLLD conveyed its interest in the remaining property of Crystal Pines to Phillips for the sum of \$392,679.05 plus the assumption of certain mortgage indebtedness of \$185,470.05.

9. On July 28, 1997, Phillips dissolved CLLD. The only asset remaining in the corporation was the sum paid by Phillips to CLLD for the Crystal Pines property.
10. At the time of CLLD's dissolution, Phillips was the sole shareholder of CLLD. At dissolution, Phillips transferred the remaining assets of CLLD to himself.
11. In 1997, Phillips caused to be prepared a proposed corrected deed to the CPHOA which would grant title to the Roads to the CPHOA ("Corrected Deed").
12. Attached to the Corrected Deed was an Exhibit B. Exhibit B reserved easements for the Roads to CLLD and required the CPHOA to assume the maintenance obligations for the Roads.
13. Various drafts of Exhibit B circulated between Phillips and the CPHOA over the next few years, but the parties never agreed on the language. The Corrected Deed and Exhibit B were never executed, delivered and filed.
14. On December 18, 1998, Phillips filed an amendment to the Declaration of Restrictions for Phases I, III, and IV of Crystal Pines. In the amendment, Phillips attempted to shift the maintenance obligations for the Roads to the CPHOA.
15. On October 29, 2001 and February 11, 2002, Phillips wrote letters to the CPHOA. In each letter, he confirmed that CLRC was the owner of the Roads, and not him. Additionally, in his February 11 letter, Phillips stated that the intention of the Deed was to convey the entrance gates and boat ramp to the CPHOA as well.
16. The Roads have been in poor condition for some time. In 1997 or 1998, CLLD or Phillips extended the Roads to open new areas of Crystal Pines. At that time, CLLD or Phillips also repaired the existing Roads.

17. Despite these repairs, the Roads remained in need of repairs. There was extensive cracking and numerous potholes. CPHOA approached Phillips about additional repairs to the Roads but received no response.
18. Because the Roads were in such poor condition, the CPHOA determined that it was necessary to undertake emergency repairs.
19. In March 2006, the CPHOA paid \$10,000 to Zack Smith's Paving and Sealcoating to patch areas of critical need on Red Fox Trail and Torrey Pine Lane.
20. Even after these emergency repairs, the Roads remain in dire need of repair. There are large potholes and severe cracking in multiple locations.
21. The CPHOA retained Geo-Systems Design & Testing, Inc. ("Geo-Systems") to evaluate the Roads in June 2007. Geo-Systems found the Roads had thin pavement sections for the particular soil type as well as inadequate asphalt density.
22. Geo-Systems concluded that it would require between \$400,000 and \$450,000 to repair the Roads. These repairs included tearing out the existing pavement, placing down a new layer of sand, and repaving on top of this new base.
23. Geo-Systems' \$400,000 estimate included a 2 inch asphalt surface course and an 8 inch cement stabilized base course. The \$450,000 estimate included a 2.5 inch asphalt surface course and a 10 inch macadam base course.
24. When Crystal Pines was developed in the early 1980's, CLLD constructed a boat ramp with access to Lake Murray as well as tennis courts.
25. CLLD and Phillips advertised boat ramp and tennis court access as an amenity for purchasers of Crystal Pines' property.

26. On April 1, 1986, Phillips filed a plat with the Lexington County Register of Deeds for a portion of Crystal Pines (Section IV) that showed a community boat ramp.
27. On April 2, 1998, Phillips filed protective covenants for Section V of Crystal Pines. These covenants provide that Section V homeowners shall enjoy reasonable use of a boat ramp as shown on subdivision surveys.
28. Between 1981 and 2004, homeowners in Crystal Pines enjoyed unfettered access to the boat ramp. They utilized the boat ramp on hundreds of occasions each year without objection from CLLD or Phillips.
29. In 2004, Phillips installed a locked gate that prohibited access to the boat ramp.
30. On December 11, 2006, Phillips conveyed title to the boat ramp to his son Wright L. Phillips. Wright L. Phillips then transferred title to the boat ramp to the Defendant Crystal Pines Yacht Club, LLC ("Yacht Club") on January 25, 2007.
31. The Yacht Club has continued to maintain the locked gate to the boat ramp.

CONCLUSIONS OF LAW

Two basic concepts control this case analysis: (1) Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App.2006) and (2) A developer has certain obligations or duties regarding roads when ownership is transferred to a homeowner's association. Cf. Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation, 349 S.C. 251, 562 S.E. 2d 633 (2002). The complaint asserts various causes of action relating to road maintenance issues and use of the boat ramp and tennis courts. Additionally, Plaintiff orally amended its complaint at trial with the consent of the Defendants to assert an additional cause of action for adverse possession. Several of the causes of action are

pled in the alternative. Resolution of four of the six causes of action will provide the extent of relief requested.

A. Breach of Contract

Plaintiff has alleged that Phillips breached his agreement to maintain the Roads. Under the terms of the Deed, CLLD undertook to maintain the Roads. Responsibility for the maintenance of the Roads now falls on Phillips as the successor to CLLD. The Deed also granted title to the Roads to the CLRC. The CPHOA is the successor to the CLRC and may properly seek damages from Phillips for a breach of the Deed's requirements.

1. Phillips is Obligated to Maintain the Roads as the Successor to CLLD.

As CLLD initiated the development of Crystal Pines, it prepared a deed which granted the Roads to the CLRC. At the same time, however, CLLD retained the obligation to "carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved." (Plaintiff's Ex. #1). CLLD therefore contracted with the CLRC to maintain the Roads according to the terms of the Deed. The Deed is still in effect today. (Trans. p. 64, ll. 18-20; p. 75, ll. 10-16).

In June 1997, CLLD conveyed its interest in the remaining property of Crystal Pines to Phillips. (Trans. p. 54, ll. 2-5). Shortly thereafter, Phillips dissolved CLLD. (Trans. p. 54, ll. 14-17). At this point, the only asset remaining in the corporation was the sum paid by Phillips for the land. (Trans. p. 54, ll. 18-21). When CLLD was dissolved, Phillips, as the sole shareholder of CLLD, took the remaining assets of CLLD. (Trans. p. 54, ll. 2-9, 14-21).

As the successor to CLLD, Phillips not only acceded to the assets of CLLD, but its liabilities as well. South Carolina has adopted the general successor liability framework recognized in other jurisdictions. See Simmons v. Mark Lift Industries, 366 S.C. 308, 315, 622

S.E.2d 213, 215 (2005). That framework permits successor liability in the case of a mere continuation. *Id.*; Walton v. Mazda of Rock Hill, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct.App. 2008). "The underlying theory of [the mere continuation doctrine] is that, if a corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability." 15 Fletcher's Cyclopedia of the Law of Corporation § 7124.10.

Phillips is the mere continuation of CLLD. From 1981 through 1997, CLLD developed and marketed lots in the Crystal Pines subdivision. In 1997, Phillips dissolved the corporation and continued with the same operation but in a personal capacity. Phillips was CLLD before the dissolution of CLLD, and Phillips seamlessly stepped into CLLD's shoes following its dissolution. "The single most important factor for applying the mere continuation theory is the continuity of ownership and management." Gladstone v. Stuart Cinemas, 878 A.2d 214 (Vt. 2005).

Additionally, Phillips' behavior since the conveyance of the Roads makes clear that he knew where the maintenance obligation lay. In the late 1990's, Phillips undertook to repair the Roads at his own expense. (Phillips Dep. [REDACTED] p. 10, ll. 22-25, p. 11, ll. 1-4) (245). Additionally, throughout 1999 and 2000, Phillips attempted to transfer maintenance obligations to the CPHOA. (Plaintiff's Exs. # 7 and 8; Trans. p. 45, l. 25, p. 46, ll. 1-7). The homeowners actively resisted any effort to assume the road maintenance obligations because it was not in their best interest to do so. (Trans. p. 48, ll. 4-12, p. 49, ll. 14-16). Phillips' behavior is consistent with an understanding that the road maintenance obligations have always belonged to him.

2. CPHOA is the Successor to the Rights of the CLRC.

After taking title to the Roads in the Deed, CLRC moved forward as the de facto homeowner's association for Crystal Pines. Eventually, the CLRC morphed into the CPHOA

eventually incorporating the association. (Trans. p. 18, ll. 20-25, p. 19, ll. 1-11). Phillips has also recognized that the CPHOA is the successor to the CLRC (Trans. p. 65, ll. 3-7), as well as the owner of the Roads and the entrance gates. (Plaintiff's Exs. #4 and 5).

As the successor to the CLRC, the CPHOA acceded to the benefits of the CLRC, including the right to seek recovery for a breach by Phillips of the road maintenance agreement contained in the Deed as well as title to the Roads and entrance gates.

3. The Roads Are in Need of Repair.

All the parties agree that the Roads are in dire need of repair. (Trans. p. 24, ll. 16-18, p. 25, ll. 9-25, p. 26, ll. 1-25, p. 27, ll. 1-6, p. 50, ll. 12-23). There are large potholes and severe cracking in multiple locations throughout Crystal Pines. *Id.* Plaintiffs have already spent \$10,000 to repair some of the more obvious concerns. (Plaintiff's Ex. #10; Trans. p. 27, ll. 10-25, p. 28, ll. 1-15). Even with those repairs, additional work remains to be done. (Trans. p. 28, ll. 16-21). Plaintiffs have retained Geo-Systems to prepare a comprehensive estimate regarding additional costs to repair the Roads. (Trans. p. 29, ll. 23-25, p. 30, ll. 1-6). Geo-Systems concluded that an additional \$450,000 would be required to completely repair the roads. (Plaintiff's Ex. #16; Trans. p. 30, ll. 19-23).

4. Phillips is in Breach of his Contract with the CPHOA.

As discussed in detail above, Phillips is the successor to the CLLD and the CPHOA is the successor to the CLRC. As such, Phillips now has contractual obligations to the CPHOA through the terms of the Deed. Phillips has breached his contract with the CPHOA by failing to maintain and repair the Roads.

With respect to Plaintiff's cause of action for breach of contract, the Court orders that judgment in the amount of \$460,000 be entered against Phillips in favor of the Plaintiff. This

sum includes \$10,000 in reimbursement for the repairs made by Zack Smith's Paving and \$450,000 to make the repairs recommended by Geo-Systems.

B. Phillips Failed to Shift the Road Maintenance Obligations When He Amended the Restrictions for Phases I, III, and IV.

On December 18, 1998, Phillips attempted to shift the maintenance obligations for the Roads to the CPHOA by an amendment to the Restrictions for Crystal Pines Phases I, III, and IV.¹ As discussed in detail below, this effort was unsuccessful.

1. The Road Maintenance Obligations Are Contained in the Deed, not the Restrictions.

The road maintenance agreement that lies at the heart of this dispute is contained in paragraph 11 of the Deed. (Plaintiff's Ex. #1). A change to the road maintenance obligations would entail a modification of the Deed, not the restrictions. Phillips' amendment to the restrictions therefore had no effect on the maintenance obligations contained in the Deed.

2. The Restrictions May Only Be Modified if in the Best Interest of Crystal Pines.

Phillips' attempt to modify the restrictions to shift the road maintenance obligations is not permitted by the original restrictions. The source for the authority to amend the restrictions comes from paragraph 15 of the restrictions. (Defendant's Ex. #1B). It allows the developer "to amend these restrictions from time to time as it may see fit in the best interest of the subdivision...." *Id.* It is difficult to envision how an amendment which transfers responsibility for road maintenance away from the developer and onto the homeowners' association would be in the best interest of the subdivision. (Trans. p. 49, ll. 14-16); See Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 971 (Utah 1925) (Best interests represents "greatest or most

¹ This attempt at amendment is also further evidence that Phillips understood that the obligation to maintain the Roads belonged to him.

advantage or usefulness."). Indeed, it is just the opposite. Phillips' attempted amendment did not meet the best interest requirement of the restrictions.

Phillips' attempt to modify the road maintenance agreement contained in the Deed by an amendment to the restrictions was unsuccessful. His amendment was directed at the incorrect instrument, and the amendment is not effective because it is not in the best interest of the subdivision.

C. The Residents of Crystal Pines Have a Prescriptive Easement for Use of the Boat Ramp.

Plaintiff alleges that it has a prescriptive easement for use of the boat ramp based on its use of the boat ramp since 1981. Plaintiff has satisfied the elements necessary to establish a prescriptive easement.

Creation of a prescriptive easement requires the following: (a) continued and uninterrupted use or enjoyment of the right for a period of 20 years; (b) proof of the identity of the thing enjoyed; and (c) adverse use or use under a claim of right. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Cl.App. 2005).

1. Plaintiff has Continually and Uninterruptedly Used the Boat Ramp Since 1981.

Plaintiff has enjoyed the right to use the boat ramp continually and uninterrupted since 1981. (Trans. p. 67, ll. 20-25; p. 68, ll. 1-23). It was not until Phillips placed a locked gate on the boat ramp in 2004 that usage of the boat ramp ceased. (*Id.*). By the time Phillips prohibited access to the ramp, Plaintiff's prescriptive period had already run for 23 years. See Matthews 365 S.C. at 250, 616 S.E.2d at 440. Plaintiff has satisfied the necessary prescriptive period.

2. The Identity of the Boat Ramp is Undisputed.

The identity of the boat ramp is undisputed. It is a clearly marked area of land. Further, Phillip's gating of the boat ramp clearly delineated what all parties considered to be the boat ramp.

3. Plaintiff Used the Boat Ramp Under a Claim of Right.

Finally, Plaintiff used the boat ramp under a claim of right. It is undisputed that Plaintiff's use of the ramp was not hostile as to CLLD or Phillips through 2004. (Trans. p. 68, ll. 13-16). However, a prescriptive easement does not require hostility when a party uses the easement under a claim of right. Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005); Revis v. Barrett, 321 S.C. 206, 208, 467 S.E.2d 460, 462, FN1 (Ct.App. 1996).

"The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he intends to acquire it." Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App. 2003). Instead, a party claiming a prescriptive easement under a claim of right must only demonstrate a substantial belief that he had the right to use the property." Matthews, 365 S.C. at 250, 616 S.E.2d at 440. This substantial belief is generally shown by regular usage of the easement without interference for the prescriptive period. *Id.*; Jones, 363 S.C. at 316-17, 609 S.E.2d at 600; Revis, 321 S.C. at 209-210, 467 S.E.2d at 462.

Plaintiff has demonstrated a substantial belief that it had a right to use the property. As described above, the Plaintiff's members regularly used the boat ramp without limitation and with Phillip's knowledge until 2004. (Trans. p. 41, ll. 17-25, p. 42, ll. 1-7, p. 68, ll. 20-23). Additionally, Phillips and CLLD informed homeowners that they would have access to the boat ramp at the time of their purchase. (Trans. p. 33, ll. 19-25, p. 34, l. 1, p. 42, ll. 1-7). Based on this belief, Plaintiff has shown a claim of right to the easement.

With respect to Plaintiff's cause of action for a prescriptive easement for use of the boat ramp, the Court finds that the Plaintiff has demonstrated a prescriptive easement and is entitled to an easement for continuous and uninterrupted usage of the boat ramp. Phillips and the Yacht Club are further ordered to remove all barriers that prohibit access to the boat ramp or ensure that all homeowners in Crystal Pines have access to the means of access.

D. Owners of Section IV are Entitled to an Implied Easement to the Boat Ramp.

Plaintiff has alleged that it is entitled to an implied easement for use of the boat ramp as a result of the recorded plat which shows community access. The recorded plat does establish an implied easement to the boat ramp for the owners of the land shown on that plat.

On April 1, 1986, Phillips filed a plat outlining Section IV of Crystal Pines. The plat showed a community boat ramp. (Plaintiff's Ex. # 13). Purchasers in Section IV of Crystal Pines therefore purchased the land with knowledge of the availability of a boat ramp. Purchasers of land made with reference to a subdivision plat acquire "every easement, privilege, and advantage shown upon said plat...." Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16 (1975). By virtue of the recorded plat, CLLD granted an implied easement to make use of the boat ramp to the owners in Section IV.

With respect to Plaintiff's cause of action for recognition of an implied easement to the boat ramp of Crystal Pines, the Court orders that the owners of Section IV of Crystal Pines are granted an easement for use of the boat ramp with all the privileges that accompany such easement. Phillips and the Yacht Club are further ordered to remove all barriers that prohibit access to the boat ramp to the homeowners in Section IV or ensure that all Section IV homeowners have access to the means of access.

E. Phillips Has Granted Access to the Boat Ramp to Owners of Section V.

Phillips filed a set of protective covenants for Section V of the Crystal Pines. (Defendant's Ex. # 1B). In these covenants, Phillips ensured homeowners in Section V that they would enjoy "reasonable use of the boat ramp as shown on subdivision surveys." (*Id.* at ¶ 19). At the time of the Section V covenants, Phillips had previously filed a plat which designated a community boat ramp. (Plaintiff's Ex. # 13). Taken together, these documents indicate a grant of access to the boat ramp to Section V homeowners.

With respect to Plaintiff's cause of action for misrepresentation regarding access to the boat ramp, the Court orders that the owners of Section V of Crystal Pines are entitled to reasonable use of the boat ramp. Phillips and the Yacht Club are further ordered to remove all barriers that prohibit access to the boat ramp to the homeowners in Section V or ensure that all Section V homeowners have access to the means of access.

F. CPHOA is not Obligated to Address the Concerns Raised in Phillips' Counterclaim.

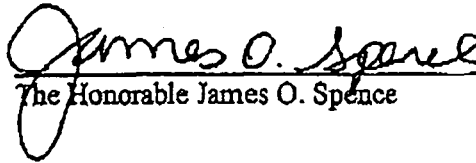
Phillips seeks an order from this Court that requires the CPHOA to address various alleged violations of the restrictive covenants of Crystal Pines. Phillips demonstrated a variety of modifications to homes and lots within Crystal Pines that he contends are violations of the covenants. Even if this Court were to find that these modifications were violations of the covenants, the CPHOA is not obligated to prohibit these alleged violations.

The document on which Phillips relies to establish the various violations of restrictions is the "Protective Covenants for Crystal Pines, Phase V." (Defendant's Ex. #1B) As a preliminary matter, this document would only govern conduct within Phase V of Crystal Pines-Phillips has not identified the phase where these alleged violations occurred or produced a document which prohibits similar conduct in other phases of Crystal Pines.

Even if the violations were limited to Phase V, the covenants provide that the CPHOA "may enforce these restrictions by proceedings at law or in equity." (Defendant's Ex. #1B) (emphasis added). "The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary...." Kennedy v. South Carolina Retirement System, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001). There is no affirmative obligation on the CPHOA to enforce the covenants.

Phillips' counterclaim for damages arising out of the CPHOA's failure to enforce the covenants is therefore denied.

IT IS SO ORDERED.


The Honorable James O. Spence

Lexington, South Carolina
January 6, 2009

2005-CP32-4364
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

ORIGINAL

Crystal Pines Homeowners Association, Inc.

Plaintiff(s)

vs.

Don E. Phillips,

Defendant(s)

CIVIL ACTION COVERSHEET

2005 - CP - 32 -

2005 DEC 19 A 11: 50

BETH A. CARRIGG
CLERK OF COURT

(Please Print)

Submitted By: H. Clay Walker, Jr.

Address: Walker, Martin & Reibold, LLC

Post Office Box 61140, Columbia, SC 29260

SC Bar #:

57799 LEXINGTON SC

Telephone #:

(803) 454-0955

Fax #:

(803) 454-0956

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

☒ JURY TRIAL demanded in complaint.☐ NON-JURY TRIAL demanded in complaint.☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

Administrative Law/Relief

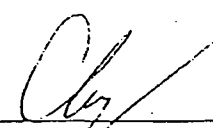
- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Other (699)

Submitting Party Signature: Date: December 14, 2005
July 26, 2005

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Record on Appeal -00018

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR.**
 Failure to do so may affect your case or may result in sanctions.

Record on Appeal -00019

2005-CP32-4364

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

C/A No.:

2005 DEC 19 AM 11:49

Crystal Pines Homeowners
Association, Inc.,)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Plaintiff,)

vs.)

Don E. Phillips,)

Defendant.)

SUMMONS

(Jury Trial Demanded)

TO: DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled action, a copy of which is hereby served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 3800 Forest Drive, Suite C-201, Columbia, SC 29204 within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid

WALKER, MARTIN & REIBOLD, LLC

BY:

H. Clayton Walker, Jr.
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
December 12, 2005

Record on Appeal -00020

2005-CP32-4364

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

C/A No.:

2005 DEC 19 A 11: 50

Crystal Pines Homeowners
Association, Inc.,)

Plaintiff,)

vs.)

Don E. Phillips,)

Defendant.)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

COMPLAINT
(Jury Trial Demanded)

Crystal Pines Homeowners Association, Inc., complaining of Defendant Don E. Phillips,
would respectfully show unto this Court as follows.

GENERAL ALLEGATIONS

1. Plaintiff is a corporation incorporated under the laws of the State of South Carolina.
2. Upon information and belief, defendant is a citizen and resident of the State of Tennessee.
3. This action involves the parties' rights, duties and obligations concerning various interests in real property located in Lexington County, South Carolina.
4. Defendant is the successor in interest to Crystal Lake Land Developers, Inc. (collectively referred to herein as "Phillips"). Phillips has engaged in the development of a parcel of land on Lake Murray for residential purposes. This land is now commonly known as the Crystal Pines Subdivision ("Crystal Pines").

Record on Appeal -00021

5. Early in the development of Crystal Pines, Phillips purported to convey the roads, including those that were both built and to be constructed, to the Crystal Lake Road Co. Plaintiff is the successor to the Crystal Lake Road Co. and holds title to the roads conveyed by Phillips, as set forth in a Deed to Real Estate recorded in the Office of the Registrar of Deeds for Lexington County in Book 462 at page 242 ("Deed"). Phillips undertook various obligations pursuant to the terms of that Deed, including an obligation to open for development the roads described in the Deed and to "carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved."

6. Phillips thereafter caused various roads in Crystal Pines to be opened pursuant to the terms of the Deed. Upon information and belief, the paving was not completed in a proper manner. As a result of the construction done by or on behalf of Phillips, the paving has failed to stand up to the ordinary wear and tear of traffic in Crystal Pines. The construction of the roads has also influenced drainage in such a way that the paving has contributed to both the degradation of the roadbed and damage to the road right-of-way.

7. The actions of Phillips have made the roadways in Crystal Pines difficult and dangerous to use for cars and pedestrians. Damage resulting from drainage problems created by the roadways continues to occur with each successive rainfall. Damage to the paving and associated improvements are so substantial that major maintenance, including total repaving, is necessary. Plaintiff has made demand upon Phillips to contribute to the maintenance and repair of the roads, as required in the Deed.

8. During the marketing of lots in Crystal Pines, Phillips repeatedly made representations in South Carolina that residents and members of Plaintiff would have access to a

boat ramp and to tennis courts. As the seller of various residential lots in Crystal Pines, Phillips had a pecuniary interest in the making of those representations, and as the maker of those statements, he had a duty of care to future residents of Crystal Pines to see that the information he communicated to them to induce them to purchase lots in Crystal Pines was truthful.

9. Phillips has placed locks on the tennis courts and the community boat ramp. Upon information and belief, only Phillips has keys to the locks on these amenities in Crystal Pines.

10. The community boat ramp is shown on the recorded plat of Phase 5 of Crystal Pines.

FIRST CAUSE OF ACTION

11. The preceding allegations are incorporated herein by reference as if set forth verbatim.

12. Phillips, for good and valuable consideration, contracted to maintain and repair the roads in Crystal Pines.

13. Despite demand from the Plaintiff, Phillips has failed and refused to maintain and repair the roadways pursuant to the agreement between the parties.

14. As a result of Phillips' breach of contract, Plaintiff is being required to incur the expense of maintaining and repairing the roads in Crystal Pines. Plaintiff is informed and believes that it is entitled to recover from Defendant the cost of maintaining and repairing roadways in Crystal Pines.

SECOND CAUSE OF ACTION

15. The preceding allegations are incorporated herein by reference as if set forth verbatim.

16. In the alternative, Phillips owns and is actively marketing undeveloped lots in Crystal Pines. Phillips also maintains a home in Crystal Pines. In the alternative, Plaintiff is informed and believes that it is entitled to have this Court inquire into the burdens and benefits of the roadways in Crystal Pines created by and conferred upon Phillips and to allocate to Phillips an equitable portion of the cost of maintaining and repairing the roads in Crystal Pines.

THIRD CAUSE OF ACTION

17. The preceding allegations are incorporated herein by reference as if set forth verbatim.

18. Phillips' paving of the various roadways in Crystal Pines has caused damage to the right-of-way and the roadbed of the roads in Crystal Pines.

19. The actions of Phillips have unreasonably interfered with Plaintiff's use and enjoyment of the roadways granted to it by the Deed. The injuries suffered by Plaintiff would not have occurred but for the improper actions of Phillips.

FOURTH CAUSE OF ACTION

20. The preceding allegations are incorporated herein by reference as if set forth verbatim.

21. Phillips falsely represented that members of Plaintiff would have access to a community boat ramp and tennis courts when they purchased lots in Crystal Pines. Plaintiff justifiably relied upon the representations made by Phillips regarding access to the boat ramp and tennis courts, and Phillips breached his duty to Plaintiff by failing to exercise due care in the representations he made to induce lot purchases in Crystal Pines.

FIFTH CAUSE OF ACTION

22. The preceding allegations are incorporated herein by reference as if set forth verbatim.

23. The conveyance of lots in Crystal Pines by reference to a plat depicting a community boat ramp created an implied easement for the use of that ramp.

WHEREFORE, Plaintiff prays that this Court issue its order:

1. Awarding Plaintiff actual damages on its First and Second Causes of Action;
2. Awarding Plaintiff actual and punitive damages on its Third and Fourth Causes of Action;
3. Declaring that Phillips granted an implied right of easement for access to the community boat ramp on Plaintiff's Fifth Cause of Action;
4. Declaring that in the alternative that Plaintiff holds title to the boat ramp parcel and the entrance gate parcel; and
5. For such other and further relief as this Court deems just and proper.

SIXTH CAUSE OF ACTION

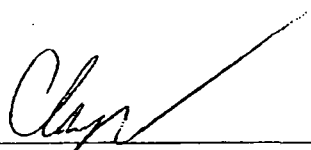
24. The preceding allegations are incorporated herein as if set forth verbatim.

25. The Deed, according to Phillips, conveys title to the boat ramp and entrance gate area to the Plaintiff's predecessor in interest. Upon information and belief, a dispute now exists regarding the Plaintiff's title to these properties.

26. Plaintiff is informed and believes that, in the alternative, it is entitled to a judgment confirming its title is and to the boat ramp parcel and the entrance gate parcel.

Respectfully submitted,

WALKER, MARTIN & REIBOLD, LLC

BY: 

H. Clayton Walker, Jr.
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
November 22, 2005

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Crystal Pines Homeowners
Association, Inc.,

Plaintiff,

vs.

Don E. Phillips,

Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C.A. No: 05-CP-32-4364

**ANSWER
JURY TRIAL DEMANDED**

FILED
20 FEB 24 10 10 AM
CLERK OF COURT
LEXINGTON, SC

Defendant responding to the allegations of the Complaint hereby answers as follows:

1. Paragraph 1 is admitted.
2. All other paragraphs are denied.

Wherefore having fully responded to the Complaint the Defendant requests it be dismissed.

OSWALD LAW FIRM, LLC

BY

Gene Stockholm

1031 Center Street, P.O. Box 4052
West Columbia, South Carolina 29171-4052
(803) 796-7260; (803) 796-1055 (fax)
ATTORNEYS FOR DEFENDENT

February 24, 2006

RBP

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

C/A No.: 2005 CP 32-4364

Crystal Pines Homeowners
Association, Inc.,

SUMMONS

Plaintiff,

(Jury Trial Demanded)

v.

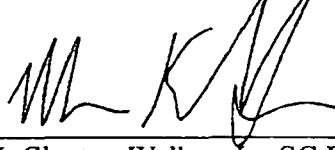
Don E. Phillips, Crystal Lake Land
Developers, Inc., and Crystal Pines Yacht
Club, LLC,

Defendants.

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled action, a copy of which is hereby served upon you, and to serve a copy of your Answer upon the subscribers at their offices located at 3800 Forest Drive, Suite C-201, Columbia, SC 29204 within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WALKER & REIBOLD, LLC



H. Clayton Walker, Jr., SC Bar #5779

Robert L. Reibold, SC Bar 9284

Marcus K. Gore

Post Office Box 61140

Columbia, SC 29260

(803) 454-0955

2007-LP-32-

560
862

ATTORNEYS FOR PLAINTIFF

July 13, 2007

Record on Appeal -00028

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

C/A No.: 2005 CP 32-4364

ORIGINAL

Crystal Pines Homeowners
Association, Inc.,)

Plaintiff,)

vs.)

Don E. Phillips, Crystal Lake Land
Developers, Inc., and Crystal Pines
Yacht Club, LLC,)

Defendants.)

**AMENDED COMPLAINT
(Jury Trial Demanded)**

FILED
CLERK OF COURT
JUL 17 2007
LEXINGTON, SOUTH CAROLINA

Crystal Pines Homeowners Association, Inc., complaining of Defendants Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC would respectfully show unto this Court as follows.

GENERAL ALLEGATIONS

1. Plaintiff is a corporation incorporated under the laws of the State of South Carolina.
2. Upon information and belief, Defendant Don E. Phillips is a citizen and resident of Lexington County, State of South Carolina.
3. Don E. Phillips is the successor in interest to Defendant Crystal Lake Land Developers, Inc. (collectively referred to herein as "Phillips").
4. Upon information and belief, Defendant Crystal Pines Yacht Club ("Yacht Club"), LLC is a limited liability company organized and in good standing under the laws of the state of South Carolina.

2007-LP-32- 862

Record on Appeal -00029

5. This action involves the parties' rights, duties, and obligations concerning various interests in real property located in Lexington County, South Carolina.

6. Phillips has engaged in the development of a parcel of land on Lake Murray for residential purposes. This land is now commonly known as the Crystal Pines Subdivision ("Crystal Pines").

7. Early in the development of Crystal Pines, Phillips purported to convey the roads, including those that were both built and to be constructed, to the Crystal Lake Road Co. Plaintiff is the successor to the Crystal Lake Road Co. and holds title to the roads conveyed by Phillips, as set forth in a Deed to Real Estate recorded in the Office of the Registrar of Deeds for Lexington County in Book 462 at page 242 ("Deed"). Phillips undertook various obligations pursuant to the terms of that Deed, including an obligation to open for development the roads described in the Deed and to "carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved."

8. Phillips thereafter caused various roads in Crystal Pines to be opened pursuant to the terms of the Deed. Upon information and belief, the paving was not completed in a proper manner. As a result of the construction done by or on behalf of Phillips, the paving has failed to stand up to the ordinary wear and tear of traffic in Crystal Pines. The construction of the roads has also influenced drainage in such a way that the paving has contributed to both the degradation of the roadbed and damage to the road right-of-way.

9. The actions of Phillips have made the roadways in Crystal Pines difficult and dangerous to use for cars and pedestrians. Damage resulting from drainage problems created by the roadways continues to occur with each successive rainfall. Damage to the paving and associated improvements are so substantial that major maintenance, including total repaving, is

necessary. Plaintiff has made demand upon Phillips to contribute to the maintenance and repair of the roads, as required in the Deed.

10. When Phillips refused to accede to Plaintiff's requests for contributions to road repairs, Plaintiff undertook road repairs at its own expense.

11. During the marketing of lots in Crystal Pines, Phillips repeatedly made representations in South Carolina that residents and members of Plaintiff would have access to a boat ramp and to tennis courts. As the seller of various residential lots in Crystal Pines, Phillips had a pecuniary interest in the making of those representations, and as the maker of those statements, he had a duty of care to future residents of Crystal Pines to see that the information be communicated to them to induce them to purchase lots in Crystal Pines was truthful.

12. Phillips has placed locks on the tennis courts which prevent access to that area. Upon information and belief, only Phillips has keys to the tennis court lock.

13. Phillips also placed locks on the gate which allowed access to the community boat ramp. On December 11, 2006, Don. E. Phillips transferred title to the boat ramp to his son, Wright L. Phillips. Wright L. Phillips then transferred title to the boat ramp to Yacht Club on January 25, 2007.

14. Yacht Club continues to maintain the locks installed by Phillips which prevent access to the community boat ramp.

15. The community boat ramp is shown on the recorded plat of Phase 5 of Crystal Pines.

FIRST CAUSE OF ACTION

16. The preceding allegations are incorporated herein by reference as if set forth verbatim.

17. Phillips, for good and valuable consideration, contracted to maintain and repair the roads in Crystal Pines.

18. Despite demand from the Plaintiff, Phillips has failed and refused to maintain and repair the roadways pursuant to the agreement between the parties.

19. As a result of Phillips' breach of contract, Plaintiff is being required to incur the expense of maintaining and repairing the roads in Crystal Pines. Plaintiff is informed and believes that it is entitled to recover from Defendant the cost of maintaining and repairing roadways in Crystal Pines.

SECOND CAUSE OF ACTION

20. The preceding allegations are incorporated herein by reference as if set forth verbatim.

21. In the alternative, Phillips owns and is actively marketing undeveloped lots in Crystal Pines. Phillips also maintains a home in Crystal Pines. In the alternative, Plaintiff is informed and believes that it is entitled to have this Court inquire into the burdens and benefits of the roadways in Crystal Pines created by and conferred upon Phillips and to allocate to Phillips an equitable portion of the cost of maintaining and repairing the roads in Crystal Pines.

THIRD CAUSE OF ACTION

22. The preceding allegations are incorporated herein by reference as if set forth verbatim.

23. Phillips' paving of the various roadways in Crystal Pines has caused damage to the right-of-way and the roadbed of the roads in Crystal Pines.

24. The actions of Phillips have unreasonably interfered with Plaintiff's use and enjoyment of the roadways granted to it by the Deed. The injuries suffered by Plaintiff would not have occurred but for the improper actions of Phillips.

FOURTH CAUSE OF ACTION

25. The preceding allegations are incorporated herein by reference as if set forth verbatim.

26. Phillips falsely represented that members of Plaintiff would have access to a community boat ramp and tennis courts when they purchased lots in Crystal Pines. Plaintiff justifiably relied upon the representations made by Phillips regarding access to the boat ramp and tennis courts, and Phillips breached his duty to Plaintiff by failing to exercise due care in the representations he made to induce lot purchases in Crystal Pines.

27. Yacht Club continues to deny access to the community boat ramp to Plaintiff.

FIFTH CAUSE OF ACTION

28. The preceding allegations are incorporated herein by reference as if set forth verbatim.

29. The conveyance of lots in Crystal Pines by reference to a plat depicting a community boat ramp created an implied easement for the use of that ramp.

30. As successor to Phillips' ownership in the community boat ramp, Yacht Club is bound to honor the easement granted by its predecessor.

SIXTH CAUSE OF ACTION

31. The preceding allegations are incorporated herein as if set forth verbatim.

32. The Deed, according to Phillips, conveys title to the boat ramp and entrance gate area to the Plaintiff's predecessor in interest. Upon information and belief, a dispute now exists regarding the Plaintiff's title to these properties.

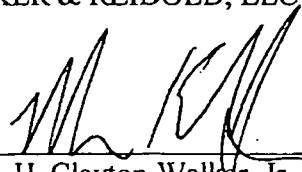
33. Plaintiff is informed and believes that, in the alternative, it is entitled to a judgment confirming its title in and to the boat ramp parcel and the entrance gate parcel, and to an award of attorney's fees.

WHEREFORE, Plaintiff prays that this Court issue its order:

1. Awarding Plaintiff actual damages on its First and Second Causes of Action;
2. Awarding Plaintiff actual and punitive damages on its Third and Fourth Causes of Action;
3. Declaring that Phillips granted an implied right of easement for access to the community boat ramp on Plaintiff's Fifth Cause of Action;
4. Declaring that in the alternative that Plaintiff holds title to the boat ramp parcel and the entrance gate parcel;
5. For an award of attorney's fees; and
5. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

WALKER & REIBOLD, LLC

BY: 

H. Clayton Walker, Jr.
Robert L. Reibold
Marcus K. Gore
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

ATTORNEYS FOR PLAINTIFF

July 13, 2007

Record on Appeal -00034

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COPY FILED
IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C.A. No: 05-CP-32-4364

2007 AUG 13 P 3: 56

Crystal Pines Homeowners
Association, Inc.,

Plaintiff,

**AMENDED ANSWER
JURY TRIAL DEMANDED**

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

vs.

Don E. Phillips,

Defendant.

Defendant responding to the allegations of the Complaint hereby answers as follows:

FOR A 1st DEFENSE

1. Each and every one of the allegations of the Complaint not specifically admitted, modified or explained is hereby denied in its entirety.
2. Paragraphs 1, 2, 4, 5, 6, 13, 14, and 27 are admitted.
3. Paragraphs 3, 7, 9, 11, 12, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33 and the Wherefore Clause are denied.
4. Paragraph 8 is admitted as to the part that certain roads were open pursuant to the terms of the deed. It is denied to the extent that the paving was improper and/ or that construction of the roads caused degradation of the roadbed and the damage to the right of way.
5. Paragraph 10 is admitted to the extent that the Defendant has not assisted to the contribution to the road and denied to the remainder of the paragraph.
6. Paragraph 15 is admitted to the extent that a boat ramp is shown on the recorded plat in phase 5.
7. Paragraph 21 is denied in its entirety and the Defendants would further state that Paragraph 21 does not state a cause of action.

FOR A 2nd DEFENSE AND COUNTERCLAIM

8. Defendant incorporates all allegations of paragraphs 1 through 7 not inconsistent with the following.
9. The Plaintiff upon information and belief is a corporation organized under the laws of the State of South Carolina, with agents and servants that conduct business in the County of Lexington, State

of South Carolina.

10. The Plaintiff was incorporated in order to oversee the development and preservation of the Crystal Pines community in Lexington, South Carolina.

11. In accordance with the by-laws, agreements, deeds and restrictions that run with the property in the development of the Crystal Pines subdivision the Plaintiff was charged with seeing that all covenants and agreements were followed by the purchasers and owners of the property in the Crystal Pines subdivision.

12. Numerous incidents have occurred wherein but not limited to property has been modified or otherwise changed in a manner inconsistent with the bylaw agreements, deeds, road agreements and restrictions in the following non-exclusive examples:

- (a) Dirt, road base, and asphalt removed from turnaround and replaced with mulch and shrubbery. Mailbox blocking turnaround. Drainage altered from "as built" plan approved by the county. (Lot 37/Lapine)
- (b) Mailbox is 24 feet into the 80 foot turnaround required by the county. Shrubs and trees also in the turning area. (Lot 17/ Derham)
- (c) Mailbox in the turning circle. Blocked drainage that diverts water to the road. (Lot 18/Massey)
- (d) Mailbox is blocking 80 foot clearing required by the county. It is 22 feet onto the road. (Lot 11/Westmoreland)
- (e) Mailbox is blocking the 80 foot turnaround clearing and drainage is partially blocked. (Lot 10/Trombower)
- (f) Swimming pool and metal roof enclosure built without approval and not in accordance to guidelines of building committee. Landscaping ditch filled and blocking drainage that damages road. (Lot 4/Strickland)
- (g) Garage built approximately 4 feet from property line and setback is 15 feet. Not built according to agreed design and location. (Lot 3/Porter)
- (h) Drainage blocked by mailbox. Drainage partially blocked by driveway. Unapproved building in yard. Junk in yard. Rodent infestation. (Lot 27/West)
- (i) Filled drainage ditch along road that direct drainage to the road. Irrigation sprinklers are too close to the road and over spray road. (Lot 7/Holts)
- (j) New driveway blocks drainage 100%. (Lot 25/Temple)

13. Under the covenants and agreements it is the mandatory duty of the Home Owners' Association to enforce these covenants, restrictions and agreements that go with the land.
14. The Home Owners' Association has refused and/or neglected to enforce these restrictions thereby violating their duty under the homeowners' agreement, which in fact created them.
15. Defendant on numerous occasions has requested that the Home Owners' Association enforce these restrictions and agreements.
16. Despite Defendant's best efforts the Home Owners' Association has taken no action in enforcing the restrictions and road agreement against the offending parties in the subdivision.
17. Under the Home Owners' Association operating agreement the Defendant is allowed to enforce the agreements himself and/or make a claim to have the Home Owners' Association enforce these agreements.
18. Defendant exercises his right under the agreement and hereby requests this Court order the Home Owners' Association to begin enforcing strictly the agreements and covenants that went with the land and correcting all of the non-conforming uses and modifications of the property that do now exist in the Crystal Pines subdivision. Specifically the application for rezoning undeveloped property owned by Don Phillips not counting votes allocated to Don Phillips.
19. Defendant has attempted to resolve this situation prior to the filing of this suit and believes he should be compensated for having the filing of this suit with attorneys fees, the costs of this action and any other relief the Court Feels is just and equitable. And thus Plaintiff complaint be dismissed.

FOR A 3rd DEFENSE AND COUNTERCLAIM

20. Defendant incorporates all allegations of paragraphs 1 through 19 not inconsistent with the following.
21. Plaintiff in this matter caused to be sent out a letter to Real Estate Agents and other parties regarding the dispute on the property between the Plaintiff and the Defendant Phillips.
22. This letter caused various parties reconsider land sales from Phillips to them.
23. One land sale that was rescinded cost the Defendant Phillips amount of Four Hundred and Fifty Thousand and 00/100 Dollars (\$450,000.00).
24. That the sending of this letter by the Plaintiff constituted the Tortuous Interference with the contract that the Defendant Phillips had with this party.
25. The Defendant has been injured by this Tortuous Interference with contract in an amount

excess of \$25,000.00 actual damages plus such punitives that the court in its discretion may determine.

FOR A 3rd DEFENSE AND COUNTERCLAIM

26. Defendant incorporates all allegations of paragraphs 1 through 25 not inconsistent with the following.

27. The letter sent on the behest and the authorization of the Plaintiff was slanderous to the Defendant Phillips.

28. This letter was libelous *per se*.

29. The Defendant Phillips has been injured in an amount in excess of \$25,000.00 actual and punitive damages by the libelous action of the Plaintiff.

WHEREFORE, the Defendant requests this case be dismissed and judgment be awarded to Defendant Phillips on his Counter Claims.

RESPECTFULLY SUBMITTED,

OSWALD LAW FIRM, LLC

BY 

Gene Stockholm

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(803) 796-7260; (803) 796-1055 (fax)

ATTORNEYS FOR DEFENDANT

March 24, 2006

1 Q: Paragraph two, look at paragraph two and tell
2 me what, if anything, that is about you in
3 paragraph two that you find to be untrue or
4 defamatory.

5 A: I don't see anything.

6 Q: Paragraph three, that short little thing that
7 says, "The roads in Crystal Pines are zoned R-
8 4," is there anything in that paragraph that is
9 about you that is either defamatory or untrue?

10 A: Okay. It's not specifically about me, but it's
11 untrue.

12 Q: Okay. And what is untrue about that?

13 A: The roads are not R-4, not all the roads are R-
14 4.

15 Q: What are some of the roads?

16 A: Some of the roads are R-4. One entrance road,
17 Crystal Pines Drive is still the old zoning.

18 Q: What is that?

19 A: I think it's R-8. I'm not real sure.

20 COURT REPORTER: Did you say --

21 Q: R-8?

22 A: I think it's called -- it's a lesser -- you can
23 have more dense population by that zoning. I'm
24 not sure of the numbers.

25 Q: Okay. She was just curious whether you said 8

DON PHILLIPS

11

1 or A.

2 A: I think it's an 8.

3 Q: Okay.

4 A: I'm not real sure about the zoning number.

5 Q: All right.. So the third paragraph there has
6 nothing about you that is untrue or defamatory,
7 but you think that some of the roads are not R-
8 4?

9 A: I know one of the roads is not R-4.

10 Q: Okay. Let's go to the fourth paragraph. Is
11 there anything that is in the fourth paragraph
12 that is said about you that you find to be
13 untrue or defamatory?

14 A: Well, I'm not real clear what the homeowners'
15 association is -- they have a legal action
16 against me and I'm not sure how, why that's the
17 case or --

18 Q: Well, it is true that they did have a legal
19 action pending against you at the time this
20 letter went out?

21 A: I don't know what it's -- it seems like there's
22 something terrible about me that -- that I have
23 to do with the development, but I don't know
24 what it is.

25 Q: Well, that's what we're trying to find out from

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13

1 was decided to put that in, and it is their
2 obligation.

3 We believe, when Your Honor interprets the
4 documents -- and Mr. Walker and I have agreed on
5 what to put in, Your Honor. We have the same
6 documents, and we agree our interpretation is
7 correct, or I should say that I agree, that the
8 Homeowners' Association is responsible for the
9 roads and not Mr. Phillips. Your Honor, other
10 than that, as we have talked about, we have
11 stipulated to just about all the documents, and
12 this case should move quickly.

13 JUDGE SPENCE: Thank you. Call your first witness.

14 Mr. WALKER: Your honor, I call George Bugenske.

15 THE BAILIFF: Place your left hand on the Bible and
16 raise your right hand. Do you solemnly swear or
17 affirm to tell the truth, the whole truth and
18 nothing but the truth, so help you God?

19 Mr. BUGENSKE: I do.

20 JUDGE SPENCE: Have a seat on the witness stand and
21 state your full name.

22 Mr. BUGENSKE: George Bugenske.

23 EXAMINATION OF Mr. BUGENSKE

24 BY Mr. WALKER:

25 Q Mr. Bugenske, how long have you lived in

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14

1 Crystal Pines?

2 A 14 years.

3 Mr. WALKER: Your honor, I know this is aggravating,
4 but we have several pieces of paper, and it might
5 be easiest -- and perhaps the court reporter can
6 give us some input, here -- I've shown
7 plaintiff's counsel sixteen exhibits. He's
8 stipulated to their admissibility, and rather
9 than stop as we go along and admit them, if it's
10 okay with everybody and the court reporter, I'll
11 just go on and move to admit my sixteen exhibits.

12 Mr. STOCKHOLM: I have no objection, Your Honor.

13 JUDGE SPENCE: Without objection and by stipulation,
14 Plaintiff's Exhibit 1 through 16?

15 Mr. WALKER: Yes, sir; and they're already pre-marked
16 and numbered.

17 MARKED AS PLAINTIFF'S EXHIBITS #'S 1
18 THROUGH 16, HEARING OF 9/30/2008 (SEE
19 INDEX FOR DESCRIPTIONS).

20 THE EXAMINATION OF MR. BUGENSKE BY MR. WALKER
21 CONTINUES.

22 Q Mr. Bugenske, I'm going to hand you what
23 we've marked as Exhibit 1, down here at the
24 bottom. Are you familiar with that document?

25 A Yes.

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15

1 Mr. WALKER: Your Honor, I'm going to lead on some of
2 this preparatory stuff.

3 Q Is this a deed that was recorded by the
4 developer?

5 A Yes.

6 Q With the Homeowners', I know, for some
7 extended period of time, you've been very active?

8 A Yes.

9 Q Been president for several years?

10 A Yes.

11 Q And in the course of doing your job as the
12 president of the Homeowners', you've become
13 somewhat familiar with this piece of paper?

14 A Yes I have.

15 Q Could you turn to Paragraph 11 with me?

16 A Okay.

17 Q Down about the third line from the bottom,
18 does it talk about the responsibility for -- or
19 let me ask it a different way. The developer
20 that's shown at the beginning of Paragraph 11,
21 says "the undersigned Crystal Lake Land
22 Developers." Do you see where I'm talking about?

23 A Yes.

24 Q And that's in this Paragraph 11, which says
25 "Crystal Lake Homeowners," right?

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16

1 A Uh-huh.

2 Q Does Paragraph 11 then go on to talk about
3 responsibility for repair and maintenance of
4 certain roads?

5 A Yes, it does.

6 Q Does it allocate some responsibility for the
7 maintenance and repair of the roads?

8 A Yes, it does.

9 Q What does it say?

10 A It says that "Crystal Lake Land Developers,
11 by execution of this instrument, hereby agrees at
12 its own personal cost and expense to open the
13 unopened portion or make it necessary for
14 development of Crystal Pines Drive, Knob Cone
15 Road, Red Fox Trail and Whippoor Will Court,
16 Torrey Pine Lane, as described on Exhibit A
17 hereto and to pave the same; determine and carry
18 out or cause to be performed on all improvements,
19 maintenance and repair of said roads as nearly as
20 may be practicable in the same condition and
21 repair as originally paved."

22 Q Now, would you turn to the first page of this
23 deed agreement? Down about two-thirds of the
24 way, does it refer to the "Road Company"?

25 A Yes.

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17

1 Q Have you lived in Crystal Pines long enough
2 to have been involved with the Road Company?

3 A Yes, I have.

4 Q What was the Road Company?

5 A When I moved in, there was a Crystal Lake
6 Road Company that was -- I was told was the
7 existing association.

8 Q Did you have meetings?

9 A We had meetings at different people's houses.
10 Yes.

11 Q Elect officers?

12 A Yes, we did.

13 Q Take minutes?

14 A Yes, we did.

15 Q Mr. Bugenske, this is out of order, but I'm
16 going to hand you Exhibit #15. Is this a set of
17 minutes from a Road Company meeting?

18 A Yes, it is.

19 Q And this is dated October 4th, '86?

20 A Yes.

21 Q Is this typical of the minutes that would
22 have been taken?

23 A On topics, issues, yes.

24 Q Do you have any idea of whether the Road
25 Company ever got formally incorporated by the

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1 Secretary of State?

2 A Yes. We did investigate that after -- we
3 were very disturbed at how it was being run, how
4 it appeared that all of the homeowners had all of
5 the responsibility and all of the costs -- I
6 mean, all of the costs -- and that the developer
7 had no costs and he paid no dues, but he had most
8 of the votes -- all of the votes -- most of the
9 votes, I should say -- and we just couldn't get
10 anything done.

11 Q Did the Road Company ever do any road
12 repairs?

13 A Yes; we did patching.

14 Q Why did you patch?

15 A For safety reasons, mainly, and we couldn't
16 get any cooperation from the developer, so we --
17 just to keep people from falling down and getting
18 hurt and damage to cars, we would have to
19 eventually do a patch here and there.

20 Q Did the Road Company eventually wind down and
21 get replaced by the Homeowners' Association?

22 A Yes, it did.

23 Q By the way, is there some mention in those
24 minutes about the Association, in the future,
25 probably about two-thirds of the way down that

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1 first page?

2 A It was suggested that we change the title of
3 the Association to "Homeowners'" rather than
4 "Road Company." It was felt that all the
5 provisions of the current road agreement would
6 remain unchanged; however, it would allow us also
7 to address more far-reaching concerns of the
8 developer, at the same meeting. Everyone agreed.

9 Q And the Homeowners' Association eventually
10 was formed to replace the Road Company?

11 A Yes.

12 Q I'm going to hand you what's been marked as
13 Exhibit #2.

14 Mr. WALKER: Your Honor, these are the articles of
15 incorporation of the Road Company.

16 Q There is a fellow sitting here with me; Mr.
17 Lapine. Does Mr. Lapine know more about this
18 part of it than you do?

19 A Yes, because I backed off a little bit.

20 Q Over the course of time, have there been some
21 disagreements with Mr. Phillips about the
22 enforceability of Exhibit #1?

23 A Yes.

24 Q And Exhibit #1, we're going -- we may call it
25 the "deed" and we may call it the "Road

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1 Maintenance Agreement," okay?

2 A Yes.

3 Q And there had been some disagreements about
4 whether that was enforceable?

5 A Yes.

6 Q I'm going to hand you what we've marked as
7 Exhibit #3. Are you familiar with that document?

8 A Yes.

9 Q Who wrote that document?

10 A Mr. Phillips.

11 Q Did it get transmitted to the Homeowners'
12 Association?

13 A Yes; we received it.

14 Q Is it numbered "Fact One," "Fact Two," and so
15 on?

16 A Yes, it is.

17 Q What did Mr. Phillips write as "Fact Two"?

18 A "The present road agreement required by the
19 County was recorded May 13th, 1981, and is still
20 in effect today."

21 Q Would you look at Exhibit #1, please, sir?

22 A That's --

23 Q The agreement.

24 A Yes, it is.

25 Q And when you say, "Yes, it is," what date was

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1 it recorded?

2 A May 13th, 1981.

3 Q I'm going to hand you what's been marked as
4 Exhibit #4, sir. Are you familiar with that
5 document?

6 A Yes, I am.

7 Q What is it?

8 A It's a statement that says -- it's presented
9 "to make clear that Mr. Phillips does not own the
10 roads at Crystal Pines and has not owned the road
11 since May 13th, 1981, as stated in the deed to
12 real estate filed with the County."

13 Q Let me break this down a little piece at a
14 time. Who prepared this document?

15 A Don Phillips.

16 Q Is it directed to the board?

17 A The board of directors, Crystal Pines
18 Homeowners' Association.

19 Q Was it received by the board from Mr.
20 Phillips?

21 A Yes.

22 Q Does it talk about the Road Maintenance
23 Agreement?

24 A Yes, it refers to the Road Maintenance
25 Agreement.

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22

- 1 Q Does it talk about who owns the roads?
- 2 A Yes, it does.
- 3 Q Who does it say owns the roads?
- 4 A It makes clear that Mr. Phillips does not own
- 5 the roads at Crystal Pines and has not owned them
- 6 since May 13th, 1981.
- 7 Q Does it also note that the deed to real
- 8 estate, the Road Maintenance Agreement, is a
- 9 proper instrument recorded in Lexington?
- 10 A Yes, it does.
- 11 Mr. WALKER: Your Honor, I apologize for kneeling
- 12 down.
- 13 JUDGE SPENCE: No problem.
- 14 Q What is the date on Exhibit #4, Mr. Bugenske?
- 15 A October 29th, 2001.
- 16 Q I'm going to hand you what we've marked as
- 17 Exhibit #5. Is that another letter from Mr.
- 18 Phillips to the board?
- 19 A Yes, it is.
- 20 Q What's the date on this one?
- 21 A February 11th, 2002.
- 22 Q Does it contain much of the same information
- 23 as the previous letter from 2001?
- 24 A Yes, it does.
- 25 Q Would you look about, I think, the third

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1 paragraph that begins, "Although not specifically
2 mentioned..."?

3 A Okay.

4 Q Does this letter discuss things besides the
5 roads?

6 A Yes. "Although not specifically mentioned in
7 the deed, the entrance gates and Parcel A,
8 including the boat ramp, are included in the
9 property turned over with the roads."

10 Q Turned over to whom, sir?

11 A Turned over to Crystal Pines Homeowners'
12 Association.

13 Q We have now gone through several written
14 representations from Mr. Phillips about the Road
15 Maintenance Agreement. Has Mr. Phillips ever
16 indicated to the Association, through you, that
17 the Road Maintenance Agreement was not
18 enforceable?

19 A No, he has not.

20 Mr. WALKER: Your Honor, just to keep us moving
21 chronologically, I'm going to submit Plaintiff's
22 Exhibit #6. It's a deed from Crystal Lake Land
23 Developers to Don E. Phillips. It was filed in
24 1997; the consideration was \$392,679.95 plus the
25 assumption of mortgage indebtedness of

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1 \$185,470.05, and it conveys the remaining
2 portions of the Crystal Pines subdivision to Mr.
3 Phillips personally.

4 Q Mr. Bugenske in 1999/2000, was there some
5 discussion involving a modification of the Road
6 Maintenance Agreement?

7 A Not that I remember. I was not as involved
8 at that time.

9 Q So we need to talk to Mr. Lapine about that?

10 A Yeah.

11 Q Now, we're going to talk about something I
12 know you know something about, and that is the
13 current condition of the roads in the
14 subdivision, okay?

15 A Okay.

16 Q Are those roads in need of maintenance and
17 repair?

18 A Very much so.

19 Mr. WALKER: I've got a set of photographs, Your
20 Honor; they are collectively marked as Exhibit
21 #9. On the back of the photograph, we have
22 letters A through P as in "play."

23 Q Mr. Bugenske, some of these may be
24 repetitive, but if you would, please show the
25 Judge what some of our problems are.

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1 JUDGE SPENCE: I would ask, too, when you identify a
2 picture, if you will, just say "B," "C," "D,"
3 because we already know it's marked as Exhibit
4 #9; but, if you would, identify the picture by
5 letter, so the court reporter will know which
6 picture we're talking about.

7 A This appears to be --

8 Mr. WALKER: Look on the back.

9 A -- it's Exhibit A, Picture A. It shows the
10 type of alligatoring and just breaking up of the
11 road that we have had in various sections of the
12 road for the last several years, that we've
13 usually, on our own and with our own dues, just
14 for safety reasons, have gone ahead and repaired.
15 It starts off with alligatoring -- this is
16 Picture B -- and then individual chunks of
17 asphalt will just lift off to expose the under-
18 road and potholes. Picture C shows pieces of the
19 road --

20 JUDGE SPENCE: If you will, just hold them out this
21 way and then I can see them, and opposing counsel
22 can, too.

23 A Picture C shows pieces of the road over on
24 the side. Picture D shows a major pothole with a
25 yardstick across it to show that it's at least 3

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1 feet wide and about 4 or 5 feet long. Picture E
2 shows an even larger section, where the top of
3 the asphalt is completely gone. Picture F shows
4 more of the same, possibly the same picture, but
5 a different angle. Picture G looks very similar
6 to Picture A, showing the damage on the road.
7 Picture H shows a boiling up of the asphalt and
8 then alligating and holes all around it.
9 Picture H looks very similar to a few of the
10 previous pictures, with the large holes.

11 JUDGE SPENCE: Is that "I" or "H"?

12 Mr. BUGENSKE: It says "H." Wait a minute; what did I
13 just show you, then? There's two that claim to
14 be "H." Let's see what this one says. That must
15 be "I."

16 A J, another shot, same damage. K, more pieces
17 of the road, over on the side of the road. L,
18 more alligating, more complete loss of the
19 surface. Picture M, very severe alligating.
20 N, another picture of the boiling up of the road
21 with the severe alligating, just before it. O
22 is another picture of a very large pothole, at
23 least 3 feet, with a yardstick on it, 3 feet by 4
24 or 5 feet. P, another picture with a yardstick,
25 showing the size of the chunks of the alligated

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1 part of the road, and that covers all of them.

2 Q Mr. Bugenske, how widespread are the problems
3 that are depicted in these photographs, on the
4 roads of Crystal Pines?

5 A I would say there's more damaged parts of the
6 road than there are undamaged parts of the road.

7 Q Have children been hurt?

8 A Yes. Children over on Red Fox Trail have
9 actually had spills.

10 Q Has the Association undertaken what I guess I
11 could characterize as "emergency repairs"?

12 A Yes, especially -- in response to your
13 question that you just asked, when that started
14 happening and it got to the extent of these
15 pictures, for safety reasons and after getting no
16 response from Mr. Phillips to join in on the
17 repairs, we used \$10,000.00, just about all of
18 our treasury, to make a major patch to that
19 section of the road.

20 Q Mr. Bugenske, I'm going to hand you Exhibit
21 #10. Is this the estimate for those emergency
22 repairs?

23 A Yes, it is. This is the estimate and this is
24 what we paid.

25 Q And your contractor was Zack Smith?

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- 1 A That's correct.
- 2 Q And his estimate for patching 4,008 square
- 3 feet of paved area was how much?
- 4 A \$10,000.00.
- 5 Q Was this a negotiated figure?
- 6 A Yes, it was.
- 7 Q Was it negotiated down from a higher charge?
- 8 A Yes, it was.
- 9 Q Did Mr. Zack Smith and his company effect
- 10 these emergency repairs?
- 11 A Yes, they did.
- 12 Q Was he paid?
- 13 A Yes, he was.
- 14 Q How much?
- 15 A \$10,000.00.
- 16 Q Despite those repairs of an emergency nature,
- 17 is further maintenance and repair necessary?
- 18 A Yes. Even on this large area of patching,
- 19 because of the foundation having such problems,
- 20 even these new patches are doing the same thing:
- 21 the boiling-up and the alligatoring.
- 22 Q What do you mean, the foundation "having
- 23 problems"?
- 24 A Engineers that have come by say that --
- 25 Mr. STOCKHOLM: Objection, Your Honor.

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1 JUDGE SPENCE: Sustained.

2 Q Mr. Smith will deal with all that later. You
3 made mention before of an effort being made to
4 engage Mr. Phillips on these repairs.

5 A Yes.

6 Q Can you tell us about that?

7 A Well, in that particular case, we asked if he
8 would participate, and he said he would not and
9 that he -- that his dues -- what he paid would
10 pay for it. In earlier times, with the previous
11 version of the Association, when these patches
12 were required, they were completely paid for by
13 the Association.

14 Q But these temporary repairs, he declined to
15 participate?

16 A That is true.

17 Q Have you sought his participation in a more
18 comprehensive repair of the roads?

19 A Yes, we have.

20 Q Did he agree or disagree to help pay for
21 that?

22 A He disagreed.

23 Q You started talking about an engineer
24 earlier. Did the Homeowners' engage an engineer
25 to look at the roads?

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1 A Yes, we did.

2 Q Was this Geo-Systems Design and Testing?

3 A Yes, it was.

4 Q Did Geo-Systems come out and do some work?

5 A Yes; they did core samples and complete
6 engineering tests.

7 Q I'm going to hand you what's been marked as
8 Exhibit #16. Is this the report we're referring
9 to?

10 A Yes, it is.

11 Q These pages aren't numbered, but there's a
12 section, Roman numeral III; it's about four pages
13 in. Are you with me now?

14 A Uh-huh.

15 Q Does this report address the cost of
16 repairing and maintaining the roads that were
17 examined in this report?

18 A Yes, it does.

19 Q What is the estimated cost from Geo-Systems,
20 in this report, to properly repair the roads?

21 A At one level of repair, with 2 inches of
22 surface, it would be \$400,000.00; 2 1/2 inches
23 would be \$450,000.00.

24 Q The higher charge would also include two
25 additional inches of base?

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- 1 A That's -- that's true.
- 2 Q The next page is a map. Does this map depict
- 3 the roads to be repaired?
- 4 A Yes, it does.
- 5 Q That's Red Fox Trail, Torrey Pines Lane and
- 6 Little Gap Court?
- 7 A That is correct.
- 8 Q Does Mr. Phillips still own property within
- 9 the confines of Crystal Pines?
- 10 A Very many lots, yes.
- 11 Q Of all the property in the development, about
- 12 how much does he still own, if you know?
- 13 A I would have thought, and I did hear him say
- 14 at the deposition, that he still owns about 40%.
- 15 Q That's something you've heard him say?
- 16 A Yes.
- 17 Q And you have no reason to dispute that?
- 18 A Right.
- 19 Q Is Mr. Phillips still, over the course of
- 20 recent years, selling property in Crystal Pines?
- 21 A Yes, he is.
- 22 Q When he sells it, does it typically get
- 23 developed?
- 24 A Yes, it does.
- 25 Q What does that do to the burden on the roads?

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1 A Especially during the construction process,
2 it's a heavy burden on the roads.

3 Q We're going to shift gears, Mr. Bugenske, and
4 move from roads to boat ramps and tennis courts,
5 okay?

6 A Okay.

7 Q So we're kind of closing the book on this one
8 issue and moving on to something else. Is there
9 a boat ramp within the Crystal Pines development?

10 A Yes, there is.

11 Q I'm going to hand you what's been marked as
12 Exhibit #13. I know you don't spend a lot of
13 time looking at plats, but this is a plat of a
14 portion of the development. On the right-hand
15 side of this plat, is there a note written in on
16 the survey that says "note"?

17 A Yes.

18 Q Does it refer to something being designated
19 as "community commons"?

20 A Yes. Lot A, 1.5 acres, is designated as
21 "community commons."

22 Q Do you see a "Lot A" just below that note?

23 A Yes.

24 Q Does it appear to have a concrete ramp as
25 part of Lot A?

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1 A Yes.

2 Q Does this plat reflect the boat ramp that's
3 located in Crystal Pines?

4 A Yes, it does.

5 Q There's some handwriting on the edge of this
6 exhibit, where it was recorded. Does it say
7 "dated April 1, 1986"?

8 A Yes.

9 Q From 1986, for some period of years on, was
10 the boat ramp used by people who lived in Crystal
11 Pines?

12 A Yes. Like I said, I moved in -- I had my
13 house completed in '94 and I used it whenever I
14 needed to put my boat in or out. I used it many
15 times. More than one time, Mr. Phillips actually
16 approached me and made sure it was me and said,
17 "Oh, okay. Now that I see it's you," or one of
18 my sons, "it's okay."

19 Q Do you, of your own knowledge, know if other
20 people in the development used the boat ramp?

21 A Yes, I do.

22 Q Tell me about that.

23 A Everyone, as we purchased our lots, was told
24 there was a boat ramp and, sure enough, anytime
25 anyone of us needed to launch a boat, we would

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1 use the community boat ramp.

2 Q During the period of years from the time you
3 moved in, in '94, on, were you charged for using
4 the boat ramp?

5 A No. We never had a charge.

6 Q Up until recent years, was the boat ramp
7 locked or secured?

8 A No, it was not.

9 Q When was the first time you remember there
10 being some obstruction to using the boat ramp?

11 A I would say it has been approximately three
12 or four years. I can't say for sure, but it's
13 been at least the last three or four years.

14 Q So 2004, give or take?

15 A Yes.

16 Q Up until that time -- and let's pick the year
17 2000, 2001, 2002 -- how many times a year, to
18 your knowledge, would the boat ramp be used,
19 ballpark?

20 A Oh, I'd have to say a couple of hundred times
21 a year. That's just a guess.

22 Q Are you aware of anybody trying to, during
23 this time, disguise their use of the boat ramp or
24 hide it in any way?

25 A No.

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1 Q You mentioned Mr. Phillips approaching you
2 about your use of the boat ramp. Are you aware
3 of him approaching others?

4 A Yes. I heard other people say the same
5 thing, and that was fine.

6 Q Has access to the boat ramp changed in the
7 last three or four years?

8 A Yes, it has.

9 Q Tell the judge about it.

10 A There's posts on either side of the entrance
11 to the ramp, with a cable going across, denying
12 access to the boat ramp.

13 Q Do you have a key to it?

14 A No, I do not. I believe it's a combination
15 lock.

16 Q Do you have the combination?

17 A No.

18 Q Do you know who put the posts up?

19 A Yes, I do.

20 Q Who?

21 A It was Mr. Phillips.

22 Q Have you been told anything by Mr. Phillips
23 about access to the boat ramps by homeowners?

24 A Not directly from Mr. Phillips. Possibly, at
25 one of the meetings, it was brought up that,

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1 going forward, if you wanted to use the ramp, you
2 needed to provide some sort of sum of money.

3 Q Do you have any knowledge of the boat ramp
4 being sold by Mr. Phillips to someone else?

5 A Yes, I do.

6 Q Mr. Bugenske, I'm going to hand you Exhibit
7 #14. Are you familiar with these documents, at
8 all?

9 A Yes.

10 Q Is the first page a deed from Mr. Phillips to
11 Wright L. Phillips?

12 A Yes, it is.

13 Q Who is Wright L. Phillips?

14 A Wright is Mr. Phillips' son.

15 Q Does this deed purport to deed the boat ramp
16 to his son?

17 A Yes, it does.

18 Q If you go about three pages in, is there
19 another deed that is part of this exhibit?

20 A Yes.

21 Q Does Mr. Wright L. Phillips transfer title to
22 the boat ramp again?

23 A Yes.

24 Q And to whom does this deed purport to sell
25 the boat ramp?

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1 A Crystal Pines Yacht Club, LLC.

2 Q You don't have any role or ownership in the
3 Yacht Club, do you?

4 A No, I do not.

5 Q Have there been representations made by Mr.
6 Phillips in the past, in writing, about boat
7 ramps and tennis courts at Crystal Pines?

8 A Not when -- it was mostly verbal and, of
9 course, on the signs and pamphlets.

10 Q I'm going to hand you Exhibit #11. Are you
11 familiar with that document?

12 A Yes.

13 Q What is it?

14 A This is a copy of what was a pamphlet, a
15 bright green pamphlet that could be folded three
16 ways into a pamphlet and it was placed at the
17 Lake Murray welcome center.

18 Q Does it make any mention about water access
19 or boat ramps?

20 A Yes; "deep water access," "tennis courts."

21 Q Does it, on this first page, underneath the
22 picture, refer to them as well?

23 A Oh, yes.

24 Q "Amenities include" --

25 A "Amenities include tennis courts and

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1 launching ramp," yes.

2 Q I'm going to hand you Exhibit #12. Can you
3 tell the Judge what that is?

4 A This is a picture of the Crystal Pines sign
5 that, in this picture, is on Amick's Ferry Road,
6 coming up on the road to turn to Crystal Pines,
7 and it states that there are point lots, tennis
8 courts, privacy gate, community access and the
9 telephone number.

10 Q In the past, did members have access to the
11 tennis courts?

12 A No. No members have ever actually -- they
13 have never really been completed and, as soon as
14 they were completed, they were locked.

15 Q Mr. Bugenske, if you'll give me just one
16 minute.

17 Mr. WALKER: Mr. Bugenske, I'm grateful for your time.
18 If you would, answer any questions opposing
19 counsel may have, please, sir.

20 JUDGE SPENCE: Cross, Mr. Oswald?

21 Mr. STOCKHOLM: Stockholm, Your Honor.

22 JUDGE SPENCE: Stockholm.

23 EXAMINATION OF Mr. BUGENSKE

24 BY Mr. STOCKHOLM:

25 Q Hello, Mr. Bugenske. Sir, I'm going to be

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1 brief. Let's just take this -- since we're
2 already talking about the boat ramp, have you
3 ever received anything in writing signed by Don
4 Phillips that gave you ownership interest in the
5 boat ramp?

6 A Nothing that -- no.

7 Q Have you ever received anything in writing
8 from Don Philips which gave you any type of
9 ownership interest in the tennis courts?

10 A No.

11 Q You bought your house, I think you said, in
12 1994, sir?

13 A I believe it was '93; I built it in '94.

14 Q Did you receive documents from your closing
15 attorney when you bought the house?

16 A Yes.

17 Q To your knowledge, sir, was there anything in
18 those documents that gave you any ownership
19 interest in either the boat ramp or the tennis
20 courts?

21 A No.

22 Q Wasn't there a proposal by the Homeowners'
23 Association in 2003 or 2004 to buy the boat ramp
24 from Don Phillips?

25 A There were several over the years, and it was

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1 usually started by Mr. Phillips with an offer,
2 "Do you want to buy it?"

3 Q And I think, at one time, there had been
4 discussions that the Homeowners' Association had
5 agreed to, perhaps, \$800.00 to buy it?

6 A I wasn't involved with the Association back
7 at that time; I wasn't as involved in the
8 negotiations or anything.

9 Q Relative to the problems with the road, which
10 we all agree the road needs repairs, are you
11 involved now in the Homeowners' Association?

12 A Yes.

13 Q And what is your position with them?

14 A Board member.

15 Q Now, what is the monthly assessment for each
16 lot at Crystal Pines subdivision?

17 A It's not a monthly assessment; it's a yearly
18 assessment.

19 Q How much?

20 A \$240.00 a year.

21 Q And I believe you said Mr. Phillips had ten
22 lots?

23 A I don't believe I said that.

24 Q How many lots does he have; do you remember?

25 A I wouldn't know. There's -- there's numerous

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1 lots and then there's a great deal of
2 undeveloped.

3 Q Does he have to pay an assessment on each
4 undeveloped lot?

5 A No, he does not.

6 Q Now, since you're on the board, is the
7 Homeowners' Association's claim for relief in
8 this matter, relative to the roads, based upon
9 the Road Maintenance Agreement and the other
10 documents that have been submitted?

11 A Yes.

12 Mr. STOCKHOLM: I have nothing further, Your Honor.

13 Thank you, sir.

14 Mr. WALKER: Redirect; very briefly, Your Honor.

15 RE-EXAMINATION OF Mr. BUGENSKE

16 BY Mr. WALKER:

17 Q The boat ramp, Mr. Bugenske, from the time
18 you moved there until three or four years ago,
19 the homeowners had uninterrupted use of the boat
20 ramp?

21 A Yes.

22 Q The boat ramp was used, you testified, I
23 think, one or 200 times a year, on average?

24 A Yes.

25 Q Mr. Phillips had knowledge of that?

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1 A Yes. When I first purchased my lot, I was
2 told that was included, the boat ramp and tennis
3 courts.

4 Mr. STOCKHOLM: Your Honor, I would object to that,
5 unless he can specify that it was Mr. Phillips
6 who told him that. It would be hearsay.

7 Mr. Bugenske: It was Mr. Phillips.

8 Q You testified earlier that you heard Mr.
9 Phillips also say that he owned 40% of the land
10 at Crystal Pines?

11 A Yes. As an officer, I sat in on the
12 deposition, and I believe I heard that.

13 Mr. WALKER: I don't have any further questions.

14 JUDGE SPENCE: Re-cross, Mr. Stockholm?

15 Mr. STOCKHOLM: Nothing further your honor.

16 JUDGE SPENCE: You may step down.

17 Mr. WALKER: We call Mr. Lew Lapine, Your Honor.

18 THE BAILIFF: Place your hand on the Bible and raise
19 your right hand. Do you solemnly swear or affirm
20 to tell the truth, the whole truth and nothing
21 but the truth, so help you God?

22 Mr. LAPINE: I do.

23 THE BAILIFF: Have a seat on the witness stand and
24 state your full name.

25 Mr. LAPINE: My name is Louis A. Lapine.

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EXAMINATION OF Mr. LAPINE

BY Mr. WALKER:

Q Mr. Lapine, how long have you lived in Crystal Pines?

A We purchased the property in 1999 and moved into our house in January of 2000.

Q Thanks for kind of setting me straight on the time. Once you bought your property, did you become involved in Crystal Pines?

A Yes, I did.

Q When I say "involved," actively involved in the Association and the development itself?

A Shortly after I bought property in Crystal Pines, a number of neighbors, Mr. Phillips and his wife, approached me and asked if I would like to participate in the forming of a Homeowners' Association.

Q Did you do that?

A Yes, we did, for the best interests of the homeowners.

Q When you got involved, the Homeowners' Association was in the process of being put together?

A The only thing that I knew about Homeowners' or Road Company prior to that time was that Mrs.

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1 Phillips had incorporated Crystal Pines
2 Homeowners' Association. That's the only
3 activity I knew about.

4 Q Did you and your wife get involved in putting
5 the bylaws together?

6 A Yes, sir. In my wife's previous profession,
7 before we moved down here, she assembled
8 documents for homeowners' associations, and she
9 helped us assemble the bylaws that we currently
10 use for Crystal Pines Homeowners' Association.

11 Q Are you familiar with the bylaws?

12 A Pretty familiar; yes, sir.

13 Q Did they, as they were formed, put any
14 obligation on the Homeowners' Association to
15 maintain and maintain the roads?

16 A There is no mention of road maintenance in
17 our bylaws.

18 Q The first exhibit we talked about today,
19 which I have called the Road Maintenance
20 Agreement, this 1981 deed -- it's probably buried
21 over here -- down at the bottom, it says "Exhibit
22 #1."

23 A Yes, sir.

24 Q Are you familiar with that document?

25 A Yes, I am.

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1 Q Did you become familiar with it in the course
2 of working with the Homeowners'?

3 A After we assembled the bylaws, we went to the
4 courthouse on numerous occasions and assembled
5 every deed we could find relevant to Crystal
6 Pines, and this was one of the principal
7 documents we discovered.

8 Q After you got your lot and the Homeowners'
9 Association began to be formed, was there some
10 effort to amend or modify that deed by Mr.
11 Phillips?

12 A We were approached -- I don't know; I'm not
13 sure I'm answering the question.

14 Q Well, let me -- I realized, after I asked
15 you, that it was kind of long and complicated,
16 and I tried to avoid that. I'm sorry.

17 A I'm also kind of hard of hearing, so I'm also
18 reading your lips as you're speaking her.

19 Q And I apologize. I don't talk very loud, so
20 we'll go at this a different way. I'm going to
21 hand you what's been marked as Exhibit #7. Take
22 a minute and look at that.

23 A I'm familiar with this.

24 Q Tell me about it.

25 A Don asked that the board of directors get

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1 together for a meeting at one of the neighbor's
2 houses and discuss whether the Crystal Pines
3 Homeowners' Association would agree to the
4 contents of Exhibit B. He was anxious to turn
5 the roads over to the Homeowners' Association and
6 use this document, Exhibit B, as the document
7 that would ultimately form the deed.

8 Q Let's look at the first page of this exhibit.

9 Mr. WALKER: Your Honor, if it's okay with you, I'm
10 just going to stand a little closer so that it's
11 easier for Mr. Lapine to hear me. Lew, I
12 apologize.

13 Mr. LAPINE: I'm not really handicapped; but, if it
14 helps.

15 Q I want to talk about the first page of
16 Exhibit #7. Is this a letter?

17 A Yes, it is.

18 Q Is it addressed to the Homeowners'
19 Association?

20 A The Homeowners' Association, care of me.

21 Q Care of you because why?

22 A I was the president of the Homeowners'
23 Association.

24 Q And this letter is dated July 19th, 1999?

25 A Correct.

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1 Q In the first sentence, does it indicate that
2 this lawyer has been asked by Mr. Phillips to
3 prepare a corrected deed?

4 A Yes.

5 Q Is Exhibit B that you just mentioned part of
6 that corrected deed?

7 A Correct.

8 Q If you flip over to the second page of this
9 exhibit -- that's Exhibit B -- after some
10 preparatory language, does it have some lettered
11 paragraphs, A, B, C, D and so on?

12 A Yes, it does, through H.

13 Q Does paragraph A talk about the roads?

14 A Yes, it does.

15 Q This proposed corrective deed, after
16 paragraph A, who does this corrective deed that
17 was proposed -- sorry. Bad question. This
18 subparagraph A in this exhibit, who does it say
19 is responsible for maintaining and repairing the
20 roads?

21 A I'm not a lawyer, but I think "grantee" would
22 be the Homeowners' Association.

23 Q Did the Homeowners' Association ever agree to
24 that --

25 A No, we did not.

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1 Q -- the corrective deed ever, to your
2 knowledge?

3 A Not to my knowledge.

4 Q Why didn't the homeowners agree to amend the
5 deed in this respect?

6 A When we read this corrective deed, our
7 interpretation was that we would take over all
8 the responsibilities, all the costs, and Mr.
9 Phillips would maintain control of the roads
10 forever, including his successors, his children,
11 his grandchildren, and we found that
12 unacceptable.

13 Q Have you read Exhibit #1, the Road
14 Maintenance Agreement?

15 A Yes, sir.

16 Q Does it also talk about who's responsible for
17 maintaining and repairing the roads?

18 A I think you addressed that with Mr. Bugenske,
19 and it says that Mr. Phillips is responsible for
20 maintaining the roads.

21 Q Let me hand you Exhibit #8, sir, and take a
22 minute to look at it.

23 A Okay.

24 Q At the top, it calls itself a "letter of
25 intent," right?

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1 A Correct. Yes.

2 Q Down in the lower left-hand corner, it's
3 signed by Don E. Phillips?

4 A Correct.

5 Q Dated September 29th, 2000?

6 A Yes, sir.

7 Q In the third paragraph, does it also refer to
8 Exhibit B?

9 A Yes, it does.

10 Q Did Mr. Phillips, in or about September of
11 2000, make another effort to approach the
12 homeowners about a modification?

13 A Yes, sir.

14 Q Did the homeowners, in 2000, agree to accept
15 responsibility to repair and maintain the roads?

16 A It was still not in our best interest.

17 Q In 1999/2000, in these letters, you're
18 dealing with Don personally?

19 A Yes, sir.

20 Q At that time, did he own the remaining
21 undeveloped property, personally?

22 A Did he --

23 Q I'm sorry. I apologize. The exhibits we
24 just looked at are dated --

25 A I'm just missing one word, if you can

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1 rephrase the question.

2 Q The exhibits we just looked at are dated in
3 1999 and 2000, right?

4 A Yes, sir.

5 Q And that's the time you were having these
6 discussions with Mr. Phillips?

7 A Yes, sir.

8 Q Were you -- at that time, did he personally
9 own the property that is undeveloped in Crystal
10 Pines, or do you know?

11 A I assume he did, yes.

12 Q You heard Mr. Bugenske talk about the
13 condition of the pavement on the roads we
14 discussed. Is there anything you need to add to
15 what he said?

16 A Well, yes. The roads that are in the
17 undeveloped portion of Crystal Pines, Little Gap
18 Lane, where there is only one household, at this
19 point in time, are as badly alligatored as the
20 rest of the roads, and those roads aren't even
21 traveled, so we're very concerned about the
22 engineering and the design that went into those
23 roads.

24 Mr. WALKER: Your honor, I apologize; I'm trying to
25 make sure we don't do anything cumulative, here.

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1 Q Tell me a little more about your concern
2 about the condition of the undeveloped roads and
3 why that's different.

4 A Well, we've always been told that placement
5 of mailboxes, design of driveways, have caused
6 the problems with the roads, and here we have a
7 perfectly pristine, unused, almost half-mile of
8 roads, and they're showing the same effects of
9 degradation as those roads throughout the
10 developed portion of the property, so I'm
11 wondering how could it be minor problems like
12 where a mailbox is or where a driveway is placed
13 that could cause these problems.

14 Mr. WALKER: Your Honor, I don't have any more
15 questions for Mr. Lapine right now.

16 JUDGE SPENCE: Cross, Mr. Stockholm.

17 Mr. STOCKHOLM: Briefly, Your Honor.

18 EXAMINATION OF Mr. LAPINE

19 BY Mr. STOCKHOLM:

20 Q Good morning, sir.

21 A Good morning.

22 Q I'm sorry; what is your status right now with
23 the Homeowners' Association?

24 A I'm just a homeowner in the Association.

25 Q When did you buy your home, again, sir?

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1 A I bought the property in 1999.

2 Q When did you build your house?

3 A It was completed January.

4 Q When you moved into Crystal Pines --

5 A I may have made a mistake. I may have bought
6 the property sometime in 1998.

7 Q When you moved into your home at Crystal
8 Pines, sir, was the Homeowners' Association then
9 active?

10 A There was no Homeowners' Association when I
11 first bought my property.

12 Q When you moved into your home, was there a
13 Homeowners' Association?

14 A Yes, sir.

15 Q And these are private roads that we're
16 talking about; correct?

17 A Privately maintained roads.

18 Q None of these are County roads?

19 A These are not County roads.

20 Mr. STOCKHOLM: That's all I have. Thank you.

21 JUDGE SPENCE: Re-direct?

22 Mr. WALKER: No, Your Honor.

23 JUDGE SPENCE: You may step down.

24 Mr. WALKER: Your Honor, I would go ahead and call Mr.
25 Phillips, as a hostile witness, of course.

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1 JUDGE SPENCE: Mr. Phillips, come forward and be
2 sworn.

3 THE BAILIFF: Place your left hand on the Bible and
4 raise your right hand. Do you solemnly swear or
5 affirm to tell the truth, the whole truth and
6 nothing but the truth, so help you God?

7 Mr. PHILLIPS: I do.

8 THE BAILIFF: Have a seat on the witness stand and
9 state your full name.

10 Mr. PHILLIPS: Don Earl Phillips.

11 EXAMINATION OF Mr. PHILLIPS

12 BY Mr. WALKER:

13 Q Mr. Phillips, we're going to kind of skip
14 around a little bit because there aren't a whole
15 lot of subjects we really need to talk a whole
16 lot about, okay?

17 A Okay.

18 Q So, as we switch subjects, I'm going to try
19 to tell you, okay?

20 A Okay.

21 Q And I don't talk loud. Can you hear me okay?

22 A Pretty good.

23 Q The development we're talking about was
24 officially started by a corporation, I think
25 Crystal Lake Land Developers. Am I right?

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1 A Incorporated. Yes.

2 Q A corporation. Then, in 1997, the
3 corporation sold the remaining property to you
4 personally.

5 A Yes.

6 Q In 1997, as I understand it, when that sale
7 took place, you owned all the shares in the
8 corporation?

9 A Yes.

10 Q So you essentially paid money to the
11 corporation that you owned for that undeveloped
12 land?

13 A The corporation was dissolved.

14 Q We'll do this a piece at a time. You paid
15 the corporation money, got the land and dissolved
16 the company?

17 A Yes.

18 Q And I'm assuming, when you dissolved it, as
19 the sole shareholder, you got the assets, which
20 would be the money.

21 A Yes.

22 Q So you bought the property from the company
23 in '97, in July, and then it looks like dissolved
24 it July the 28th of 1997.

25 A Sounds right.

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1 Q So, in the space of a couple of months, the
2 company sold the land, dissolved and gave you the
3 money?

4 A I didn't quite follow.

5 Q I'm sorry. In June/July of '97, the
6 corporation sold the remaining land in Crystal
7 Pines to you, right?

8 A Right.

9 Q Then, within a month or so, you dissolved the
10 corporation?

11 A No, that's not -- no, that's not the right
12 timeline. I don't know -- I'd have to make notes
13 to figure this out.

14 Q Mr. Phillips, you and I need to have an
15 understanding. I'm trying to move quickly on
16 things I thought weren't contested, and I'm not
17 --

18 Mr. WALKER: Your Honor, I apologize for having to
19 fumble through these for the right deed.

20 Q Mr. Phillips, I'm going to you what's been
21 marked as Exhibit #6, that number right there,
22 and this is a deed from the corporation to you,
23 and right here it says this deal was done June
24 13th, 1997.

25 A Okay.

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1 Q Would it refresh your recollection about when
2 Crystal Lake Land Developers got dissolved to
3 look at what the Secretary of State says?

4 A Sure.

5 Q I'll just let you look at that. Does that
6 indicate it was dissolved in July of 1997?

7 A It was filed in July.

8 Q The dissolution was filed?

9 A Yes.

10 Q When you dissolved the company, you
11 distributed the company's assets to you?

12 A Right.

13 Q So that left Crystal Lake Land Developers
14 dissolved, with nothing?

15 A Right.

16 Q Did you continue to develop property in
17 Crystal Pines?

18 A Yes.

19 Q If the developer is responsible for
20 maintaining and repairing the roads after you
21 dissolved it, Crystal Lake Land Developers had
22 nothing to do that with?

23 A The road agreement doesn't say that.

24 Q Well, I'm asking you to assume that --

25 A It doesn't say that, so --

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1 Q -- I'm asking you to assume that, if the
2 developer was responsible, the corporation then
3 had nothing to do that with, right?

4 A Well, it doesn't -- the Road Agreement does
5 not say that, so that was never entered as a
6 possibility.

7 Mr. WALKER: Again, Judge, I apologize for having to
8 fumble around up here, but things got out of
9 order.

10 Q Mr. Phillips, I'm going to hand you Exhibit
11 #1, and that is what we have been calling the
12 Road Maintenance Agreement. You're real familiar
13 with that document by now, aren't you?

14 A I don't look at it unless I have to.

15 Q Okay. Would you turn to paragraph 11 with
16 me?

17 A Okay.

18 Q Paragraph 11 starts off, "The undersigned,
19 Crystal Lakes Land Developers, Inc., by execution
20 of this instrument, hereby agrees at its own
21 personal cost and expense" -- that's what the
22 first two lines say, right?

23 A It continues to say --

24 Q Is that what the first two lines say?

25 A Yes.

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1 Q If you go down about three lines, does it
2 continue to say, "determine and carry out or
3 cause to be performed all improvements,
4 maintenance and repair of the said roads as
5 nearly as may be practicable in the same
6 condition and repair as originally paved"?

7 A It says "cost and expense to open the
8 unopened portion," and it continues to say what
9 you just read.

10 Q Is it your position that paragraph 11 doesn't
11 obligate the developer to maintain and repair the
12 roads mentioned here?

13 A If you read the whole sentence, it says that
14 if you cause damage, you will repair it; if you
15 don't read the whole sentence, you can take
16 portions of it and put together an entirely
17 different notion, and that's what you have done.

18 Q So it's your position that this paragraph 11
19 doesn't obligate the developer to cause to be
20 performed all improvements, maintenance and
21 repair of the said roads; it doesn't require the
22 developer to do that?

23 A If you read the rest of the sentence, it
24 would make sense. What you read just does not
25 make sense.

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1 Q I'm going to borrow Mr. Lapine's pen and ask
2 you, on Exhibit #1, paragraph 11, to circle the
3 words that you contend limit the developer's
4 obligation to repair damage it causes.

5 A It would be the whole paragraph.

6 Q Then circle the whole paragraph. So you
7 can't point to specific words in the paragraph
8 that limit the developer's liability to repairing
9 damage it causes?

10 A You would have to assume that a road was
11 opened, an unpaved portion was opened, and that
12 there was damage done.

13 Q If you want to look at Exhibit #6, that's the
14 deed from the development company to you
15 personally, and it says you paid \$392,679.95 and
16 assumed a mortgage with an approximate balance of
17 \$185,470.05?

18 A Yes.

19 Q And that was your deal when you purchased the
20 remaining lands in the development?

21 A Yes.

22 Q Mr. Phillips, we're going to talk about
23 Exhibits #7 and #8. Do you have Exhibit #7 in
24 front of you?

25 A Yes.

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1 Q This is Mr. Robin Turner's letter of July
2 1999 to the Homeowners'?

3 A Yes.

4 Q He obviously wrote this under instructions
5 from you, right?

6 A Yes.

7 Q If you look at Exhibit B, which is attached
8 to this letter -- you can flip over to the second
9 page with me -- the first thing Exhibit B does,
10 in this subparagraph A, is say the grantee is
11 responsible for maintaining the roads, right?

12 A In paragraph A?

13 Q Yes, sir. Paragraph A says, "Grantee and its
14 successors and assigns shall adequately maintain
15 the roadways."

16 A Uh-huh.

17 Q So Exhibit B says the grantee is responsible
18 for road maintenance, right?

19 A Yes.

20 Q Is it your position that, under the existing
21 Road Maintenance Agreement, Exhibit 1, they're
22 responsible anyway?

23 A Yes.

24 Q Well, then, why do you need to amend and get
25 a corrective deed to say the same thing?

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1 A Rob Turner -- I believe the attorney did
2 this.

3 Q He did this on your behalf, personally,
4 right?

5 A Uh-huh.

6 Q Correct?

7 A Yes.

8 Q So he did this because you asked him to?

9 A Yes.

10 Q Isn't it true that you asked him to do this
11 to try to get you off the hook for the road
12 maintenance responsibility that's in Exhibit #1?

13 A No.

14 Q That's not why you did this?

15 A No.

16 Q Would you look at Exhibit #8? Is that a
17 letter from you -- it says "letter of intent" at
18 the top -- is that your signature down there at
19 the bottom?

20 A Yes.

21 Q So this is something you sent to the
22 homeowners in what, September of 2000?

23 A Yes.

24 Q Was this also trying to get them to agree to
25 that Exhibit B that we just looked at?

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1 A I believe so.

2 Q So this is a second effort to get the
3 homeowners to agree to a corrective deed
4 incorporating this Exhibit B, right?

5 A The Homeowners' Association was being formed
6 and, along with the help of my attorney, Rob
7 Turner, we were trying to get whatever documents
8 we needed to get this completed.

9 Q Well, when we looked at Exhibit B, the very
10 first thing it said was that the grantee, the
11 Association, is responsible for the roads, right?

12 A Right.

13 Q Isn't it true that that's different from
14 what's in Exhibit #1, which is the Road
15 Maintenance Agreement?

16 A I don't follow. Say that again.

17 Q This Exhibit B, the very first thing it says
18 is that the Association is responsible for road
19 maintenance.

20 A Okay.

21 Q Isn't that different from what Exhibit #1,
22 the Road Maintenance Agreement, says?

23 A You're talking about the Road Agreement?

24 Q Yes, sir. Yes, sir. Let me ask this a
25 different way. Exhibit #1, the Road Maintenance

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1 Agreement, where in there does it say that the
2 Association is responsible for road maintenance?

3 A It says if you buy property, you become a
4 member of the Road Company, if you buy property
5 in the development.

6 Q Well, I'd ask you to take your pen, again,
7 and circle the language in Exhibit #1 that says
8 the Homeowners' Association is responsible for
9 road maintenance and repair.

10 A There is none.

11 Q Circle the language that says the Road
12 Company is responsible for the road maintenance
13 and repair.

14 A I'll have to spend some time and read this
15 sucker.

16 Q Take your time.

17 A Okay. Paragraph one.

18 Q Circle the part of paragraph one that you say
19 obligates the Road Company to maintain and repair
20 the roads.

21 A I think the whole document speaks for itself.

22 Q So the whole document is what you have to
23 look at --

24 A Yes, you do.

25 Q -- to support your position that the Road

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1 Company, now the Association, is responsible for
2 the road maintenance?

3 A Correct.

4 Q So you can't point to the specific paragraph
5 in here that says that, can you?

6 A I can't pick the best paragraph; no.

7 Q Can't pick any paragraph, can you?

8 A Paragraph one is the best when individuals --
9 it specifically speaks of one person buying into
10 it.

11 Q That paragraph talks about an easement over
12 the roads, right?

13 A "And the same shall be held and maintained
14 for the use" -- "maintained for the use and
15 benefit of such owners."

16 Q That's what you've got, right?

17 A Uh-huh.

18 Q That agreement, Exhibit #1, that's still in
19 effect today, isn't it?

20 A Yes.

21 Q And you've been consistent in that position,
22 while we've looked at these letters we have that
23 said that, right?

24 A Yes. Yes.

25 Q So, whatever it says, this agreement is still

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1 the governing agreement today?

2 A Yes.

3 Q Exhibit #1 that we're looking at talks about
4 the Road Company, and the Homeowners' Association
5 should be the successor to the Road Company,
6 right?

7 A Yes. I think that was the intent.

8 Q When we talked at your deposition -- and it
9 may have been some time ago -- at that point in
10 time, you still owned about 40% of the property
11 in the subdivision; correct?

12 A Correct.

13 Q Is that still true today?

14 A Correct.

15 Q Some parcels you're still marketing, some you
16 are not?

17 A Correct.

18 Q And what you're marketing is raw land, not
19 property with a home?

20 A Correct.

21 Q So, typically, when you're going to sell
22 property to somebody, they're going to build a
23 house on it?

24 A They may elect to.

25 Q Well, I mean, we're selling home sites?

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1 A Yes.

2 Q So most of these people, within a modest
3 period of time, do some construction?

4 A Most of them do.

5 Q It is it fair to say that construction
6 equipment places more strain on a roadway than
7 the kinds of cars you and I drive?

8 A Yes.

9 Q Are you familiar with the flyer that I
10 discussed with Mr. Bugenske, advertising the
11 subdivision?

12 A Yes.

13 Q Is that something you either put together or
14 had put together to market the property?

15 A Yes.

16 Q Isn't it true that it refers to deep water
17 access and boat ramps?

18 A And locks.

19 Q Isn't it true that refers to deep water
20 access and a boat ramp?

21 A Yes.

22 Q Were you using this flyer to advertise the
23 property before 2004?

24 A Yes.

25 Q We also have a picture of a sign that used to

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1 up on the side of the road that also referred to,
2 I think, deep water access and tennis courts.

3 A And locks.

4 Q And that sign was also used before 2004 to
5 market your property in Crystal Pines, right?

6 A Yes.

7 Q Before 2004 -- well, let me back up, just to
8 be sure we're clear. Exhibit #13 is the plat of
9 the portion of the property that shows the boat
10 ramp, and the boat ramp is right here on the
11 plat. Let me give you a minute and let you get
12 oriented. This plat is dated in 1986, is that --
13 within a year or so of when the boat ramp went
14 in?

15 A No. No.

16 Q Well, this is shown on a plat, here. It says
17 it was, according to the courthouse, dated April
18 1, 1986.

19 A That's when this plat was recorded; yes.

20 Q When are you saying the boat ramp was put in?

21 A 1981 -- 1980, 1980.

22 Q So the boat ramp had been there since 1980?

23 A Uh-huh.

24 Q From 1980 until -- well, let me back up.
25 Around 2004, did you put up something to limit

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1 access to the boat ramp?

2 A The president of the Homeowners' Association
3 gave me two yellow posts and I put the posts up,
4 rather than blocking that off.

5 Q You put the posts up and you put a lock on it
6 in 2004?

7 A Yes.

8 Q From the early '80s to 2004, the homeowners
9 who owned property in the subdivision were able
10 to use the boat ramp without having to undo a
11 lock?

12 A With my permission, yes.

13 Q Did you permit homeowners who owned property
14 in the subdivision to use the boat ramp prior to
15 2004?

16 A Yes.

17 Q Were they allowed to do so without paying a
18 fee, prior to 2004?

19 A Yes; for the most part, yes.

20 Q Were you aware, from the early '80s through
21 2004, that the homeowners were freely using the
22 boat ramp to put boats in and out of the lake?

23 A Yes, with my permission.

24 Q If there was somebody from outside the
25 subdivision, we didn't want them using it. We

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1 try to keep them away; is that right?

2 A Oh, I did.

3 Q So that's something you tried to do?

4 A Yes.

5 Q I'm assuming the only way to do that is to
6 kind of keep an eye on who's using the boat ramp.

7 A Correct.

8 Q So you kept an eye on who was using the boat
9 ramp all these years?

10 A Yes.

11 Q And you knew the homeowners were regularly
12 using the boat ramp from the early '80s through
13 2004?

14 A Yes; less than 200 times a year, of course.

15 Q But they were regularly doing it --

16 A Yes.

17 Q -- throughout all those years?

18 A Yeah.

19 Q They continued to do so up until 2004 when
20 the posts and the chain and the lock went up?

21 A Yes.

22 Q The boat ramp property, as I understand it,
23 was transferred from yourself to your son,
24 Wright?

25 A Correct.

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1 Q And Wright created this Crystal Pines Yacht
2 Club?

3 A Correct.

4 Q What do you know about the Yacht Club?

5 A It's a yacht club.

6 Q I apologize. We'll do this a different way.
7 The posts you talked about, the chain and the
8 lock, are they still up today?

9 A Yes.

10 Q The plat we looked at briefly, Exhibit #13,
11 that plat is recorded in the courthouse, right?

12 A Yes.

13 Q Lots were sold at Crystal Pines subdivision
14 after this plat was recorded, right?

15 A Yes.

16 Q The plat -- and this is Exhibit #13 -- this
17 is a plat you had recorded; correct?

18 A Yes.

19 Q And it contains a note, "Lot A is designated
20 as community commons." Do you see the note I'm
21 talking about?

22 A Yes.

23 Q And Lot A is right below that note, and Lot A
24 is the boat ramp parcel, isn't it?

25 A Yes.

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1 Q So your own plat says the boat ramp is
2 community commons property, right?

3 A Well, the surveyor recorded it that way, and
4 he also had it stamped that the Road Agreement
5 was -- referenced the Road Maintenance Agreement,
6 deedbook and page.

7 Q On Exhibit #13, there are two handwritten
8 areas off on the right. Do you see where I'm
9 pointing to?

10 A Yes.

11 Q And one is below the other one, and the one
12 that's below the other one is titled "owner's
13 certificate" and is signed by "Don E. Phillips."

14 A Yes.

15 Q Is that you?

16 A Yes.

17 Q So you personally signed this plat before it
18 got recorded, didn't you?

19 A Yes.

20 Q And when you signed it, it had designated Lot
21 A as community commons, didn't it?

22 A But that section had not been developed, nor
23 was Knob Cone Lane, because we don't even have a
24 Knob Cone Lane, and the road there now does not
25 have those -- that entire area where it's called

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1 "community commons" and the road was properly
2 developed later, several years later. I think it
3 was recorded in 2000.

4 Q The lots shown on this plat, 21 through 34 --
5 excuse me, 21, 20, 19, 18, 17, 32, 33 and 34 --
6 were they sold?

7 A Yes. They front Torrey Pine Lane.

8 Q The advertising materials -- I just want to
9 be sure we're clear -- the sign that we discussed
10 earlier and the brochure, those were approved by
11 you?

12 A Yes.

13 Q Used to market these properties?

14 A Yes.

15 Mr. WALKER: Bear with me just one moment, please,
16 Judge.

17 [Mr. WALKER AND Mr. LAPINE CONFER.]

18 Q Mr. Phillips, when you put the posts up and
19 locked off the boat ramp, did you know if the
20 Homeowners' Association had taken any kind of
21 vote on the boat ramp?

22 A At one point, they had offered to purchase
23 the boat ramp for -- I don't recall the exact
24 number, but it was in the neighborhood of
25 \$3,500.00, at one point. I don't know which year

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1 that was.

2 Q Your lawyer asked my folks if they had
3 something signed. You don't have anything signed
4 from the homeowners saying, "Please block off the
5 boat ramp," do you?

6 A No.

7 Q And all the homeowners -- you didn't pass out
8 the combination to that lock to all the
9 homeowners, after you put it up, did you?

10 A No.

11 Q In fact, very few people have that
12 combination, right?

13 A Just the members of the Yacht Club.

14 Q Who picks the members of the Yacht Club?

15 A The ones who are willing to buy a membership
16 -- ownership.

17 Q Your lawyer brought up something else,
18 talking to my people, and that is that a lot of
19 the property you still own in the subdivision is
20 undeveloped, right?

21 A Correct.

22 Q And a lot of that is -- I know some is on the
23 lake, a lot of it is off the lake, right?

24 A Yes.

25 Q If you look at road frontage, how many feet

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1 are on the road, your property is what, about
2 half the road front is on your property, half on
3 property you've sold?

4 A Thereabouts.

5 Mr. WALKER: Mr. Phillips, thank you for your time.

6 Mr. STOCKHOLM: It's my turn now. Your Honor, by
7 stipulation, I was going to have these covenants
8 -- Your Honor, for ease, I'd just like to mark
9 these Defense A and B.

10 JUDGE SPENCE: Mr. Walker, by stipulation?

11 Mr. WALKER: Yes, sir.

12 JUDGE SPENCE: Defense Exhibits A and B, by
13 stipulation.

14 MARKED AS DEFENDANT'S EXHIBIT #1,
15 HEARING OF 9/30/2008. COLOR XEROX
16 COPIES OF VARIOUS PHOTOGRAPHS (14
17 PAGES).

18 MARKED AS DEFENDANT'S EXHIBIT #1,
19 HEARING OF 9/30/2008. COPY OF A
20 DOCUMENT ENTITLED "PROTECTIVE COVENANTS
21 FOR CRYSTAL PINES, PHASE V," WITH
22 ATTACHED EXHIBITS; COPY OF A DOCUMENT
23 ENTITLED "FIRST AMENDMENT TO DECLARATION
24 OF RESTRICTIONS FOR CRYSTAL PINES,
25 SECTIONS I, III AND IV;" COPY OF A

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1 DOCUMENT ENTITLED "FIRST AMENDMENT TO
2 DECLARATION OF RESTRICTIONS FOR CRYSTAL
3 PINES, SECTION I;" COPY OF A DOCUMENT
4 ENTITLED "FIRST AMENDMENT TO DECLARATION
5 OF RESTRICTIONS FOR CRYSTAL PINES,
6 SECTION IV;" COPY OF A DOCUMENT ENTITLED
7 "COMMON DOCK AGREEMENT" (23 PAGES).

8 EXAMINATION OF Mr. PHILLIPS

9 BY Mr. STOCKHOLM :

10 Q Don, I think we all agree that the Road
11 Maintenance Agreement is a key document; is that
12 correct?

13 A Correct.

14 Q And that has been in effect since 1981;
15 correct?

16 A Correct.

17 Q It's also fair to say that you and the
18 Homeowners' Association have butted heads several
19 times; is that correct?

20 A Correct.

21 Q Now, regarding the matter with the boat ramp,
22 you tried to sell that to them in 2003?

23 A I started in the '90s.

24 Q But you were never able to sell it; is that
25 correct?

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1 A Well, at one point, they said they were going
2 to buy it and, at the next meeting, they didn't
3 accomplish that; they just failed to do it.

4 Q Eventually, you never sold it to them?

5 A Correct.

6 Q Now, I'm going to hand you these pictures,
7 and they have been marked as Defense Exhibit A.
8 You have some problems with how the Homeowners'
9 Association has been handling the covenants and
10 restrictions at the Crystal Pines subdivision,
11 don't you?

12 A Correct.

13 Q What can you tell us about the problems you
14 had?

15 JUDGE SPENCE: Hold on a second. I think we've got
16 multiple pictures. If you will, write on the
17 back of them maybe "1," "2," "3."

18 Mr. STOCKHOLM: May I approach, Your Honor?

19 JUDGE SPENCE: Certainly.

20 Mr. STOCKHOLM: I've put a number on the side of each
21 photo.

22 JUDGE SPENCE: Okay. Great. If you will, identify
23 those as you're talking, please.

24 Q Now, those pictures -- and you do not need to
25 go through every one, some cover the same thing

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1 -- but explain to the Judge the problems you've
2 had with the Homeowners' Association regarding
3 what is shown in those pictures.

4 A This one has changed. I think this is all
5 posted-in, now, and it has been for several
6 years. This is on Little Gap Lane, and there's a
7 house across the street, the Bass house. I don't
8 know the lot number -- Lot 52, I do know the
9 number -- across from Lot 52.

10 Anyway, this catchbasin top is caved in now,
11 and it has been for three or four years, now, and
12 it's definitely -- could be a death trap to
13 somebody as old as me, walking on the roads. I'm
14 sixty-eight, but there are older people who walk
15 these roads, also, and the Homeowners'
16 Association even invited the neighboring
17 community to walk down our streets, Timberlake
18 Plantation folks. So a lot of folks walk up
19 these roads, and it's clearly a danger to
20 somebody's health, particularly at night, because
21 they are poorly lighted, the streets are. There
22 are streetlights, but you can't see a hole like
23 that. You could break your darned neck.

24 Q How did you -- as Mr. Walker's witnesses did,
25 if you would be kind enough, when you pick a

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1 picture off the top, say the number out loud, and
2 what the picture is.

3 A This is Lot 1, on Little Gap Lane. This is
4 picture #2; this is on Little Gap Court. This is
5 Lot 37, the Lapines, and this is part of a Y
6 turnaround and, as you can see, the Y turnaround
7 is totally blocked -- well, even if the trash
8 wasn't there, they removed approximately 40 tons
9 of dirt from the area, from the shoulder, and
10 they even cut part of the asphalt. They put a
11 string, popped a line on it, and cut the corner
12 of the turn of that Y off, and they had just more
13 or less claimed that to be their own and dared
14 anybody to park their cars over there, or do
15 anything else. You certainly can't use it.
16 Emergency equipment cannot turn around in that Y
17 turnaround, or school buses. The trash truck
18 does back into this little cul-de-sac. That's
19 picture #2. That trash is out there -- when I
20 lived out there -- I lived across the street, and
21 the trash was there for several years. It would
22 be there five days out of seven.

23 This is at the corner of -- this is a private
24 -- this is Lot -- picture #3. This is Torrey
25 Pine Lane, at the intersection of Little Gap Lane

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1 and Torrey Pine Lane, and this wall was built out
2 into the shoulder, onto the shoulder of Torrey
3 Pine Lane, and some of these rocks are knocked
4 off by vehicles coming in. Personally, I've
5 backed my boat trailer into that wall, and I
6 never did get the tail light fixed, but I always
7 had trouble with it leaking water when I'd back
8 it into the ocean. At any rate, that is a
9 hazard. This is picture #3.

10 This is at the end of Torrey Pine Lane, just
11 beyond this picture, picture #4. It's on the
12 cul-de-sac on Torrey Pine Lane; this is, I think,
13 in front of Lot 17. This structure here is 25
14 feet into the 100-foot piece of property. The
15 Road Company owns a 100-foot circle there at the
16 turnaround, and this goes into the circle
17 something like 25 or 26 feet. Here's the
18 catchbasin, way back here, and the drainage was
19 way around through here, on the outside of this
20 cul-de-sac, and that's the way it was built. The
21 paving company just did not make the circle --
22 the asphalt as large as I had hoped for when I
23 had it surfaced in 1991 and, as they indicated,
24 no one has paved the roads since 1991, not out
25 there.

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1 This is a duplication; this is picture #5.
2 It shows -- it's just a different date, October
3 7th of '04, showing more structure than what's
4 over here on the sideline, and what's missing
5 from the road on Little Gap Court. Just another
6 -- same photo, same scenario, on Little Gap
7 Court. The right side that's been blocked -- the
8 left side is -- you could utilize it -- as a
9 matter of fact, here's the left side in photo #7.
10 The folks at Lot 39 had done a wonderful job of
11 keeping the area open for the turnaround, on
12 their side, and this house is mine -- was mine --
13 and that's at the end of Little Gap Court, and
14 this is just another picture.

15 Photo #8 is just a little bit further up,
16 showing my mailbox, which is outside of the Y
17 turnaround. If a bus or truck or firetruck comes
18 in, they have room to swing their vehicle around
19 and go in the other side, except there's no other
20 side over there. Here's the end of Little Gap
21 Lane, just beyond the first or the last house on
22 Little Gap Lane -- there are two houses coming
23 onto Little Gap lane. Someone earlier said there
24 was only one, but there's two. Anyway, this
25 shows pine needles and leaves on top of the

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1 asphalt and the asphalt does deteriorate just by
2 having leaves or pine straw, you know, not cleared
3 off it. If you peel that back, you'd see that
4 the asphalt just crumbles, and the Homeowners'
5 Association, they do cut grass sporadically in
6 certain areas, and they refuse to have the grass
7 cut out here on the end because -- for some
8 strange reason. I don't know. They don't claim
9 to maintain the whole road; they just want to
10 maintain what they've maintained, just in certain
11 areas.

12 Here's the other side of the street, same
13 street; it's photo #9. The weeds are about
14 shoulder-high, at least, maybe taller; the same
15 piles of leaves on the asphalt, along with just
16 debris. It just -- it mats up and might be 2
17 inches thick on top of the asphalt, and it just
18 causes it to deteriorate. This is on Torrey Pine
19 Lane, this section. Now, that road was paved in,
20 I think, about '98, so it's due to be resurfaced

21 --

22 Mr. WALKER: Your Honor, I'm going to object to him
23 talking about when things are due to be repaved,
24 on the same basis that the plaintiff objected to
25 my guys talking about engineering. I understood

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1 these were being offered to show covenant
2 violations, and he's now starting to testify
3 about when roads should be repaved and so on, and
4 he's not competent to do that.

5 JUDGE SPENCE: Mr. Stockholm?

6 Mr. STOCKHOLM: Your Honor, they are offered for
7 covenant violations. That's why we put them in.

8 JUDGE SPENCE: Sustained.

9 THE EXAMINATION OF MR. PHILLIPS BY MR. STOCKHOLM

10 CONTINUES.

11 A This is -- picture #11 is on Torrey Pine
12 Lane, and this is in the older section. This
13 road was paved in 1991, and other than the few
14 times that I cleared out some catchbasins, for
15 the most part, they have not -- they have not
16 ever cleared out any catchbasins, and this was in
17 September, September 26th of '04, as stamped on
18 the photo. See, the water cannot go in the
19 catchbasin; it has to come around. This was also
20 on Torrey Pine Lane, in the same vicinity of that
21 catchbasin, where water has stood and, as the ad
22 says, "just add water," and the road will fall
23 apart.

24 Mr. WALKER: Objection, Your Honor.

25 JUDGE SPENCE: Sustained.

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1 A Here's picture #13, showing the same water
2 damage. Now, they did mention repairing --
3 resurfacing this section where this photo was
4 made, and it was probably resurfaced, I'm pretty
5 sure, after the date of this photo, and the area
6 just to the right of this, the open ditch that
7 was built for drainage to prevent water from
8 going on a shelf -- this whole area is -- I think
9 it's -- I don't know the name of the rock, but
10 it's a shelf of rock just under this road, maybe
11 18 to 24 inches under road. There was an open
12 ditch on the right side of this street, right
13 before this, that was allowed to be filled in and
14 a pipe put in, so water still stands back here on
15 Lot Number Four, and that water goes into the
16 ground and along on top of that shelf, causing
17 that right there.

18 Q Don, have you talked to the Homeowners'
19 Association about trying to get these things
20 resolved?

21 A Numerous times.

22 Q Do you have an estimate of how many times?

23 A Every time we meet; every time I've been to a
24 meeting or met up with them individually or in
25 their directors' meetings; I've gone to a couple

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1 of those.

2 Q Now, have these problems ever been corrected
3 by the Homeowners' Association?

4 A No.

5 Q Did you have a problem, one time, with
6 someone putting in a swimming pool?

7 A Yes. A fellow built a house over a swimming
8 pool. He did not --

9 Mr. WALKER: I'm not sure I understand the relevance,
10 Your Honor.

11 Mr. STOCKHOLM: That was another violation of the
12 covenant, Your Honor; no approval by the
13 Homeowners' Association.

14 JUDGE SPENCE: Overruled. You can continue.

15 Q So you said he built a house over the pool?

16 A Yes, and he put a tin roof on it, and I
17 understand the tin roof, after 10, these many
18 years -- several years, I don't know how many
19 years, probably in excess of 10 years -- that
20 roof has been or is being removed or changed.

21 Q Did you ever see, from the Homeowners'
22 Association, any written approvals of these
23 alterations?

24 A No.

25 Q What has happened when you have talked to the

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1 Homeowners' Association about correcting these
2 basic things, such as the drainage and clearing
3 out the drains?

4 A I get no response.

5 Q How long have you been trying?

6 A Since the Homeowners' Association was begun,
7 they have collected maintenance money to maintain
8 the roads, and they have failed to maintain the
9 roads.

10 Q And you would like them to be required to get
11 the drainage corrected?

12 A Yes. I'd like to have it returned to as-
13 built.

14 Mr. STOCKHOLM: I have nothing further, Your Honor.

15 JUDGE SPENCE: Mr. Walker, this would be redirect, I
16 think.

17 Mr. WALKER: We're going to be very brief and very
18 focused.

19 RE-EXAMINATION OF Mr. PHILLIPS

20 BY Mr. WALKER:

21 Q Mr. Phillips, once again, we're back to
22 talking about documents. You don't have a
23 document that you've handed the judge that says
24 the Homeowners' Association is required to chase
25 down all these issues that you have pointed out,

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1 right?

2 A I don't understand. I don't understand the
3 authority of the Homeowners' Association. I
4 mean, you mentioned whether they absolutely have
5 to do something or should do something. I don't
6 know; that's sort of a gray area, I guess.

7 Q Isn't it true that the bylaws do not require
8 the Association to pursue these issues?

9 A I don't know their bylaws. I don't know. Do
10 they mention the roads or the restrictions or any
11 restrictive covenants?

12 Q Have you shown the Judge the document that
13 you contend requires the Association to pursue
14 what you claim are problems?

15 A I think the Road Agreement is the document.

16 Q What does it say about where mailboxes are?

17 A Restricted -- in the restrictions -- in some
18 of the restrictions, mailboxes are mentioned to
19 be placed according to the wishes of the
20 developer, which was Crystal Lake Land
21 Developers.

22 Q Mr. Phillips, who controlled the
23 architectural review board?

24 A I did.

25 Q And all these mailboxes and grading and all

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1 we're talking about happened while you controlled
2 the architectural review board, right?

3 A Yes.

4 Q That's your problem, isn't it?

5 A Well, I think that's why we're here.

6 Q Your Exhibit B, we're going to turn to the
7 fifth page, okay, and this is a set of covenants
8 for the subdivision, right?

9 A Yes.

10 Q Doesn't your own exhibit say that the owners
11 referred to here "shall have the reasonable use
12 of the boat ramp" as shown on your survey?

13 A Yes.

14 Mr. WALKER: I apologize, your honor.

15 Q When you were looking at photograph #8, you
16 made some reference to the pavement "just
17 crumbling." Do you remember that?

18 A No. I wasn't looking at photograph #8 when I
19 said that; I was looking further -- I mean, I was
20 looking at picture --

21 Q It was the one before #9, so I assumed it was
22 --

23 A It was numbers 10 and 11, where the grass,
24 the leaves and pine straw has been accumulating
25 along the side of the road.

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1 Q The asphalt out there in places, it's just
2 crumbled, right?

3 A Yes. It will do that when you leave leaves
4 and grass compacted on top of it. Just add water
5 and heat and cold.

6 Mr. WALKER: Your Honor, I don't have any more
7 questions of Mr. Phillips right now.

8 JUDGE SPENCE: Mr. Stockholm?

9 Mr. STOCKHOLM: Nothing further, Your Honor.

10 JUDGE SPENCE: You can step down.

11 Mr. WALKER: Your honor, I've had the misfortune of
12 being in a lot of long trials lately. I have one
13 more short witness, who is the engineer who tells
14 us why it costs a lot of money to fix this, and I
15 unfortunately told him, as I mentioned to you
16 earlier, 2:00. I will be glad to call him and
17 see if I can hustle him over here. It's my fault
18 for misunderstanding how long this case was going
19 to take.

20 Mr. STOCKHOLM: Your honor, may we have a small
21 conference in the back?

22 JUDGE SPENCE: Absolutely. All witnesses are under
23 oath. You don't need to be talking to anybody
24 about your testimony right now, or anything like
25 that. Let's step back.

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1 [OFF THE RECORD FROM 11:14 A.M.
2 UNTIL 11:22 A.M.]

3 JUDGE SPENCE: Everybody please be seated. It's my
4 understanding that both the plaintiff and the
5 defendant have rested.

6 Mr. STOCKHOLM: That is correct, Your Honor.

7 Mr. WALKER: That's correct, Your Honor. As
8 discussed, the deposition excerpts as designated
9 by the plaintiff will be provided to the court at
10 a later date.

11 JUDGE SPENCE: Thank you. You can have a seat. Just
12 a couple of housekeeping details.

13 When you finish the transcript, Mr. Court
14 Reporter, if you will, e-mail Mr. Walker, who is
15 the plaintiff, and then just copy the Court and
16 Mr. Stockholm, and then three weeks from that
17 date is when the brief will be due. I'd like all
18 the original exhibits, obviously, to stay with
19 the court reporter, and you all can send in your
20 proposed orders to me as a Word attachment and
21 just copy the other side.

22 Mr. Stockholm, obviously, with the deposition
23 excerpts, you certainly have the right under the
24 doctrine of completeness to say, "Hey, look at
25 this page," and you can supplement what's being

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1 inserted, so if there's any problem there, you
2 all just handle that the way it's supposed to be
3 handled and just send that to me, for your
4 deposition excerpts. I've got several things
5 that I'd like you to address in your brief, and
6 when I finish the proposed order, if I have left
7 something out, please tell me.

8 The case appears to be about road
9 maintenance, boat ramp, tennis courts. There are
10 several documents that have been recorded, so
11 we've got some law, some existing law on
12 construction of documents and development cases.
13 There's also a line of cases about the
14 developer's responsibilities and obligations.
15 There's a couple of cases, I think, from the
16 earlier or mid-'90s and some recent cases on
17 that. There's also case law about the effect of
18 things shown on plats and what that means. If,
19 as you are addressing these three issues -- the
20 maintenance, the tennis courts and the boat ramp
21 -- if you will, specify what your claim springs
22 from. Does it spring from contractual
23 obligations created in a document, or usage, and
24 then tell me what your proposed remedy is and why
25 you're entitled to it.

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1 Now, that's my quick take of it. You can
2 certainly tell me if there are any issues, and
3 certainly you can break those down however you
4 want to, but if I'm missing what the major point
5 is, please tell me. Now would be a good time.

6 Mr. WALKER: Those are the major issues, Your Honor.

7 Mr. STOCKHOLM: I would say so, Your Honor.

8 JUDGE SPENCE: All right. Appreciate it.

9 Mr. WALKER: Two housekeeping things. What we give
10 you, you want in the form of a proposed order?

11 JUDGE SPENCE: Yes.

12 Mr. WALKER: As we discussed briefly before we came
13 back in, the plaintiff is amending the amended
14 complaint to assert an additional cause of action
15 for adverse possession as to the use of the boat
16 ramp and, as I understand it, that's to conform
17 with the proof in the case, and Mr. Stockholm
18 indicated that was without objection.

19 JUDGE SPENCE: Mr. Stockholm?

20 Mr. STOCKHOLM: That is correct, Your Honor.

21 JUDGE SPENCE: I want some clarification on your
22 amendment, though. Is it an amendment to use or
23 ownership?

24 Mr. WALKER: Use.

25 JUDGE SPENCE: Anything else?

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1 Mr. STOCKHOLM: Nothing from the Defense, Your Honor.

2 JUDGE SPENCE: All right. I appreciate it.

3 Mr. WALKER: Thank you, Judge.

4 Mr. STOCKHOLM: Thank you.

5 JUDGE SPENCE: We're adjourned.

6 FURTHER DEPONENT SAITH NOT.

7 [SIGNING WAIVED.]

8 [WHEREUPON, THE HEARING WAS

9 CONCLUDED AT 11:27 A.M.]

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BOOK 462 PAGE 242

FILED

NOV 13 10 55 AM '08

STATE OF SOUTH CAROLINA
COUNTY OF LEWISTON

JOANNE E. TRISSELL
RMC
LEWISTON COUNTY TO REAL ESTATE

WHEREAS, it, the undersigned grantor, owner of real property now served and to be served by the private roadways described on Exhibit "A" attached hereto and made a part hereof, which real property is described on Exhibit "B" attached hereto and made a part hereof, and

WHEREAS, it desires to convey said roadways to the grantee herein, a non-profit corporation, for the uses and purposes and upon and subject to the terms, conditions, rights, restrictions, uses, covenants, reservations and easements hereinafter set forth, NOW, THEREFORE,

KNOW ALL MEN BY THESE PRESENTS, that it, Crystal Lake Land Developers, Inc., hereinafter called grantor, in consideration of the premises and the sum of Ten and No/100 (\$10.00) Dollars, to the grantor in hand paid at and before the sealing of these presents by the grantee hereinafter named, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee, to wit:

CRYSTAL LAKE ROAD CO., ITS SUCCESSORS AND ASSIGNS:

(For Legal Description of Property Hereby Conveyed
See Exhibit "A" Attached Hereto and Made A
Part Hereof)

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in anywise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantee, and the grantee's successors and assigns, forever, subject, however, to the terms, conditions, rights, restrictions, uses, covenants, reservations and easements hereinafter set forth.

And, the grantor does hereby bind the grantor and its successors, executors and administrators to warrant and forever defend all and singular said premises unto the grantee and the grantee's successors

BOOK 462 PAGE 242

PLAINTIFF'S
EXHIBIT
CRYSTAL PINES 1
9/30/2008

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and assigns against the grantor and the grantor's successors lawfully claiming or to claim the same or any part thereof, subject, however, to the terms, conditions, rights, restrictions, uses, covenants, reservations and easements hereinafter set forth.

This conveyance is made and accepted subject to the following terms, conditions, rights, restrictions, uses, covenants, reservations and easements, to wit:

1. Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane are hereby declared to be subject to an easement for access, ingress, and egress in favor of all persons who are or who shall become owners of any portion of the real property described on Exhibit "B" hereto, and the same shall be held and maintained for the use and benefit of such owners and shall be subject to the rights of such owners for themselves, and their agents, guests, invitees and employees to ingress and egress over, upon and across said roadways and not for the use of the public generally. The easement herein granted shall be an easement appurtenant to and shall pass with the title to each portion of the real property described on Exhibit "B" hereto.

2. Notwithstanding any other term or provision hereof, no vehicle shall be operated upon said Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, or Torrey Pine Lane in any manner violative of any law or ordinance which would be applicable if the said roads were public roads. Crystal Lake Road Co. shall have, and is hereby granted, all the necessary rights to enact and enforce the provisions of these conditions, rights, restrictions, uses, covenants, reservations and easements, both by imposition of fines and other penalties as said corporation would have at the time if said roads were public roads within the jurisdiction of the County of Lexington, South Carolina, and the corporation were the duly constituted law enforcement agency of said county.

3. The owner or owners collectively of each portion of the real property described on Exhibit "B" hereto shall be a member of Crystal Lake Road Company, and shall be entitled to cast upon all matters upon which the members shall be entitled to vote one vote for each individual lot heretofore conveyed or to be conveyed out of said real property except that the undersigned Crystal Lake Land Developers, Inc. shall be entitled to one vote for every three acres to which it holds title. Upon sale or other transfer of any ownership interest in any lot located within the real property described on Exhibit "B" hereto, the membership in the Crystal Lake Road Co. applicable to such lot and the said power to vote shall be deemed for all purposes as having been transferred to the person or other entity having acquired such ownership interest in proportion thereto. The Secretary of Crystal Lake Road Co. shall maintain a roll of the members of the corporation, and upon any sale or transfer of ownership interest in any lot located within the real property described on Exhibit "B" the Secretary shall delete from the membership roll the name of the former owner and add thereto the name of the new owner which shall be the only evidence of membership other than this instrument and the instrument of transfer of ownership. Each such owner shall in advance of a meeting of the members of Crystal Lake Road Co. designate in writing the particular person who shall have the right to cast the vote in behalf of such portion of real property described on Exhibit "B".

4. The provisions of Paragraph (3) above shall be mandatory. No owner of any interest in any portion of the real property described on Exhibit "B" shall have any right or power to disclaim, terminate or withdraw from his shareholding or membership in Crystal Lake Road Co. or any of his obligations as such shareholder or member, and no purported disclosure, termination or withdrawal thereof or therefrom on the part of any such owner shall be of any force or effect for any purpose.

5. The purpose of Crystal Lake Road Co. shall be to perform all of the functions provided herein to be performed by such corporation and the corporation shall have and possess all such powers as shall be necessary or appropriate for the accomplishment thereof.

5. The making of changes or amendments in these conditions, rights, restrictions, uses, covenants, reservations, and easements and the amendment, modification and revocation thereof all pursuant to the powers so to be granted or reserved to Crystal Lake Road Co. herein, shall be done by said corporation only upon recommendation of its Board of Directors with the approval by affirmative vote of no less than two-thirds (2/3) of the members' votes entitled to be cast upon such matter.

7. Crystal Lake Road Co. shall obtain such funds as it shall require from time to time by assessment upon the respective owners of portions of the real property described on Exhibit "B" hereto in the same proportion as the entitlement to vote on the affairs of such corporation. The amount of such assessments shall be determined not less frequently than annually by the Board of Directors of the corporation, who shall notify the members not less than thirty (30) days before such action shall become effective, except that the first annual per member assessment for the calendar year of purchase or the prevailing assessment shall be ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, or pro-rata share, due and payable at time of sale and on January 1 of each calendar year thereafter. All such assessments shall be levied upon the owners of portions of the real property described on Exhibit "B" hereto in the same proportion as the entitlement to vote on the affairs of such corporation and shall be paid annually. The amounts assessed may include provisions for such reserves for future expenditures as the Board of Directors shall deem appropriate. No such assessment or provisions for reserves shall be increased over the immediate prior year's amount by more than twenty-five (25 %) percent without approval by affirmative vote of a least two-thirds (2/3) of the members' votes entitled to be cast upon such matter.

6. To the extent necessary to provide for expenditures for which the requisite funds have not been provided by such assessments, Crystal Lake Road Co. shall have power to borrow monies from such sources and upon such terms and conditions and with such security as the Board of Directors shall determine, provided, however, that no property owned by the corporation shall be encumbered to secure such borrowings without the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to be cast upon such matters.

9. Crystal Lake Road Co. shall not distribute to its shareholders or members any sums in the nature of dividends upon its share or membership interests. To the extent that funds shall not be required for current expenditures or for such reserves, the next annual assessments may, in the discretion of the Board, be eliminated or the amount thereof appropriately reduced. Such reduction shall not prevent reinstatement of or increase in such assessments when required, but such reinstatement or increase shall not be retroactive.

10. Crystal Lake Road Co. shall receive title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane and shall hold and deal with the same and such other assets as it may receive from time to time in accordance with the provisions hereof and of its Articles of Incorporation and By-Laws. The Articles of Incorporation or By-Laws may, but need not, provide, from time to time, that upon dissolution of the corporation, its assets shall be dedicated or distributed to an appropriate public agency or other nonprofit organization to be devoted to uses and purposes corresponding as nearly as practicable to those set forth in this instrument or in said Articles of Incorporation or By-Laws.

11. The undersigned Crystal Lake Land Developers, Inc. by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion of as may be necessary for development, of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved. The said roads shall be kept free of all obstructions so as to be open for the passage of fire, police,

and other emergency vehicle personnel and equipment at all times, and by the owners of portions of the real property described in Exhibit "B" hereto and their agents, guests, invitees and employees; provided, however, this paragraph shall not prohibit Crystal Lake Road Co. from maintaining a method of controlled-access at the intersection of Crystal Pines Drive and L404-B Lexington Co. Road.

12. The corporation shall pay all taxes and other governmental impositions levied upon Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whipoor Will Court, and Torrey Pine Lane or any part thereof out of the funds collected by assessment hereunder.

13. Notwithstanding anything to the contrary in this instrument contained, if Crystal Lake Road Co. shall incur any cost or expense for or on account of any item of maintenance, repair or other matter directly or indirectly occasioned or made necessary by any wrongful or negligent act or omission of any owner of a portion of the property described on Exhibit "B" hereto, or of any agent, guest, invitee or employee of such owner, such cost or expense shall not be borne by the corporation but by such owner and if paid out by the corporation shall be paid or reimbursed to the corporation by such owner forthwith upon the corporation's demand, and shall be collectible in the same manner as assessments.

14. Any sum due to be paid by any such owner to the corporation which shall not be paid when due shall bear interest until paid at the highest rate permitted by law, but not exceeding fifteen (15%) percent per annum. If any such sum shall not be paid when due, the corporation shall have the right upon not less than (15) days notice to such owner to collect such sum by suit at law and all other legal means and to add to such sum and collect reasonable attorney's fees and all other expenses incurred by the corporation in connection therewith.

15. The obligation of each owner to pay all sums assessed or imposed upon him to pay pursuant to this instrument and to keep, observe and perform all of the terms and provisions hereof to be kept, observed and performed by him shall be a continuing lien upon the subject real property owned by such owner subject only to the lien of a bona fide first mortgage upon such real property

held by a reputable financial institution; and said lien may be enforced by the corporation in all respects as though secured by a recorded mortgage as provided by the laws of the State of South Carolina, subject to the lien of such first mortgage.

16. Crystal Lake Road Co. shall have, and is hereby given, power to require full payment of all sums then due it from any owner of a portion of the property described on Exhibit "B" hereto as a condition precedent to the transfer of any interest of such owner to the rights and privileges accorded to such owner hereunder.

17. Crystal Lake Road Co. shall promptly provide any owner of a portion of the property described on Exhibit "B" hereto so requesting the same in writing with a written statement of all unpaid sums assessed or imposed upon such owner to pay pursuant to this instrument. Any bona fide purchaser or mortgagee relying upon such a statement shall not be liable for, nor shall the real property involved be subject to, a lien for any amount in excess of that contained in the statement; provided, however, any such owner owing an amount in excess of that so stated shall not thereby be relieved of the obligation to pay the same.

18. By reason of the nature of the rights, privileges and obligations created by this instrument any violation on the part of any owner of any portion of the property described on Exhibit "B" hereto of any of the terms or conditions hereof to be kept observed or performed by him will or is likely to result in damages which are irreparable or impossible of ascertainment. Therefore, the corporation shall have, and is hereby granted, the right to prevent any such threatened violations on the part of any such owner or the further continuation of such violation, as the case may be, by means of injunctive proceedings, as well as restricting or entirely suspending for such period or periods as the Board of Directors of the corporation may from time to time determine, the use by the offending person of any of the rights, privileges, or easements, the use of which has been abused.

19. The various rights and remedies herein granted to

Crystal Lake Road Co. shall be in addition to all other rights and remedies which may be available and in addition to each other. All of the rights and remedies available to the corporation may be exercised either concurrently and partly consecutively as the corporation may from time to time elect, and as often as the corporation may elect.

20. The failure of Crystal Lake Road Co. to seek redress for any violation or to enforce any terms or provisions of this instrument shall be deemed a waiver of any such right of redress or enforcement, either as to any subsequent violation of a similar or other nature or as to any further continuation of any violation.

21. Crystal Lake Road Co. shall have, and is hereby granted, the right to subject Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane to traffic and criminal laws of the State of South Carolina and Lexington County and the enforcement thereof by the respective law enforcement officers upon the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to be cast upon such matter, and provided the same is allowed by applicable law.

22. Crystal Lake Road Co. shall have and is hereby granted the right to dedicate Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, Torrey Pine Lane to the South Carolina Highway Department, Lexington County, or any other governmental entity for perpetual maintenance upon the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to be cast upon such matter, subject to the approval of the government agency, provided that the road and drainage system meet the standards existing at that time. Until such time all roads shall be considered private roads and shall be marked as private roads.

23. Crystal Lake Road Co. shall have and is hereby granted, the power to amend, modify and otherwise alter the terms and provisions of this instrument at any time and from time to time by action recommended by its Board of Directors and approved by the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to vote upon such matter. Any action taken pursuant to this paragraph shall be evidenced by an appropriate written instrument executed by Crystal Lake Road Co. and shall become and be effective

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as of such date as shall be designated in such instrument, but not earlier than the date on which such instrument shall be filed for record in the Office of the Register of Mesne Conveyances for Lexington County.

24. Crystal Lake Road Co. shall have, and is hereby granted the power to adopt, amend, modify or otherwise enforce additional rules and regulations bearing upon the use and maintenance of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whipoor Will Court, and Torrey Pine Lane, or any part thereof, at any time and from time to time by action recommended by its Board of Directors and approved by the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to vote upon such matter, subject only to the limitation that any such action shall be applied uniformly as to all members.

25. If any term, provision, covenant, easement, agreement or condition contained in this instrument, or any rule or regulation issued hereunder, shall be or held to be invalid, the remainder of this instrument and the remainder of such rules and regulations shall not be invalidated or terminated thereby but shall remain in full force and effect to all intents and purposes as though such invalid term, provision, covenant, easement, agreement, condition, rule or regulation had not been included herein.

26. All of the easements, rights, covenants, agreements, reservations, restrictions and conditions herein contained shall run with the title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whipoor Will Court, and Torrey Pine Lane hereinabove described and to the real property described on Exhibit "B" hereto and shall inure to the benefit of and be binding upon the grantors herein and each subsequent holder of any interest in any portion of such property and their grantees, heirs, successors, personal representatives and assigns with the same full force and effect for all purposes as though set forth at length in each and every conveyance of said property or any part thereof. Reference in the

respective deeds of conveyance to the easements and covenants herein described and created shall be sufficient to create and reserve such easements and covenants to the respective grantees of such parcels as fully and completely as though said easements and covenants were fully recited and set forth in their entirety in such documents.

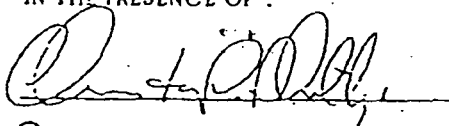
27. The undersigned Crystal Lake Land Developers, Inc. shall have and is hereby granted the right at its sole option and expense to extend Torrey Pine Lane as described on Exhibit "A" hereto into other contiguous property now owned by it subject, however, to the same terms and conditions as apply to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto. Such election shall be evidenced by a

proper instrument in writing recorded in the Office of the Register of Mesne Conveyances for Lexington County. This right and option shall be appurtenant to and run with the title to such contiguous property of Crystal Lake Land Developers, Inc.

WITNESS the grantor's hand and seal this 13th day of May, 19 81.

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF :



Rev. E. P. Helling, Pres.
CRYSTAL LAKE LAND DEVELOPERS, INC.

By 

11

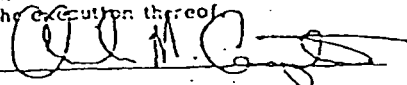
STATE OF SOUTH CAROLINA

...
...
...

PROBATE

COUNTY OF Lexington

PERSONALLY APPEARED the undersigned witness and made oath that (s) he saw the within named Crystal Lake Land Developers, Inc. sign, seal and as his act and deed deliver the within Deed To Real Estate and that deponent, with the other witness whose name is subscribed above, witnessed the execution thereof.



SWORN TO before me this

13th day of May.

1981.

Deborah K. Kline
Notary Public for South Carolina

My Commission Expires: Feb. 4 1990

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

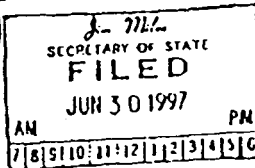
EXHIBIT F

All that piece, parcel or tract of land, situate, lying and being near Chapin at Lake Murray, County of Lexington, State of South Carolina, School District No. 5, containing 74.3 Acres being shown and described as Parcel "A" on a Plat prepared for C.H. Epling and E.I. Merchant by Baughman Land Surveyors, Inc., Dated May 13, 1974 and recorded in the Office of the R.M.C. for Lexington County, South Carolina in Plat Book 131-G at page 44. The property is bounded on the Northeast by lands now or formerly of Timberlake; on the North by lands of South Carolina Electric and Gas Company; on the South by Parcel "D"; on the Southeast by Parcel "B" and lands of South Carolina Electric and Gas Company; on the Northwest by lands of South Carolina Electric and Gas Company, and having such measurements as shown on the plat, be all measurements a little more or less.

This being the same property conveyed to Crystal Lake Land Developers, Inc., by deed of E.I. Merchant dated November 14, 1978 and recorded November 14, 1978 in Deed Book 303, at page 97, R.M.C. Office for Lexington County.

Recorded this 13th day of May, A.D. 1981 at 10:59 AM
JOANNE B. TRIGGLE, R. M. C.

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES
NONPROFIT CORPORATION
ARTICLES OF INCORPORATION



1. The name of the nonprofit corporation is Crystal Pines Homeowners' Association, Inc.
2. The initial registered office of the nonprofit corporation is 103 Mallard Cove Court

<u>Chapin</u>	<u>Lexington</u>	<u>South Carolina</u>	<u>29036</u>
City,	County,	State,	Zip Code

The name of the registered agent of the nonprofit corporation at that office is Josephine Phillips
3. Check (a), (b), or (c) whichever is applicable. Check only one box.
 - a. ☐ The nonprofit corporation is a public benefit corporation.
 - b. ☐ The nonprofit corporation is a religious corporation.
 - c. ☒ The nonprofit corporation is a mutual benefit corporation.
4. Check (a) or (b), whichever is applicable:
 - a. ☒ This corporation will have members.
 - b. ☐ This corporation will not have members.
5. The address of the principal office of the nonprofit corporation is 103 Mallard Cove Court

<u>Chapin</u>	<u>Lexington</u>	<u>South Carolina</u>	<u>29036</u>
City,	County,	State,	Zip Code
6. If this nonprofit corporation is either a public benefit or religious corporation (box a. or b. of § 3. is checked), complete either (a) or (b), whichever is applicable, to describe how the remaining assets of the corporation will be distributed upon dissolution of the corporation.
 - a. ☐ Upon dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such asset not so disposed of shall be disposed of by the court of common pleas of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said court shall determine, which are organized and operated exclusively for such purposes.
 - b. ☐ Upon dissolution of the corporation, consistent with law, the remaining assets of the corporation shall be distributed to: _____
7. If the corporation is a mutual benefit corporation (box "c" of § 3. is checked), complete either (a) or (b), whichever is applicable, to describe how the [remaining] assets of the corporation will be distributed upon dissolution of the corporation.
 - a. ☐ Upon dissolution of the mutual benefit corporation the [remaining] assets shall be distributed to its members, or if it has no members, to those persons to whom the corporation holds itself out as benefiting or serving.
 - b. ☒ Upon dissolution of the mutual benefit corporation the [remaining] assets, consistent with law, shall be distributed to _____
a successor association organized for purposes similar to those
set forth herein, or to such charitable organizations as may
be selected and approved by majority vote of the membership.
8. The optional provisions which the nonprofit corporation elects to include in the articles of incorporation are as follows (See § 33-31-202(c) of the 1976 South Carolina Code, the applicable comments thereto, and the instructions to this form): The purposes of this Corporation are hereby limited

97-016249BC



Record on Appeal -000133

_____ (add) _____
to the acquisition, construction, management, care and maintenance
of the property of the Association _____

9. The name and address (with zip code) of each incorporator is as follows (only one is required):

Name Address (with zip code)
Josephine Phillips 103 Mallard Cove Court, Clapin, S.C. 29036

10. Each original director of the nonprofit corporation must sign the articles but only if the directors are named in these articles:

(only if named in articles) Signature of director

(only if named in articles) Signature of director

(only if named in articles) Signature of director

11. Each incorporator must sign the articles.

Josephine G. Phillips
Signature of incorporator

Signature of incorporator
Signature of incorporator

FILING INSTRUCTIONS

1. Two copies of this form, the original and either a duplicate original or a conformed copy, must be filed.
2. If space in this form is insufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of space on the form.
3. This form must be accompanied by the filing fee of \$25.00 payable to the Secretary of State.

Form Approved by South Carolina
Secretary of State Jim Miles
June 1994

- FACT 1: Crystal Pines has always had private roads. The unanimous decision to make the road private was made in 1979 by all eight stockholders of Crystal Lake Land Developers, Inc.
- FACT 2: The present Road Maintenance Agreement, required by the county, was recorded May 13, 1981 and is still in effect today.
- FACT 3: According to the Lexington County Planning and Development Division Guidelines, and quoted directly from their material - "the developer remains responsible for the road and storm drainage system maintenance until the Final Plat is approved and recorded. For subdivisions with road and storm drainage systems to be privately maintained, the subdivision lot owners will collectively assume that maintenance responsibility upon approval of the Final Plat; however, the Road Maintenance Agreement, which explains the subdivision lot owner's collective responsibility, is recorded simultaneously with and cross-referenced to the Bonded Plat to notify prospective lot purchasers their eventual maintenance responsibility."
- FACT 4: Lexington County gave Final Plat Approval for Crystal Pines phases as follows:
Phase I approved 1981
Phase II - undeveloped
Phase III approved June 2, 1983.
Phase IV approved on April 25, 1986.
Phase V - under development
- FACT 5: The original private road, approved by the county, was gravel and there was no requirement for future paving. At the developer's expense, the road was voluntarily paved in 1991.
- FACT 6: At the time of contracts Crystal Pines lot owners signed that they were advised, and agreed to the Road Maintenance Agreement and Declaration of Restrictions.
- FACT 7: The current Road Maintenance Agreement states in paragraph 22 (paraphrased) that Crystal Lake Road Company shall have the right to grant the roads to SC Highway Department, Lexington County, or any other governmental entity for perpetual maintenance upon the affirmative vote of at least two-thirds (2/3) of the members' votes entitled to cast upon such matter, subject to the approval of the government agency, provided that the road and drainage system meet the standards existing at that time.



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FACT 8: To bring the present road to county specification for a public road, all utility lines, including water, sewer, electric, gas, and telephone will require relocation (it is doubtful the city of Chapin, SCE&G, Bell South, and the gas company will do that without charge). **The privacy gate would have to be removed** and all signs replaced with metal county markers unless other signs are approved by the country planning commission. In addition, the road would need to be widened to current county specifications. A farm-to-market road, with ditches for drainage, will meet county requirements. More extensive dressing is an option, but not required. The successor of Crystal Lake Land Developers, Inc. would object strongly to changing the privacy image of the development as intended and advertised.

FACT 9: Crystal Pines Road Company was never legally formed as a non-profit corporation and each individual members is not protected from personal liability from any actions they undertake in the name of the Crystal Pines Road Company. In addition, money held by the Crystal Pines Road Company is subject to personal income tax laws.

FACT 10: The collection of maintenance fees for the purpose of maintaining the subdivision roads was agreed to by all lot owners at the time of contract. Crystal Pines Road Company has been collecting maintenance fees and acting as the owner of the roads since 1981.

FACT 12: Crystal Pines Road Company has not technically accepted the conveyance of roads at Crystal Pines because Crystal Pines Road Company is not a legal entity (a corporation); however, that does not relieve the residential lot owners from their responsibility to maintain the subdivision roads as agreed to in the Road Maintenance Agreement. (see FACT 3)

FACT 13: A platted residential lot is a lot which has been surveyed and recorded with the County and gives the legal description and dimensions of the property for the purpose of assessing property taxes. There are 31 plotted residential lots in Crystal Pines

FACT 14: The roads were surveyed on July 11, 1997, covering all the roads of Crystal Pines in preparation of deeding to the Crystal Pines residents. Roads are only surveyed and recorded when required for recording development phases. The section of road in question at the curve on Torrey Pine Lane will not appear on any country tax map until the new survey is recorded..

FACT 15: A public road will not be maintained (regularly mowed and patched) acceptable to the image of an upscale development. Most country maintained roads mow only when the grass reaches a level which would be unacceptable to our neighborhood (Two to three feet high).

PR

COUNTY OF LEXINGTON, SOUTH CAROLINA

Department of Planning and Development
County Administration Building (803) 359-8121
212 South Lake Drive Lexington, South Carolina 29072
Lexington County Planning Commission

February 18, 2000

Don E. Phillips
P.O. Box 397
Chapin, South Carolina 29036

RE: Final Plat Approval - Crystal Pines, Phase V
(TMS# 01500-02-014 P/O)

Dear Mr. Phillips:

Crystal Pines, Phase V Private Road Subdivision consisting of 6 residential lots (a portion of the 20 residential lots on the previously approved Master Plat) is hereby given Final Plat approval by the Lexington County Planning Commission. Also, Crystal Pines, Phase V is hereby released from the obligations of the Agreement and Surety Bond executed to obtain Bonded Plat approval for this project. Enclosed is the original of that document accordingly stamped as released, canceled, and voided. As with Bonded Plat approval, lots within this project may be conveyed and Building Permits can then be issued to third parties. We have received SCDHEC's Final Approval To Place Into Operation No. #3884 for the water supply system and SCDHEC's Final Approval To Place Into Operation No. #3882 for the sewage disposal system.

We will continue to use the Master Plat as the reference for approval of plats for individual lots not included on the Bonded or Final Plats. The following information will be needed in order to receive plat approval of individual lots:

Three copies of each individual plat as needed for approval by either Neal McLaurin or Bill Caldon. It will not be necessary to submit these individual plats for 'redlining'.

When all of the lots have been sold, a Revised Final Plat will need to be recorded that reflects all of the lots and easements.

Buildings located such that any portion of the foundation encroaches upon the designated 100-year floodplain of Lake Murray must be elevated. The lowest floor(s) must be at least 2.0 feet above the 100-year floodplain elevation. In addition, all mechanical and utility equipment, air conditioner units, hot water

heaters, washers, dryers and other similar equipment and their components must be elevated 1.0 foot above the 100-year floodplain elevation. The as-built elevation of the lowest floor(s) must be documented by a South Carolina registered land surveyor for approval by our office, as soon as the lowest floor(s) is constructed. No rough-in inspections may be scheduled without the corresponding documentation. Also, buildings within the 100-year floodplain may be subject to additional flood insurance requirements imposed by a lending institution.

The building setbacks for the proposed single residence dwelling units, as required by the current Lexington County Zoning Ordinance, are as follows: 20 feet minimum from the road rights-of-way; and 10 feet minimum from the adjoining lot lines (or as little as 5 feet from the other lot lines if all windows, doors, and other openings in the building facades are at least 10 feet away). As a reminder, driveways accessing corner lots must meet minimum corner clearances from the intersection of the street right-of-way lines. If you have any questions regarding setbacks, please contact the zoning staff at 359-8121.

Upon recording of the Final Plat with the Register of Deeds, maintenance responsibility for the project road and storm drainage system will transfer from you, as the developer, to the Crystal Lake Road Co. Property Owners Association. The project road and storm drainage system is considered to be all of Little Gap Court and Little Gap Lane out to its intersection with Torrey Pine Lane.

Sincerely,

Bert Macaulay
Bert Macaulay
Subdivision Administrator

Approved By:

Bert Macaulay
for Charles M. Compton, Secretary
Planning Commission

Enclosures: Original Voided Bond Document
Tax Consequences, application

cc: Mark A. Amick (PE)
T. Darrell Newby (PLS)
Town of Chapin (Sewer)
Crystal Pines Subdivision (Water)
EQC
Lexington County Joint Municipal Water & Sewer Commission
Lexington County Public Works
Lexington County Assessment & Equalization
Surety (Cash Bond)
✓ Private Road File
Chronological File
Development Assistant

October 29, 2001

From: Don E. Phillips
301 Little Gap Court
Chapin, SC 29036

To: Board of Directors
Crystal Pines Homeowner's Association
Chapin, SC 29036

Gentlemen:

This statement is presented to make clear that I do not own the roads of Crystal Pines and have not owned the roads since May 13, 1981. As stated in the Deed to Real Estate filed with the County of Lexington in Book 462, pages 242 through 253, Crystal Lake Land Developers, Inc., the owner of real property, conveyed the roadways by Deed of Real Estate for the uses and purposes as set forth in that document. In paragraph three on page 242 it states that Crystal Lake Land Developers, Inc., "have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee, to wit: CRYSTAL LAKE ROAD CO., ITS SUCCESSORS AND ASSIGNS".

The Deed to Real Estate was a proper instrument, executed, signed and recorded in the Office of the Register of Mesne Conveyances for Lexington County

I do not have nor claim ownership of the private roads of Crystal Pines other than as a member of Homeowner's Association and residential owner of property in the Crystal Pines subdivision.

Don E. Phillips
Successor and Assign of
Crystal Lake Land Developers, Inc.



Record on Appeal -000139

February 11, 2002

From: Don E. Phillips
301 Little Gap Court
Chapin, SC 29036

To: Board of Directors
Crystal Pines Homeowner's Association
Chapin, SC 29036

Gentlemen:

This statement is presented to make clear that I do not own the roads of Crystal Pines and have not owned the roads since May 13, 1981. As stated in the Deed to Real Estate filed with the County of Lexington in Book 462, pages 242 through 253, Crystal Lake Land Developers, Inc., the owner of real property, conveyed the roadways by Deed of Real Estate for the uses and purposes as set forth in that document. In paragraph three on page 242 it states that Crystal Lake Land Developers, Inc., "have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee, to wit: CRYSTAL LAKE ROAD CO., ITS SUCCESSORS AND ASSIGNS".

The roadways mentioned by the Deed of Real Estate shall include all roads depicted on the following documents or as modified by the bonded Plats:

Plat of Crystal Pines Subdivision	7/11/97
Crystal Pines Section 1	8/20/80
Crystal Pines Section 3	3/25/83
Crystal Pines Section 4	4/01/86
Crystal Pines Subdivision Phase 5	3/12/98

Although not specifically mentioned in the deed, the entrance gates and Parcel A including the boat ramp are included in property turned over with the roads.

The Deed to Real Estate was a proper instrument, executed, signed and recorded in the Office of the Register of Mesne Conveyances for Lexington County

I do not have nor claim ownership of the private roads of Crystal Pines other than as a member of Homeowner's Association and residential owner of property in the Crystal Pines subdivision.

Don E. Phillips
Successor and Assign of
Crystal Lake Land Developers, Inc.



Record on Appeal -000140

STATE OF SOUTH CAROLINA

BK4208PG310

COUNTY OF LEXINGTON

TITLE TO REAL ESTATE

FILED

KNOW ALL MEN BY THESE PRESENTS, that CRYSTAL LAKE LAND DEVELOPERS, Inc., for and in consideration of the sum of Ninety Two Thousand Eight Hundred Seventy-Nine and 95/100 Dollars (\$92,679.95), plus the assumption of certain Mortgage indebtedness (current principal balance of \$185,470.05, more fully described herein below) paid to it by DON E. PHILLIPS, the receipt and sufficiency of which is here acknowledged, has granted, bargained, sold and released, and presents does grant, bargain, sell and release unto the said:

DON E. PHILLIPS:

JUN 1997

COUNTY 432.30

All that certain piece, parcel or lot of land, with any improvements thereon, situate, lying and being located in Lexington County, in the state of South Carolina, being near Chapin at Lake Murray, in School District #5, comprising 37.3 acres, more or less, being a portion of a tract of 74.3 acres shown and delineated as Parcel A on a plat prepared for C.H. Epting and E.S. Merchant by Baughman Land Surveyors, Inc., dated May 13, 1974, and recorded in the Office of the RMC for Lexington County in Plat Book 135-G at page 44, less and excepting:

Crystal Pines Section I as shown on a plat of Crystal Pines Section I prepared by James V. Gregory, RLS, dated August 20, 1980 and recorded in the RMC Office for Lexington County in Plat Book 185-G at page 108, plat #116;

Crystal Pines Section III as shown on a plat of Crystal Pines Section III prepared by James V. Gregory, RLS, dated March 25, 1983 and recorded in the RMC Office for Lexington County in Plat Book 192-G at page 98;

Crystal Pines Section IV as shown on a plat of Crystal Pines Section IV prepared by James V. Gregory, RLS, dated April 1, 1986 and recorded in the RMC Office for Lexington County in Plat Book 208-G at page 49;

Crystal Pines Section V, Lot 35, as shown on a plat prepared by Newby-Proctor & Associates, dated March 31, 1993 and recorded in the RMC Office for Lexington County in Slide #108, Plat 2-B;

All of the roads, dedicated and undedicated, as shown on the above-referenced plat as Torrey Pine Lane, Redfox Trail, Knob Cone Lane, and Little Gap Lane;

Roads known as Gator Court and Little Gap Lane as shown on a plat prepared for Crystal Lake Land Developers, Inc., of Crystal Pines Subdivision, Phase V, prepared by Newby-Proctor & Associates Land Surveyors, dated April 28, 1993, to be recorded;

Property known as the "Boat Ramp Property" shown and delineated on a plat of Crystal Pines Section IV prepared by James V. Gregory, RLS, dated April 1, 1986 and recorded in the RMC Office for Lexington County in Plat Book 208-G at page 49.

Derivation: This being a portion of the property conveyed to the Grantor herein by Deed of E.S. Merchant dated November 14, 1978 and recorded November 14, 1978 in the RMC Office for Lexington County in Deed Book 303 at page 97.

TMS#: 1500-02-014 (portion)

Grantees' Address: P.O. Box 397 Chapin, SC 29016

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining thereto.

25136

PLAINTIFF'S
EXHIBIT

CRYSTAL PINES
Record on Appeal
9/17/17 mg

BK4208PG311

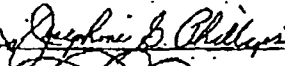
TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, his heirs and assigns forever.

AND THE GRANTOR CORPORATION DOES HEREBY promise, for itself and for its successors and assigns, to warrant and forever defend the above premises unto the Grantee, his heirs and assigns, against it and its successors and assigns and against any other person whosoever lawfully claiming through it.

WITNESS the Hand and Seal of the duly authorized officer of the Grantor, on June 13, 1997, in the year of our Lord one thousand nine hundred ninety-seven and in the two hundred twenty-first year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered:

CRYSTAL LAKE LAND DEVELOPERS, INC.





By: Don E. Phillips
Its: President

STATE OF SOUTH CAROLINA }
COUNTY OF RICHLAND }

PROBATE

PERSONALLY appeared before me the undersigned, who first being duly sworn, deposes and says that (s)he saw the above-named corporate officer of the grantor sign, seal, and as the act and deed of the corporate grantor, deliver the within Deed for the uses and purposes therein mentioned; and, that (s)he, with the other witness whose signature appears herein along with the undersigned's, witnessed the execution thereof.

SWORN TO BEFORE ME THIS
13th DAY OF JUNE, 1997


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-25-2004

Grantee specifically agrees and covenants to pay in full the indebtedness represented by that certain Note dated July 13, 1996, and assumes the Mortgage securing same to Wachovia Mortgage Company July 13, 1996 and recorded July 16, 1996 in Record Book 3804 at page 342; said Note is in the original principal amount of \$237,500.00, and has current approximate balance of \$185,470.05.


Don E. Phillips, Grantee

J. ROBIN TURNER, P.A.
ATTORNEYS AT LAW
1722 MARION STREET
P.O. BOX 11646
COLUMBIA, SOUTH CAROLINA 29211

J. ROBIN TURNER

803-799-7894
FAX 803-252-6082

July 19, 1999

Crystal Pines Homeowners' Association, Inc.
c/o Mr. Lewis A. Lapine
913 Pine Springs Road
Columbia, SC 29210

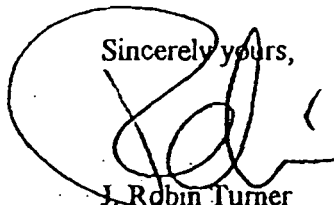
Dear Lewis:

Don Phillips asked me to make some changes which you and he apparently discussed to this Exhibit to the (still unsigned?) corrective deed prepared by my office about three years ago. That Exhibit "B" is enclosed. I made some minor changes to several paragraphs, which did not significantly change the meaning or effect of the paragraphs, in my opinion, and added a paragraph (h) confirming Don's commitment to continue restricting new lot owners to become members, etc. He wanted to put in some terms regarding the tennis courts, but I strongly resisted this and advised against including that in a deed which does not affect that property—in effect, "burying" those provisions within a deed not related to the tennis property, generally a bad idea, and creating enforceability and notice problems in future years.

Don said he would call you and/or me to discuss this from the west coast, but I have had no contact with him since he left. Please tell him to request a "fresh" deed from me especially if the 1997 was signed already—I don't believe in signing a document, then substituting an attachment 3 years later, even by consent—I have this deed on my computer storage so it is no problem to recreate.

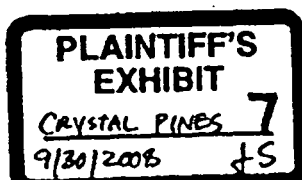
With warm regards, I remain

Sincerely yours,



J. Robin Turner

cc: Don Phillips' home address



Record on Appeal -000143

EXHIBIT "B"

BY ACCEPTING DELIVERY OF THIS DEED, THE GRANTEE CONSENTS TO THE IMPOSITION OF THE FOLLOWING RESERVATION OF EASEMENTS, COVENANTS AND RESTRICTIONS UPON THE PROPERTY AND DOES SO COVENANT FOR ITSELF, ITS SUCCESSORS AND ASSIGNS. GRANTOR DOES HEREBY RESERVE unto itself, and to its successors and assigns, the following rights, easements, and restrictions pertaining to the real property granted herein, and it is intended that these shall run with the land, and be appurtenant to the property granted herein until revoked in a recorded writing duly executed by the Grantor or by its successor in interest as developer of the Crystal Pines subdivision(s):

- a. The Grantee and its successors and assigns shall adequately maintain the roadways for use by vehicular and pedestrian traffic, and shall maintain the boat ramp and its surrounding property conveyed herein, in a manner conducive to general attractiveness, accessibility and safe use.
- b. Grantee and Grantor shall execute and agree to any road maintenance agreements or similar agreements which may be required to effect the purposes expressed herein, as long as such agreements do not materially increase the maintenance duties as herein accepted by the Grantee.
- c. The Grantor hereby reserves a non-exclusive easement along and across the roadways and planned roadways conveyed herein, for the purposes of ingress, egress, use by lot purchasers, prospective purchasers and other business invitees of Grantor, and to permit future development of any and all of the undeveloped and partially developed lands retained by the Grantor or conveyed to his successors and assigns, and such easement shall be appurtenant thereto, and shall enure to the benefit of any future purchasers of such properties. Notwithstanding the within reservation, the owner of the dominant estate (whether Grantor, its successors or its assigns) shall be liable for the proper repair of any damage to any roadway in connection with use of said easement.
- d. The Grantor hereby reserves, for itself and its successors and assigns, the right to reasonably connect the roadways granted herein to other new roads as may be designated by Grantor and built in the future, such new roads to serve as access to other adjoining lands which may be the sites of future development, all at Grantor's sole expense, in such a manner as shall not overburden the existing roadways herein demised, nor place undue expense upon Grantee corporation for maintenance of its existing roads. Grantee shall not be responsible for maintenance of roads not herein conveyed.
- e. The property granted herein is conveyed subject to any existing utility easements, and, in the event additional easements are required to provide utilities, drainage, sewer or irrigation services to any developed or to-be-developed properties within the Crystal Pines subdivisions, the Grantor hereby reserves unto itself

its successors and assigns the right to place such conduits, lines, cables, etc. on the property granted herein, and the power and right to grant such easements to private or public utilities companies as may be reasonably required to provide such services to lot owners and common areas. This Item shall not be construed to convey or to create any right of any party to locate any easement on lands other than on the rights-of-way actually granted herein.

- f. With regard to the boat ramp property granted herein, Grantor hereby reserves unto itself, its successors and assigns the right and easement to drain surface waters along and across the road accessing the boat ramp.
- g. Grantor hereby also reserves unto itself, its successors and assigns the permanent right and easement to locate, maintain and operate on or two pumps and irrigation lines on, across and under the property granted herein, for purposes of irrigation and, specifically, for the purpose of maintaining the tennis courts.
- h. Grantor herein renews and acknowledges his pledge and promise, and hereby covenants, that no lots of Grantor in Crystal Pines shall be sold to any third party without the further requirement, by restriction and/or covenant, that such new owner is required to join and abide by all rules of the applicable homeowners' association (Grantee).

Letter of Intent

This is not intended to be a binding legal document

It is my intention to deliver a **Deed to Roads and Common Properties** within Crystal Pines Development to the Crystal Pines Homeowners Association, which has the legal capacity to accept the delivery. The property to be conveyed is a portion of the real property conveyed to me by deed of E. E. Merchant dated November 14, 1978 and recorded November 14, 1978 in Deed Book 303 at page 97 in the RMC Office for Lexington County.

Attached is a survey of the Road Right-of-way completed 7/11/97, which is "recordable". An additional legal description of boat ramp may be needed.

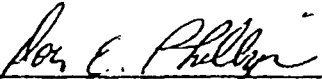
I will deliver a legal description of the premises and properly transfer the real property to the Crystal Pines Homeowners Association with the performance of assurances. These assurances are attached as Exhibit "B" which was prepared in July of 1997 for consideration by the then newly formed Crystal Pines Homeowners Association.

The contract to convey the property will require another drafting by an attorney as the circumstances have changed since July 1997. Crystal Lake Land Developers, Inc. completed dissolution at about that time.

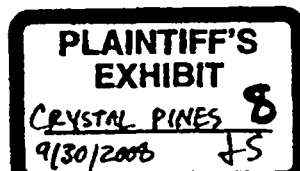
I will not be available to discuss the terms of this **Letter of Intent**, as I will be out of town. However, I believe they are clearly written and reasonable. Jody and I are leaving our proxies with Gary and Maryjo Cisco for voting purposes.

Signed and dated:

September 29, 2000



Don E. Phillips
Owner of Crystal Pines Roads and
Common Properties



Record on Appeal -000146

Vicky & Gary
PROPOSAL

Zack Smith's Paving & Sealcoating

Established 1945
Commercial &
Residential



Gravel • Grading
Line Painting

- FREE ESTIMATES -
LEXINGTON

556-8907

603-2471

PROPOSAL SUBMITTED TO:

NAME
ADDRESS
Crystal Pines
Chapin S.C.
ATTN: Vicky & Gary
PHONE NO.

ARCHITECT

Zack Smith

We hereby propose to furnish the materials and perform the labor necessary for the completion of

WE PROPOSE TO,

All patching is tapered and the size given. Patching shall consist of removing old asphalt, old base, and old sub-base approx. 10 inches in all.

Areas are as follows,

3/13/06 1000 PCH. TRAIL #1 21 ft. x 8 ft. #2 118 ft. x 21 ft. #3 20 ft. x 21 ft.

#4 16 ft. x 1 ft. #5 38 ft. x 21 ft. TOTAL 50 FT. PATCHING AREA \$10,000.00

TORREY PINE LANE #1 & #2 90 ft. x 10 ft. #3 120 ft. x 10 ft. #4 6 ft. x 30 ft.

#5 22 ft. x 1 ft. #6 23 ft. x 12 ft. #7 58 ft. x 10 ft. #8 22 ft. x 6 ft.

#9 35 ft. x 8 ft. #10 113 ft. x 21 ft. #11 180 ft. x 10 ft. #12 45 ft. x 8 ft.

#13 80 ft. x 21 ft. #14 13 ft. x 10 ft. #15 52 ft. x 6 ft. TOTAL 10,723 sq. ft.

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work, and completed in a substantial workmanlike manner for the sum of \$ 3,204 per sq. ft.

We require a one-third deposit to begin. Balance at Completion, with payments to be made as follows:

ZACK SMITH'S PAVING & SEAL COATING

Respectfully submitted

Per

Note - This proposal may be withdrawn by us if not accepted within 30 days.

Any alteration or deviation from above specifications including any price will be accepted only upon written order. All work will be done as soon as possible and before the contract. All payments are contingent upon stated, acceptable, or delays beyond our control.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

PLAINTIFF'S
EXHIBIT

CRYSTAL PINES 10
9/30/2006 JS

Date 3-13-06

Record on Appeal-000147

Signature

Signature

Victoria S. Lerner

PROPOSAL _____

Zack Smith's
Paving & Sealcoating

Established 1945
 Commercial & Residential



Gravel • Grading
 Line Painting
 - FREE ESTIMATES -
LEXINGTON

350-3907 600-2471

PROPOSAL SUBMITTED TO:

NAME _____

ADDRESS _____

PHONE NO. _____

ARCHITECT

Zack Smith

We hereby propose to furnish the materials and perform the labor necessary for the completion of _____

WE PROPOSE TO, _____

All work shall be guaranteed for 1 full year against faulty WORKMANSHIP OR MATERIALS.

Patches that are to be cut out shall be filled with stone base and type #4 hot-mix surface asphalt.
 No recycled asphalt shall be used to patch or resurface roads with.

Roads will be crowned in the middle for water run-off on both sides into ditches.

Roads will attach to all driveways. Where driveways are not present a 10 ft. x 12 ft. entrance shall be paved at each. Any roadwork shall be separate and not part of this contract.

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work, and completed in a substantial workmanlike manner for the sum of _____

Dollars (\$ _____)

with payments to be made as follows:

Respectfully submitted _____

Any alteration or deviation from above specifications involving extra costs will be discussed only upon written order and will become an extra charge over and above the estimate. All agreements contingent upon crews, accidents, or delays beyond our control.

Per _____

Note - This proposal may be withdrawn
 by us if not accepted within _____ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

Signature _____

Date _____

Signature _____

Record on Appeal -000148

FROM: ASPHALT MAINTENANCE

PHONE NO.: 3907

Mar. 13 2006 11:06AM P01

Application

carbonless

Re: _____

FAVS - 781-6959

INVOICE

Zack Smith
 Paving & Seal Coating
 121 Knoll East Dr.
 200.362 9075
 # 803.356-3907 / 400.2471

No.

NAME DATE

SENT TO:

Crystals Pines

Chap. 30

ATT: Vicky Leppke

RED Pine Trail
 Road
 "only"

SALESPERSON

Zack

ORDERED VIA

Phone

DATE

CITY ORDERED

BY SHIP

QUANTITY

DATE

Bill for: 1/3 deposit to begin
 work.

Balance due upon completion
 of work.

Check payable to Zack Smith

Amount of \$ 3500.00 DUE
 on work

Thank you

JS

3/13/06

Rec'd of \$ 10000.00

Deposit \$ 3500.00

\$ 7500.00

Balance due on the deposit

Record on April 00010

Waterfront Lots

Interior Lots

Large Lots

Great Lake Views

Deep Water Access

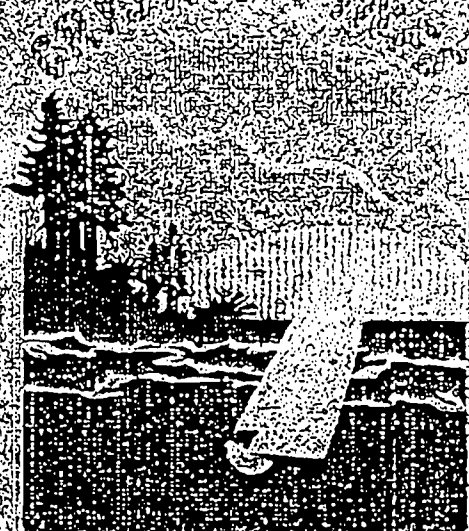
Chapin School District

Tennis Courts

Private Roads

Privacy Gate

Crystal Lake Land Development, Inc.
P.O. Box 497
Chapin, SC 29036



POINT LOTS AVAILABLE

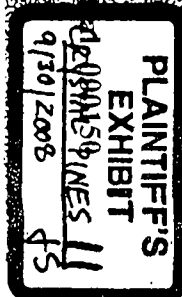
Discover Lake Murray's treasures!

Crystal Pines is a locally owned
and restricted community in the
Chapin area.

Amenities include privacy gate,
tennis courts and launching ramp.

Come see for yourself!

EXHIBIT 11



GOLF



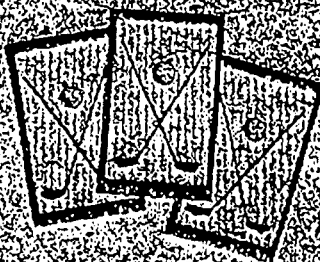
*Two
tennis
courts*

Membership to
Timberlake Plantation
available

Contact owner for a private viewing

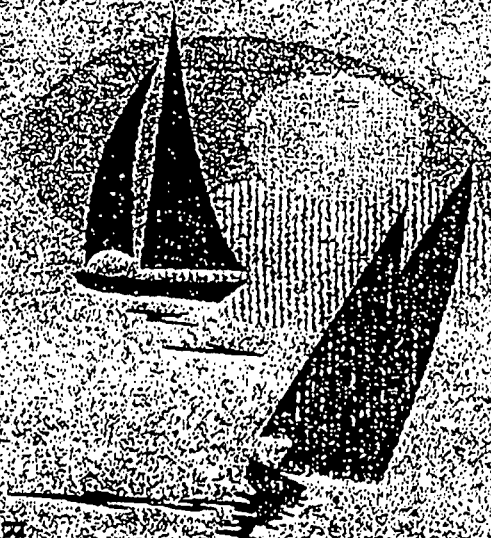
Don Phillips
Crystal Lake Land Development, Inc.
PO Box 397
Chapin, SC 29036

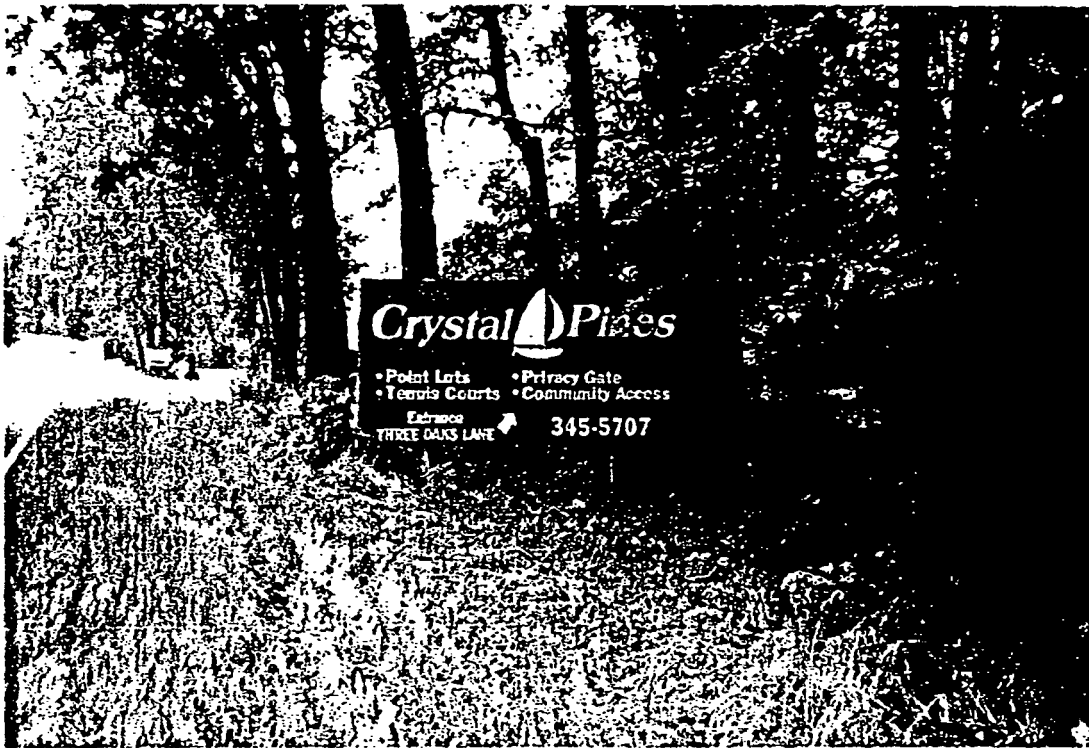
(803) 345-5707



Resort on a golf course

Deep Water Launching Ramp





Record on Appeal -000152

○

(continued)

for strata and
whites, only.

and 1, 1976
DATE

James J. McManis, Jr.
Subdivision Project Engineer

A = 8 44 . 26 E	87.69
B = 8 34 . 37 W	30.89
C = 8 12 . 39 W	34.48
D = 8 36 . 12 W	77.8

I hereby certify that I am the owner of the property shown and described hereon as Section 17, Section 10 subdivision and that I hereby adopt this plan of subdivision with my free consent, established minimum building setbacks, and dedicate all streets, public and private use as noted. I also certify that all current state, County taxes or other assessments relative to this property have been paid.

April 1, 1986

Dr. C. Phillips

THERE IS A 5' DRAINAGE & UTILITY EASEMENT
ALONG EACH SIDE OF EACH LOT LINE.

TOTAL ACREAGE : 8.53

REFERENCE ROAD MAINTAINANCE AGREEMENT
AT DEED BOOK 462 PAGE 242.

FINAL PLAT APPROVAL

The subdivision plot shown herein complies with the Subdivision Regulations for Lexington County, South Carolina and was approved by the Lexington County Planning Commission for recording in the office of the Register of Deeds Conyersense of Lexington County, South Carolina.

4/25/ ALM

Secretary, Lexington County Planning Commission

I HEREBY CERTIFY THAT THE PLAN SHOWN & DESCRIBED HEREON IS A TRUE, CORRECT & ACCURATE SURVEY REQUIRED BY THE SUBDIVISION REGULATIONS FOR LEWISTON COUNTY & THAT THE MONUMENTS SHOWN WERE PLACED TO THE SPECIFICATIONS SET FORTH IN SAID REGULATIONS, AND THAT THE RATIO OF PRECISION OF THE FIELD SURVEY IS 1 / (10,000) AS SHOWN HEREON AND THE AREA WAS DETERMINED BY (SMD) METHOD OF AREA CALCULATION.

APR 1 1964
DATE

JAMES V. GREGORY 0282
REGISTERED LAND SURVEYOR

FINAL PLAT

NAME OF SUBDIVISION
CRYSTAL PINE

SECTION III

OWNER/DEVELOPER
CRYSTAL PINES LAND DEVELOPERS, INC.
DON E. PHILLIPS, PRESIDENT
P.O. Box 393, Chapin, S.C. 29626

JAMES V GREGORY, R.L.S.
ROUTE 3, CAMPOBELLO, S.C.

4-124. AT 1 AND MIDDAY

Plant Bank 2086, Seco 449, Dated April, 1986, LIBER 872 at 5:10 PM 11-1-1986.

2007001847 FILED, RECORDED, INDEXED
2007-01-09 09:53:11:173
REC FEE: \$10.00 ST FEE: \$130.00
CO FEE: \$55.00 Pages: 3
Lexington County R.O.D. Debra M. Gunter
DEED Bk:Pg 11672:84

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that I, DON E. PHILLIPS, in the State aforesaid, for and in consideration of the sum of FIFTY THOUSAND AND NO HUNDREDTHS DOLLARS (\$50,000.00), the receipt and sufficiency of which is here acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said:

WRIGHT L. PHILLIPS

See Exhibit "A" for Property Description

Derivation: This being a portion of the property conveyed to the Grantor herein by Deed from Crystal Lake Land Developers, Inc. dated June 13, 1997 and recorded June 17, 1997, in the Register of Deeds for Lexington County Record Book 4208 at page 310.

TMS #: 001524-04-009

Grantee's Address: 109 Mallard Cove Court, Chapin, SC 29036

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, his heirs and assigns forever.

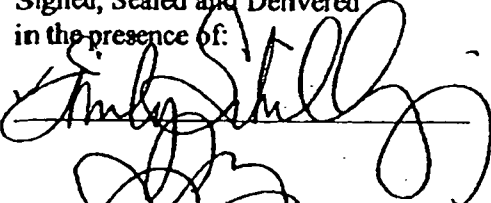
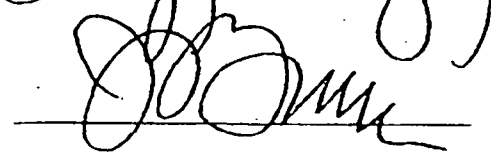
AND I DO HEREBY promise, for myself and my heirs, representatives and assigns, to warrant and forever defend the above premises unto the Grantee, his heirs and assigns, against me and my heirs and against any other person whomsoever lawfully claiming through me.

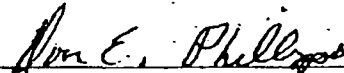
WITNESS my Hand and Seal, on December 11, 2006, and in the two hundred thirty-first year of the Sovereignty and Independence of the United States of America.



Record on Appeal -000154

Signed, Sealed and Delivered
in the presence of:

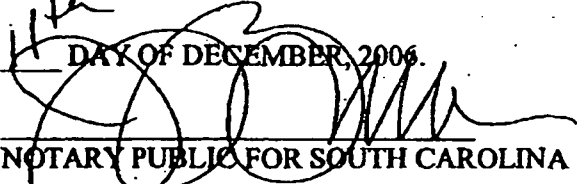

Don E. Phillips

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PROBATE

PERSONALLY appeared before me the undersigned, who first being duly sworn, deposes and says that (s)he saw the within-named Grantor sign, seal and as his act and deed deliver the within Deed, for the uses and purposes therein mentioned; and, that (s)he, with the other witness whose signature appears herein along with the undersigned's, witnessed the execution thereof.

SWORN TO BEFORE ME THIS


11th DAY OF DECEMBER, 2006.

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 3-14-13

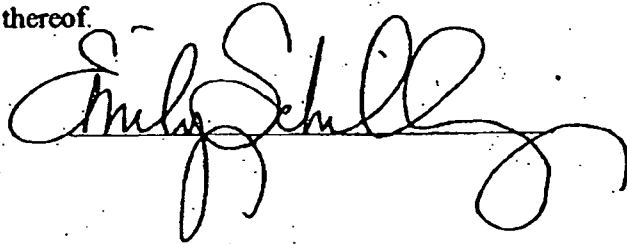


Exhibit "A"

All that certain piece, parcel or lot of land, with any improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, being shown and designated as Lot "A", on a Final Plat of Crystal Pines, Section IV, prepared by James V. Gregory, R.L.S., dated April 1, 1986 and recorded in the ROD Office for Lexington County in Plat Book 208-G at page 49, to which reference is hereby craved for specific metes and bounds; be all measurements a little more or less.

ALSO:

All that certain piece, parcel or lot of land, with any improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, containing 0.04 acre, more or less, being shown and designated as Parcel A on a "Plat Showing Parcel A & Parcel B at Crystal Pines Subdivision", prepared by Newby - Proctor & Associates, Inc., Land Surveyors, dated April 18, 1999 and recorded in the ROD Office for Lexington County on Slide 489, page 10A, to which reference is hereby craved for specific metes and bounds; be all measurements a little more or less.

200706137 FILED, RECORDED, INDEXED
2007-01-31 15:53:45:248
REC FEE: \$10.00 ST FEE: \$1.30 Exempt
CD FEE: \$0.55 Exempt Pages: 3
Lexington County R.O.D. Debra M. Gunter
DEED Bk-Pg 11725:293

AFFIDAVIT

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that I, WRIGHT L. PHILLIPS, in the State aforesaid, for and in consideration of the sum of FIVE AND NO HUNDREDTHS DOLLARS (\$5.00) AND TO RECEIVE AN INITIAL MEMBERSHIP, MANAGERIAL AND BENEFICIAL INTEREST IN THE FORMATION OF CRYSTAL PINES YACHT CLUB, LLC for the benefit of Grantee and subject to the reservation of easement described below, the receipt and sufficiency of which is here acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said:

CRYSTAL PINES YACHT CLUB, LLC

See Exhibit "A" for Property Description

Derivation: This being the property conveyed to the Grantor herein by Deed from Don E. Phillips, dated December 11, 2006 and recorded January 9, 2007 in the Office of the Register of Deeds for Lexington County in Record Book 11672 at page 84.

TMS #: 0015424-04-009

Grantee's Address: 109 Mallard Cove Court, Chapin, SC 29036

RESERVATION OF EASEMENT: The Grantor hereby reserves, for himself and for his heirs and assigns, an exclusive easement appurtenant and right-of-way across and under the land conveyed herein, for the limited purposes of installation, location and maintenance of a water line and pump for purposes of irrigation of this and other nearby properties, including the right to draw water from Lake Murray for such purposes, all pipes and pumps to be located by the grantor, in such a manner as to reasonably minimize disruption or intrusion to Grantee's quiet enjoyment of the premises.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

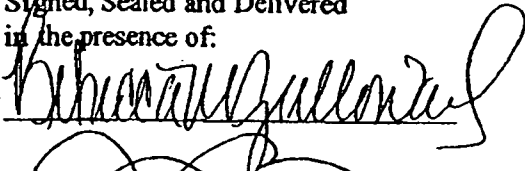
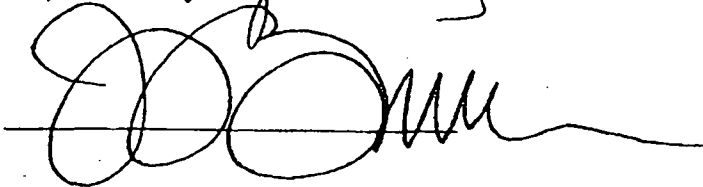
TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, its successors and assigns forever.

Record on Appeal - 000157

AND I DO HEREBY promise, for myself and my heirs, representatives and assigns, to warrant and forever defend the above premises unto the Grantee, its successors and assigns, against me and my heirs and against any other person whomsoever lawfully claiming through me.

WITNESS my Hand and Seal, on January 25, 2007, and in the two hundred thirty-first year of the Sovereignty and Independence of the United States of America.

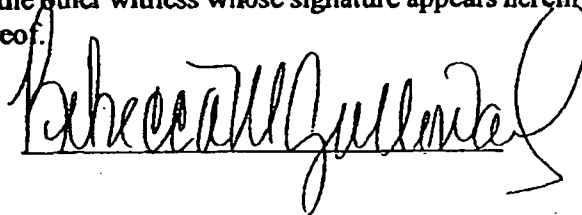
Signed, Sealed and Delivered
in the presence of:


Wright L. Phillips

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PROBATE

PERSONALLY appeared before me the undersigned, who first being duly sworn, deposes and says that (s)he saw the within-named Grantor sign, seal and as his act and deed deliver the within Deed, for the uses and purposes therein mentioned; and, that (s)he, with the other witness whose signature appears herein along with the undersigned's, witnessed the execution thereof.



SWORN TO BEFORE ME THIS
25 DAY OF JANUARY, 2007.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3-14-13

Exhibit "A"

All that certain piece, parcel or lot of land, with any improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, being shown and designated as Lot "A", on a Final Plat of Crystal Pines, Section IV, prepared by James V. Gregory, R.L.S., dated April 1, 1986 and recorded in the ROD Office for Lexington County in Plat Book 208-G at page 49, to which reference is hereby craved for specific metes and bounds; be all measurements a little more or less.

ALSO:

All that certain piece, parcel or lot of land, with any improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, containing 0.04 acre, more or less, being shown and designated as Parcel A on a "Plat Showing Parcel A & Parcel B at Crystal Pines Subdivision", prepared by Newby - Proctor & Associates, Inc., Land Surveyors, dated April 18, 1999 and recorded in the ROD Office for Lexington County on Slide 489, page 10A, to which reference is hereby craved for specific metes and bounds; be all measurements a little more or less.

J. Robin Turner, P.A.
803/799-7894
Title not certified to.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is known as Lot A, Crystal Pines, Section V and .04 acre known as Parcel A, on Plat slide 489 at page 10A, bearing Lexington County Tax Map Numbers 0015424-04-009, and was transferred by Wright L. Phillips to Crystal Pines Yacht Club, LLC.

3. Check one of the following: The deed is

- (a) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) X _____ exempt from the deed recording fee because : #8 exemption:

(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- (a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____.
- (b) _____ The fee is computed on the fair market value of the realty which is _____.
- (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____.

5. Check Yes _____ or No _____ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
- (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
- (c) Subtract Line 6(b) from Line 6(a) and place result here: _____

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$ _____.

8. As required by Code Section 12-24-70, I state the I am a responsible person who was connected with the transaction as: closing attorney.

Record on Appeal -000160

9. I understand that a person required to furnish this affidavit who willfully furnished a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than \$1,000.00 or imprisoned not more than one year, or both.

SWORN to before me on January 30, 2007.

M. L. Dupolden
Notary Public for South Carolina
My Commission Expires: 07/09/13

J. Robin Turner
J. Robin Turner

INFORMATION

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

- (1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States;
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty;
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
- (7) that constitute a contract for the sale of timber to be cut;
- (8) transferring realty to a corporation, a partnership, or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a partnership, or trust;
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership; and,
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed.

CRYSTAL LAKE ROAD COMPANY MEETING

OCTOBER 4, 1986

ATTENDEES

Karl and Christie Derrick
Marvin and Alice Massey
Kerry and Denise Murphy
Tim and Donna Murphy
Don and Ann Phillips
John and Bonnie Porter
Yvonne Rook

OPENING

The meeting began with Denise Murphy reading the minutes from the last meeting.

TREASURER'S REPORT

Kerry Murphy gave the following report:

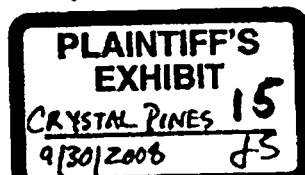
Opening balance 5/3/86	\$1,143.66
Deposits	395.84
Interest	16.88
Expenses (stamps)	4.40
	<u>\$1,551.87</u>

Kerry asked Don about his grass-cutting bill, and Don replied that it had been cut five times at 3 hours each. He was waiting to cut it one more time for the season and would submit his bill then.
 $6 \text{ times} \times 3 \text{ hours} = 18 \text{ hours} \times \$15/\text{hour} = \$270 \div 2 = \$140.$

ISSUES/TOPICS

Issues still unresolved from the last meeting included the sign/gate repair. Don said he hadn't gotten a piece of wood yet, but would shortly.

It was suggested that we change the title of the association to "Homeowners" rather than only "Road Company." It was felt that all of the provisions of the current road agreement would remain unchanged; however, it would allow us to also address more far-reaching concerns of the development at the same meeting. Everyone agreed.



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The restrictive covenants of the development were discussed, especially relating to parking of cars, boats, trailers, etc., in view of the road. Don has several of his vehicles parked on the vacant lot next to the water tank. Don said he plans on having an area prepared behind the water tank and hidden from the road. He projected this to be done in 2 to 3 weeks.

Concerning the election of officers for the Association, it was decided that this should be done each year. We will be asking for nominees/volunteers to be submitted before March 1, 1987. When notice of our next meeting is sent out around that time, we will include a ballot indicating who is interested in each position. Votes should be returned along with your 1987 assessments before the spring meeting. New officers will be appointed at the meeting.

The new Timberlake development was discussed briefly. One point relating directly to Crystal Pines concerned the Timberlake color scheme of blue and gray and, since the gate and sign needed repair, whether we wanted to go along with this theme and change our colors. It was decided to just touch up our repairs now with the colors we already have, and possibly make the change next time. Kerry Murphy and Karl Derrick volunteered to help Don with the gate repair and painting.

Kerry Murphy asked about Mr. Hudson's lot relating to his continued interest in purchasing it and billing procedures for road company dues. Don replied that the lot will not belong to Mr. Hudson. It remains part of the development.

We then talked about security in our area and the Crime Watch program. Ann Phillips said that a Janice Holman was involved with the program in the Crystal Lake area, and Ann would contact her for information. Donna Murphy volunteered to attend the next Crime Watch meeting if Ann would give her the details. Karl Derrick said he would talk to a friend of his at the Sherrif's Department, and Denise Murphy would contact the Chapin Police and Fire Department regarding becoming familiar with our development and possibly some system of "registering" homeowner information with them. (Donna Murphy did attend the Crime Watch meeting. Her notes are attached. Although this meeting mainly discussed fire prevention, she did also obtain some forms for emergency personnel to have on file for us to aid in an emergency. If those already living in the development would send these forms back to Denise Murphy, we will send them in together with a cover letter introducing our development.)

3

Bonnie Porter asked Don what we should do as far as emergency service for the water system. She said the water was off last week and she tried repeatedly to reach him with no luck. Don said that first we should try to find the problem locally by checking the development for work being done, contractors, etc. If there is no obvious reason within the development and no steps already being taken to remedy the problem, we should then call Joe Dowd, in Little Mountain, at 345-1650.

CONCLUSION

The next meeting was scheduled for Saturday, April 1, 1987, at 10:30 a.m.

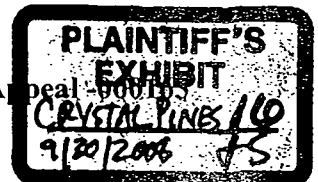
SUBSURFACE INVESTIGATION

CRYSTAL SPRINGS

**MS. VICKIE LEPPER
CHAPIN, SOUTH CAROLINA**

GEO-SYSTEMS DESIGN & TESTING, INC.
Geotechnical, Environmental and Construction Services
Post Office Box 2656
1836 Augusta Highway
West Columbia, South Carolina 29171
(803) 791-7528 (803) 791-4686 (Fax)

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GEO-SYSTEMS DESIGN & TESTING, INC.
GEOTECHNICAL & ENVIRONMENTAL ENGINEERING
CONSTRUCTION TESTING

Post Office Box 2656
West Columbia, S.C. 29171
(803) 791-7528

June 22, 2007

Ms. Vickie Lepper
118 Red Fox Trail
Chapin, SC 29036

Re: Subsurface Investigation
Crystal Springs

Dear Ms. Lepper:

As authorized, Geo-Systems Design & Testing, Inc. has completed the requested subsurface exploration of the above referenced project. This report contains a description of the project information provided to us, general site and subsurface descriptions together with our recommendations for foundation design and construction considerations.

We are available to discuss our recommendations with you and to conduct any additional testing or inspections necessary during construction. We appreciate having the opportunity to serve you on this project and look forward to serving as your geotechnical consultant.

Respectively submitted,
GEO-SYSTEMS DESIGN & TESTING, INC.

Joe A. Smith, P.E.
President

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I. PROJECT INFORMATION

The existing roadways are local residential streets constructed approximately Thirty (30) years ago utilizing thin asphalt and stonebase pavement structure over clay subgrade soils. Pavement failures exist throughout the roadway alignment.

II. FIELD INVESTIGATION AND LABORATORY TESTING

Our field investigation consisted of asphalt cores in failed and non-failed sections of the roadway area. Descriptions and classifications are based upon the Unified Soil Classification System (ASTM D-2487).

The tests performed indicate predominant in-situ soil constituencies of clayey silts becoming less moist and stiffer with depth with exception of P-5 location. The results of tests are outlined as follows:

<u>TEST LOCATION</u>	<u>PATCH</u>	<u>ASPHALT THICKNESS</u>	<u>ORIGINAL</u>	<u>STONEBASE THICKNESS</u>
1	1.0		1.5	8.0
2	1.0		1.5	4.0
3			1.5	6.0
4			1.8	2.0
5			2.5	6.0
6			1.5	2.0
7			2.0	-
8			1.8	-
9			1.5	2.0
10	1.5		-	2.5
11			1.8	3.5
Average	1.2		1.6	3.27

With asphalt thickness at average less than 2 inches and stonebase less than 4 inches, indicates an extremely thin pavement section for these soil types. Accordingly, pavement failures are frequent throughout the roadway alignment. Also, asphalt density tests were performed to correlate asphalt compaction to industry standards as follows:

GEO-SYSTEMS DESIGN & TESTING, INC.

Post Office Box 2656
West Columbia, South Carolina 29171

ASPHALT DENSITY REPORT

DATE: May 30, 2007

PROJECT NAME: Crystal Pines

PROJECT LOCATION: Chapin, South Carolina

REPORTS SUBMITTED TO: Vickie Lepper

Location	Nuclear Density	Target Density	% Density
1 Roadway	128.9	140.0	92.1%
2 Roadway	122.4	140.0	87.4%
3 Roadway	132.2	140.0	94.4%
4 Roadway	128.4	140.0	91.7%
5 Roadway	131.3	140.0	93.8%
6 Roadway	127.9	140.0	91.4%
7 Roadway	134.1	140.0	95.8%
8 Roadway	135.9	140.0	97.1%
9 Roadway	139.6	140.0	99.7%
10 Roadway	134.6	140.0	96.1%
11 Roadway	132.1	140.0	94.4%
12 Roadway	131.2	140.0	93.7%
13 Roadway	133.2	140.0	95.1%
14 Roadway	131.0	140.0	93.6%
15 Roadway	135.5	140.0	96.8%
16 Roadway	133.0	140.0	95.0%
17 Roadway	134.7	140.0	96.2%
18 Roadway	130.7	140.0	93.4%
19 Roadway	141.3	140.0	100.9%
20 Roadway	132.8	140.0	94.9%
21 Roadway	140.2	140.0	100.1%

AVERAGE

94.9%

Refer to accompanying page sheet location.

NOTE: Tests were performed with a Nuclear Moisture-Density Gauge which is typically 3-5% less than actual core density compared to the Laboratory Marshall Density.

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III. DISCUSSION OF FINDINGS

Improvement of the roadways should require the subgrade support characteristics to strengthen, as well as, the permeability of subgrade soil conditions improve throughout this site which would help mitigate pavement problems in the future. We recommend a cement-mixer be used to pulverize the existing pavement, stone and clayey silt soils with the addition of two (2) inches of sand. We recommend eight (8) inch depth below existing grades with a cement blend at 60 lbs/yd² to provide a total thickness of at least eight (8) inches blended materials. The blend should be compacted to ninety-eight percent (98%) of the Standard Proctor value then allowed to cure for 7 days with daily wetting.

IV. FLEXIBLE PAVEMENT DESIGN

Based on anticipated vehicular wheel loadings, a pavement section has been analyzed on the basis of a residential street classification according to County guidelines.

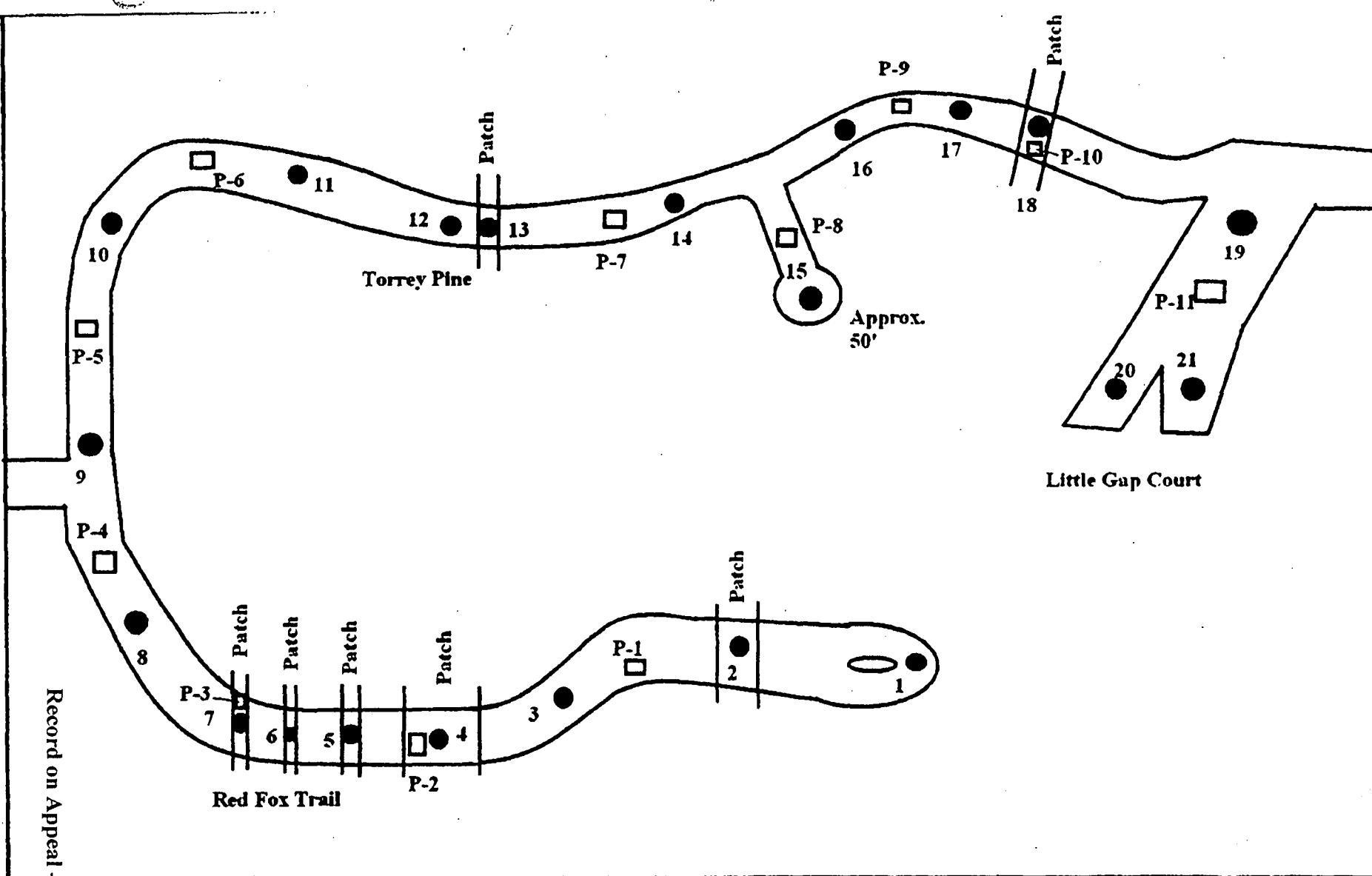
Residential Drive and cul-de-sac:		<u>Estimated Cost</u>
2.0 Inches	Asphalt Surface Course (Type 1)	\$400,000.00
8.0 Inches	Cement Stabilized Base Course	
Or,		
2.5 Inches	Asphalt Surface Course (Type 1)	\$450,000.00
10.0 Inches	Macadam Base Course (S.C.D.O.T. 305)	

The 2nd option will require the thickness of Macadam Base Course material (SCDOT Section 305) should be placed over a compacted subbase of fill or virgin soils. The Macadam Base Course should be compacted to ninety-eight percent (98%) of its maximum standard Proctor density (ASTM D-698).

We recommend that SCDOT Type 1 Bituminous Asphalt be used for all flexible pavement structure. Distress within flexible pavements can develop as a result of localized soft or depressed areas within the subgrade materials. Construction operations should not be performed without proper quality control inspection and testing by experienced engineering technicians, working under the supervision of a geotechnical engineer. These services should include field density testing of subgrade soils and asphalt paving operations to assure that construction operations are in conformance with project plans and specifications.

A major factor contributing to the life and success of any pavement structure is to provide good surface and subgrade drainage. In a dry, well-compacted condition, the on-site soils will exhibit a very high shear strength and provide good subgrade support properties. If saturated or subjected to wetting and drying cycles; however, the soils will exhibit a considerable loss in shear strength and poor subgrade support properties.

Periodic inspections should be required throughout the life of the pavement to seal minor surface cracks as to be expected in any pavement structure with time. Unattended surface deterioration cracks will decrease the life of a pavement structure significantly.



SITE LOCATION PLAN



GEO-SYSTEMS DESIGN & TESTING, INC.
 GEOTECHNICAL & ENVIRONMENTAL ENGINEERING
 CONSTRUCTION TESTING

Post Office Box 2686
 West Columbia, S.C. 29171
 (803) 791-7552

JOB NAME:

Crystal Pine

Date

5-31-07

APPROVED BY:

JAS

SCALE:

NTS

Drawing No.

DRAWN BY:

REVISED:

GEO-SYSTEMS DESIGN & TESTING, INC.

Post Office Box 2656
West Columbia, South Carolina 29171

AUGER/PENETROMETER TESTS

Project Name: Crystal Pines
Date: May 30, 2007

P-1		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.5	Asphalt	
8.0	Stonebase	
		2
-12.0	Grey Silty CLAY	5
	Boring Terminated @ 1 FOOT	

P-2 (Patch)		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.0	Asphalt Overlay	
1.5	Asphalt Original	
4.0	Stonebase	5
		12
-12.0	Tan Silty CLAY	
	Boring Terminated @ 1 FOOT	

P-3		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.0	Asphalt Overlay	
1.5	Asphalt Original	
6.0	Stonebase	6
		10
-12.0	Grey Clayey SAND	
	Boring Terminated @ 1 FOOT	

P-4		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.8	Asphalt	
2.0	Stonebase	
		10
-12.0	Tan Silty Clayey SAND	15+
	Boring Terminated @ 1 FOOT	

P-5		
DEPTH (IN.)	SOIL CLASSIFICATION	N
2.5	Asphalt	
6.0	Stonebase	
		6
-12.0	Red Silty CLAY	3
	Boring Terminated @ 1 FOOT	

P-6		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.5	Asphalt	
2.0	Stonebase	
		15+
-12.0	Tan Fine Silty CLAY	
	Boring Terminated @ 1 FOOT	

P-7		
DEPTH (IN.)	SOIL CLASSIFICATION	N
2.0	Asphalt (Patch)	
0.0	Stonebase	
		13
-12.0	Red Silty CLAY	
	Boring Terminated @ 1 FOOT	

P-8		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.8	Asphalt	
0.0	Stonebase	
		13
-12.0	Red Silty CLAY	
	Boring Terminated @ 1 FOOT	

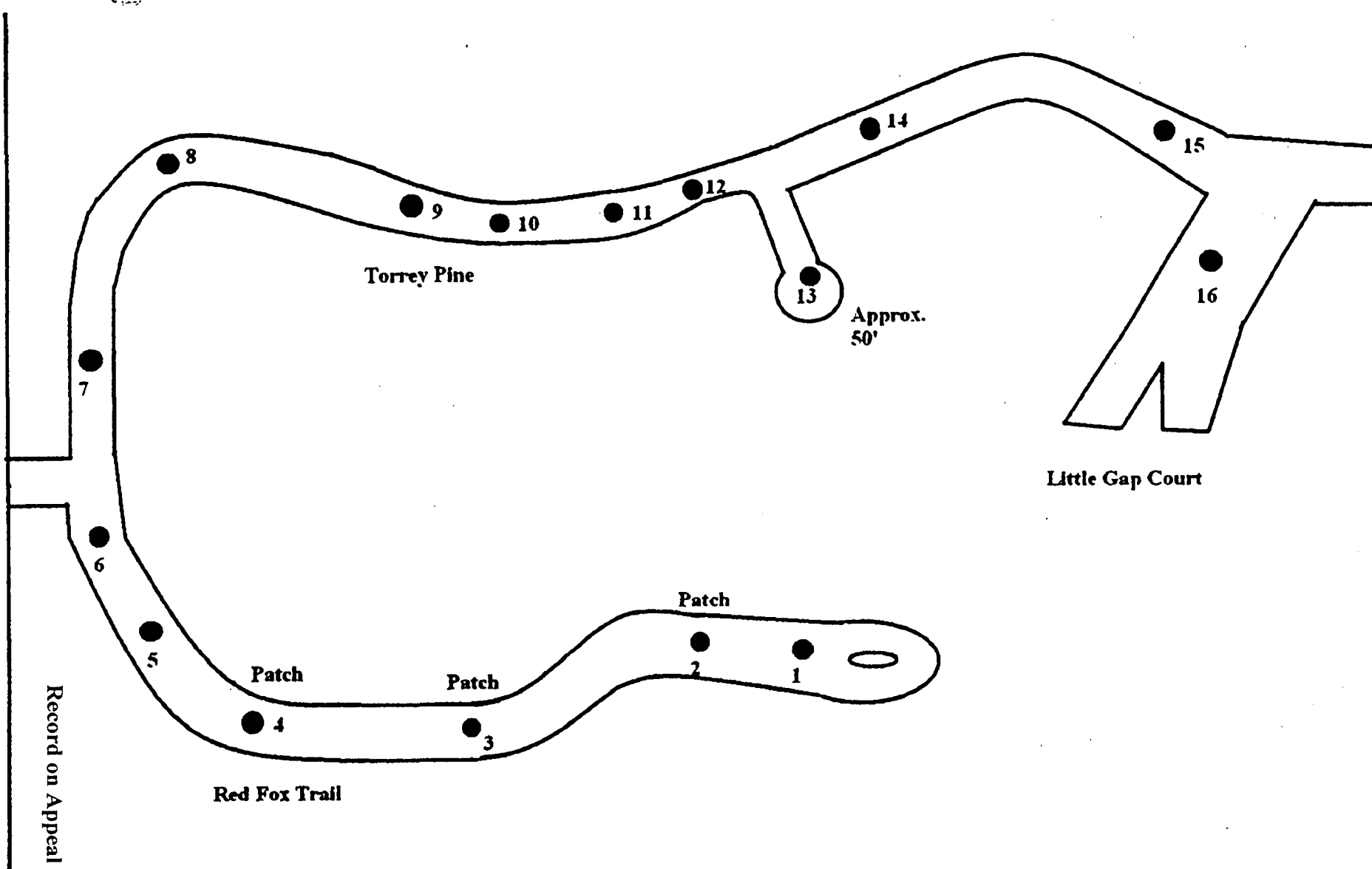
P-9		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.5	Asphalt	
2.0	Stonebase	
		15+
-12.0	Red/Grey CLAY	
	Boring Terminated @ 1 FOOT	

P-10		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.5	Asphalt	
2.5	Stonebase	
		13
-12.0	Grey Silty CLAY	
	Boring Terminated @ 1 FOOT	

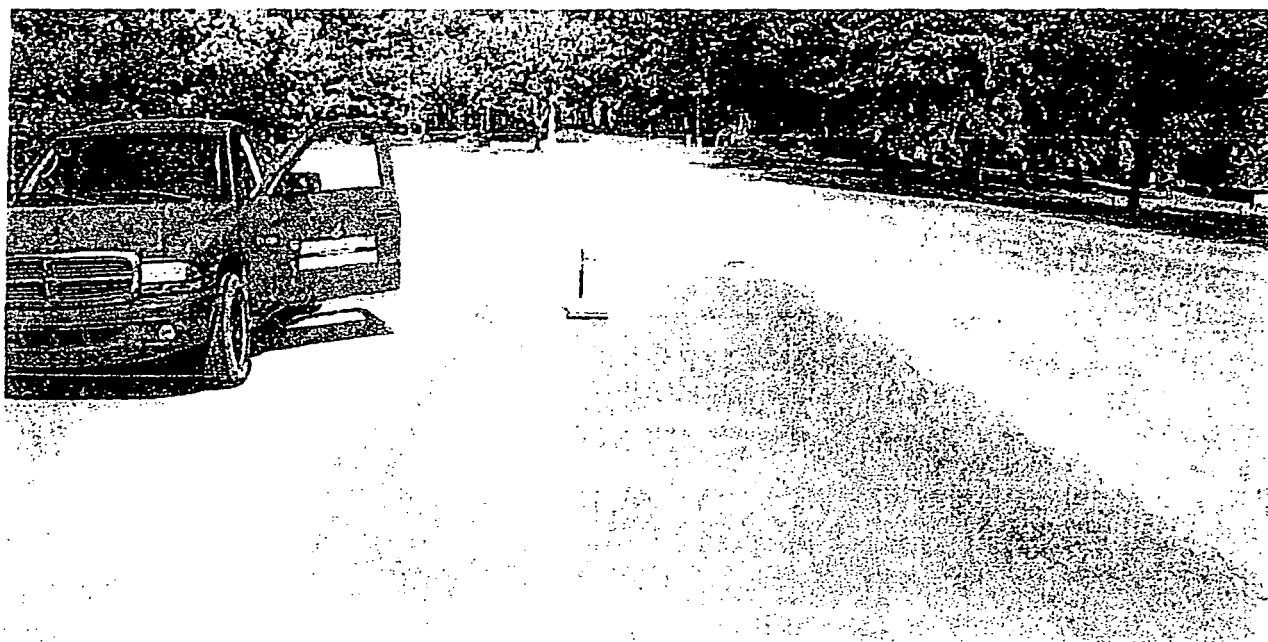
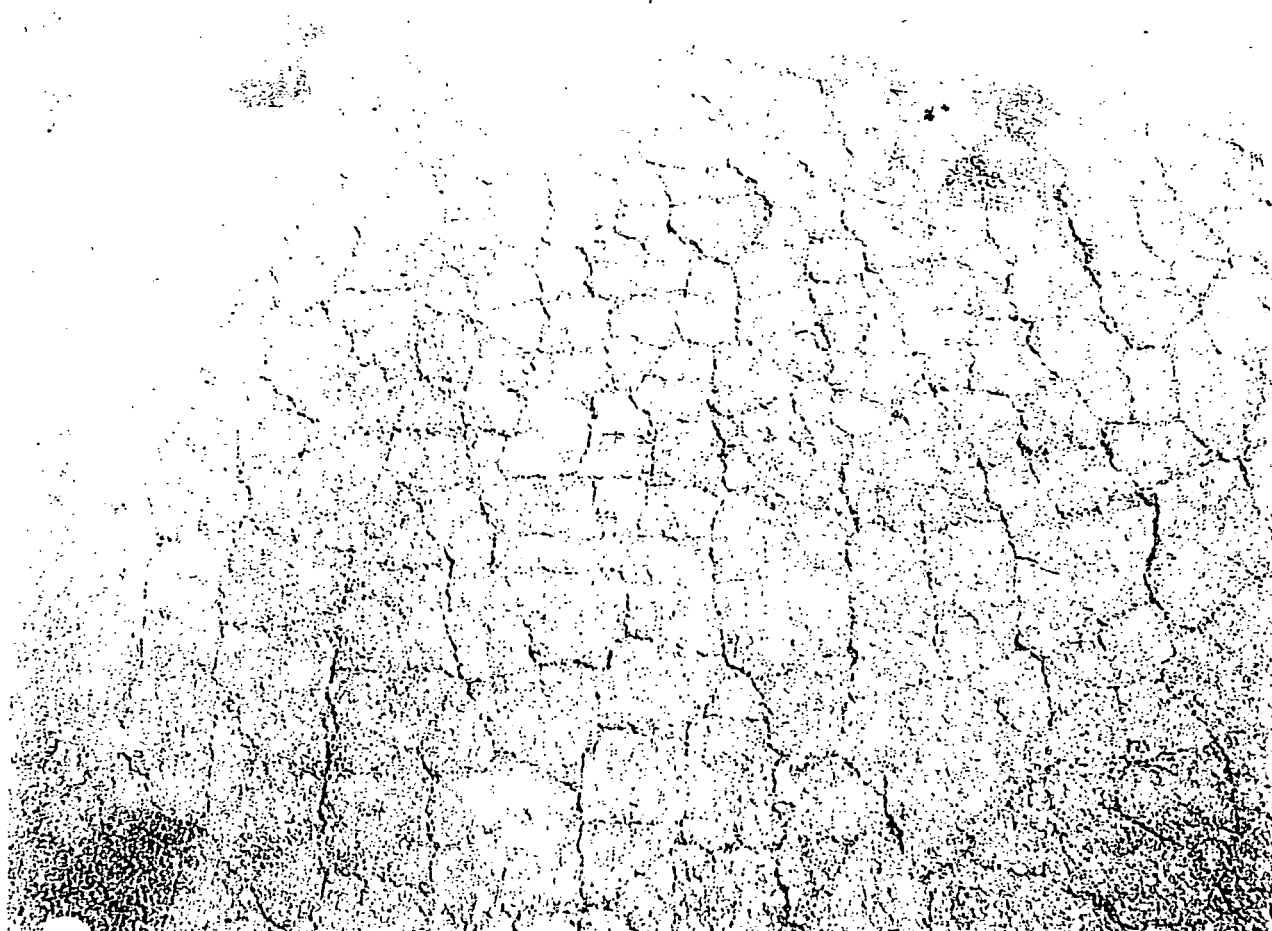
P-11		
DEPTH (IN.)	SOIL CLASSIFICATION	N
1.8	Asphalt	
3.5	Stonebase	
		7
-12.0	Red/Grey CLAY	
	Boring Terminated @ 1 FOOT	

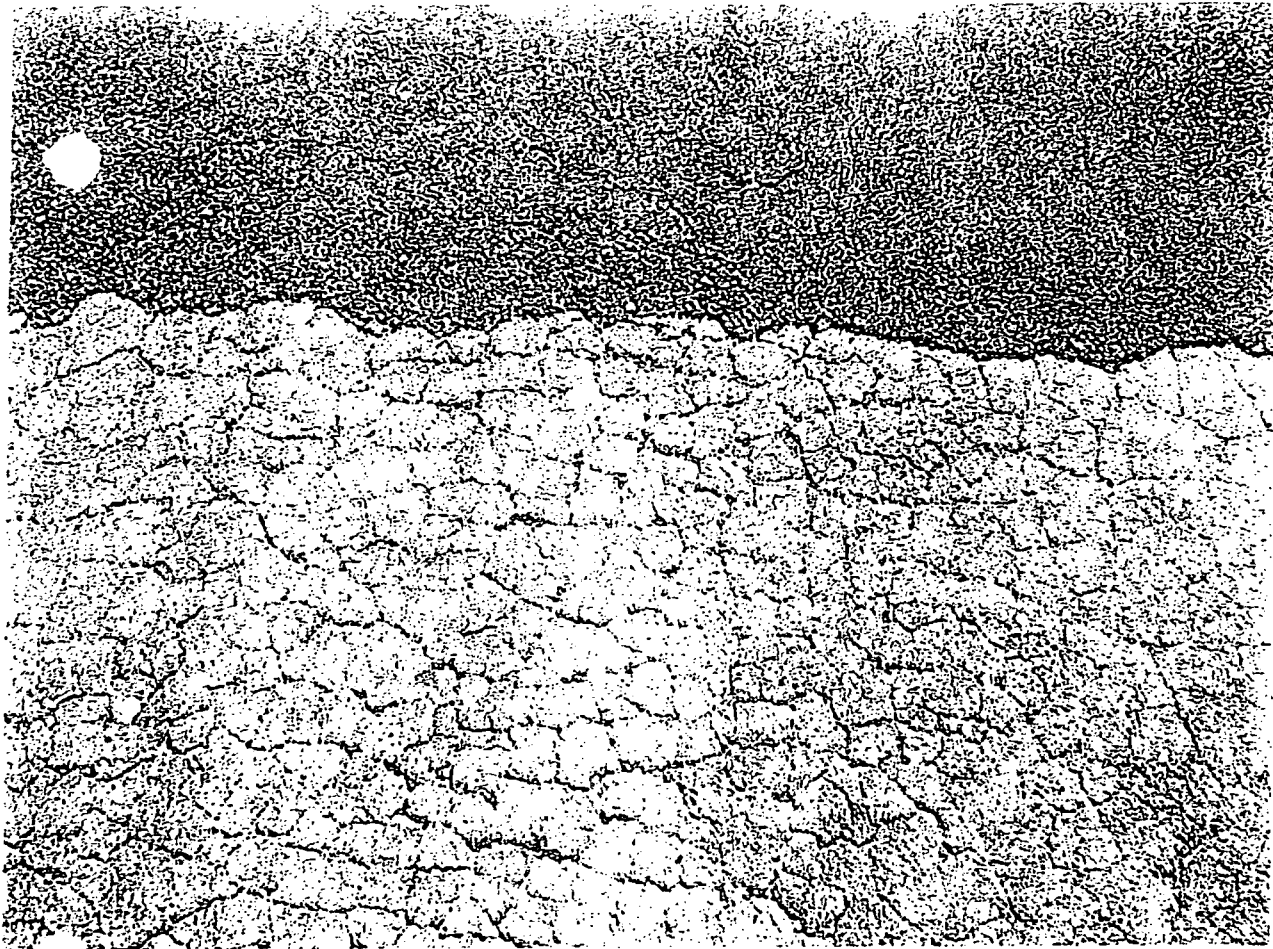
DEPTH (IN.)	SOIL CLASSIFICATION	N

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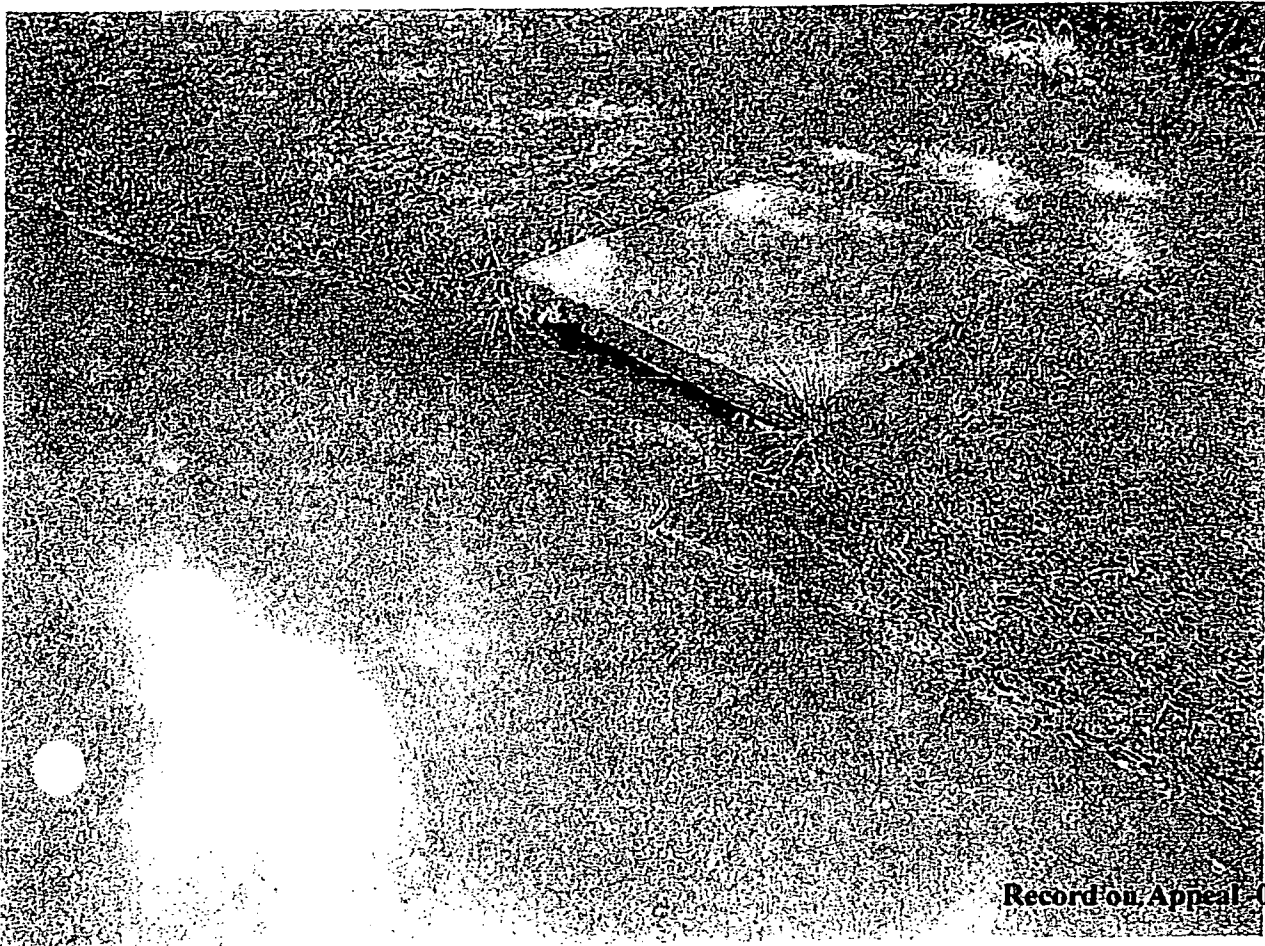


SITE LOCATION PLAN		 GEO-SYSTEMS DESIGN & TESTING, INC. GEOTECHNICAL & ENVIRONMENTAL ENGINEERING CONSTRUCTION TESTING		Post Office Box 5886 West Columbia, S.C. 29171 (803) 791-7928	
JOB NAME:	Crystal Pine	Date	5-31-07	APPROVED BY:	JAS
	Photographs			SCALE:	NTS
				Drawing No.	DRAWN BY:
					REVISED:

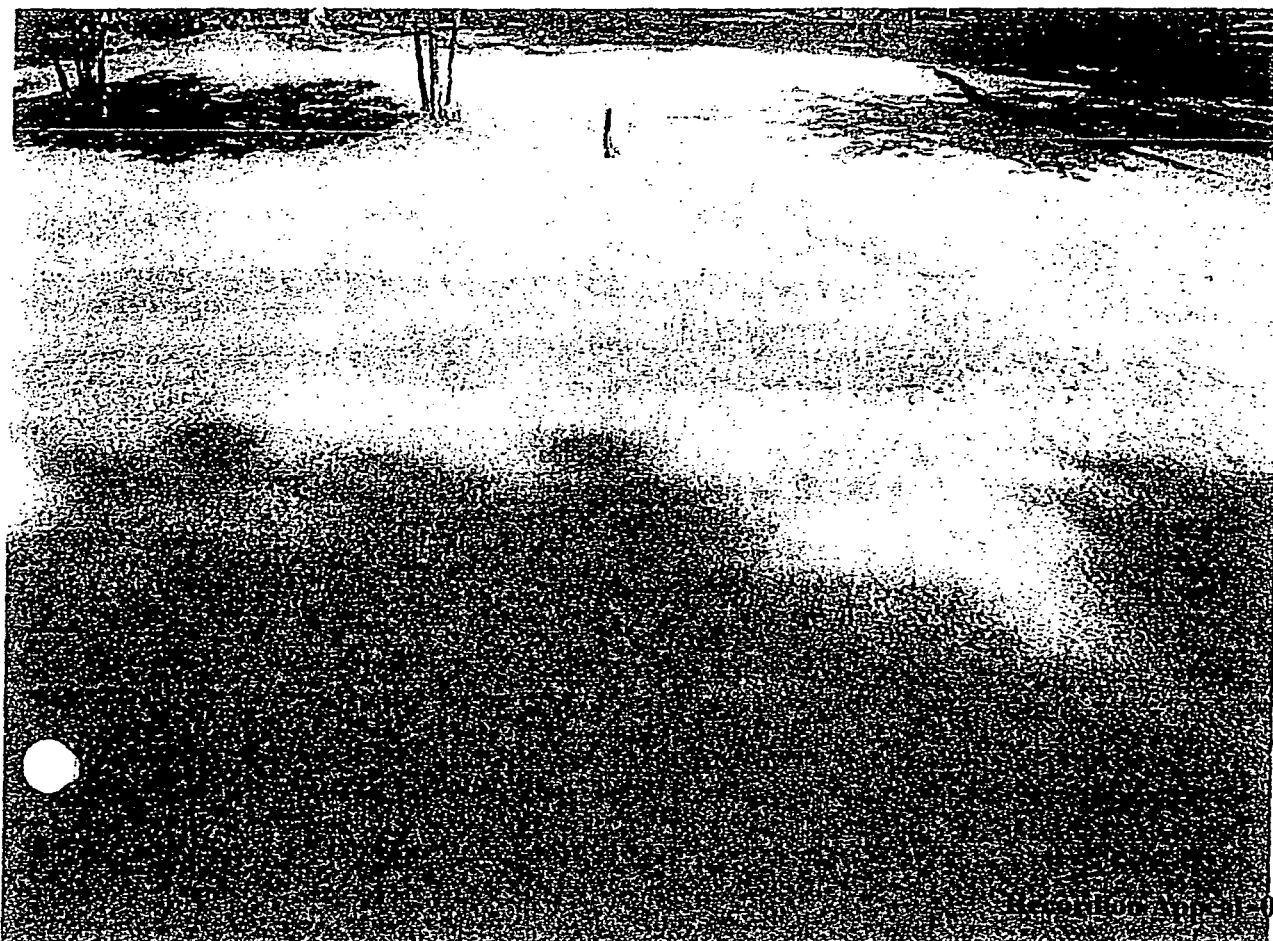
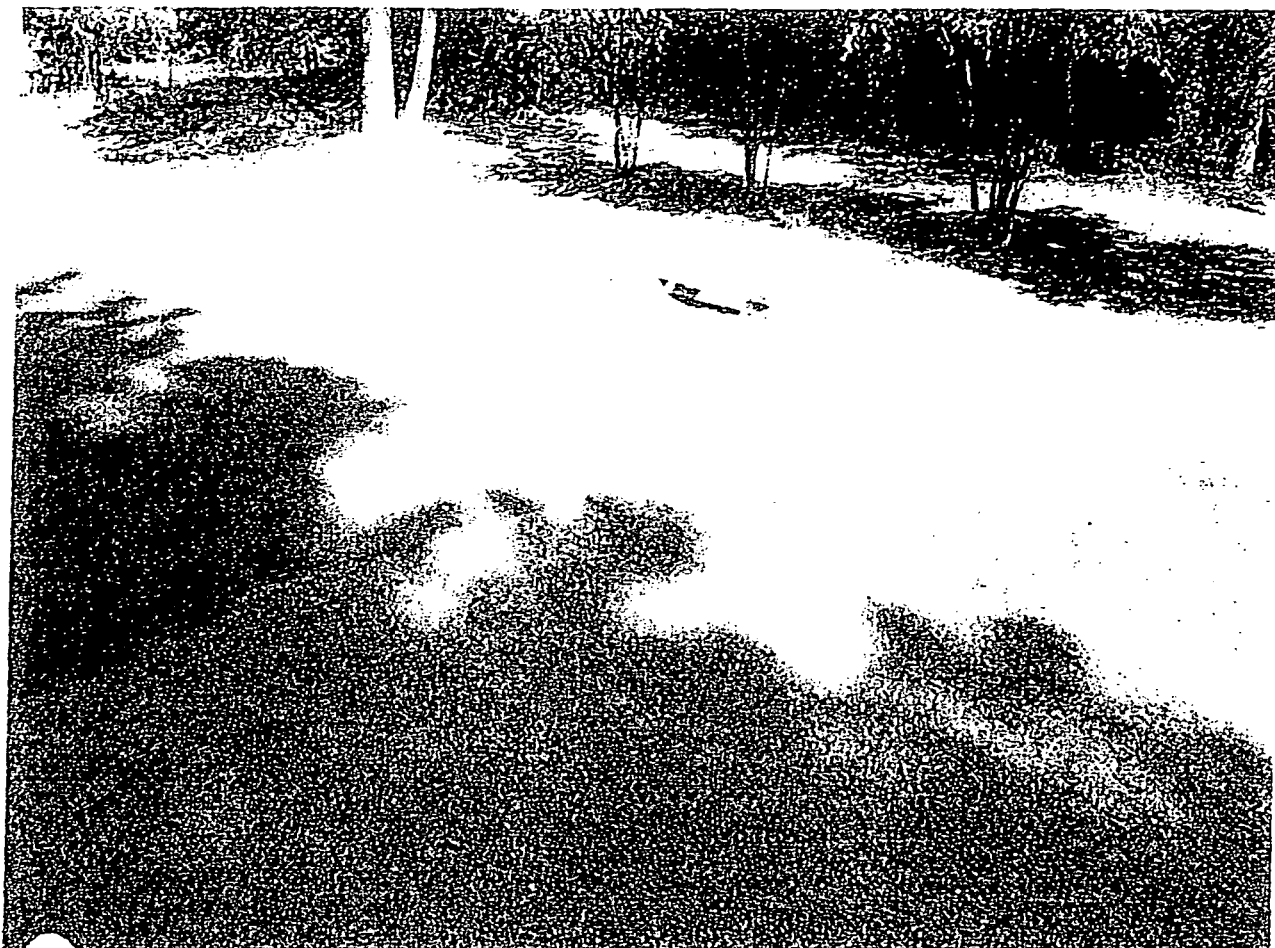




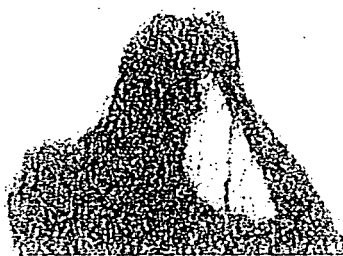
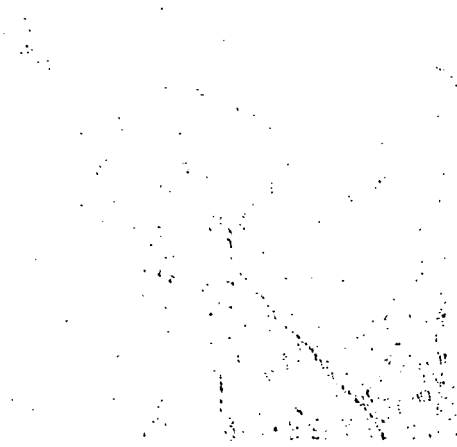
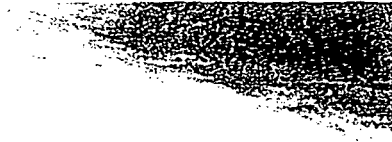
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Record on Appeal 000176



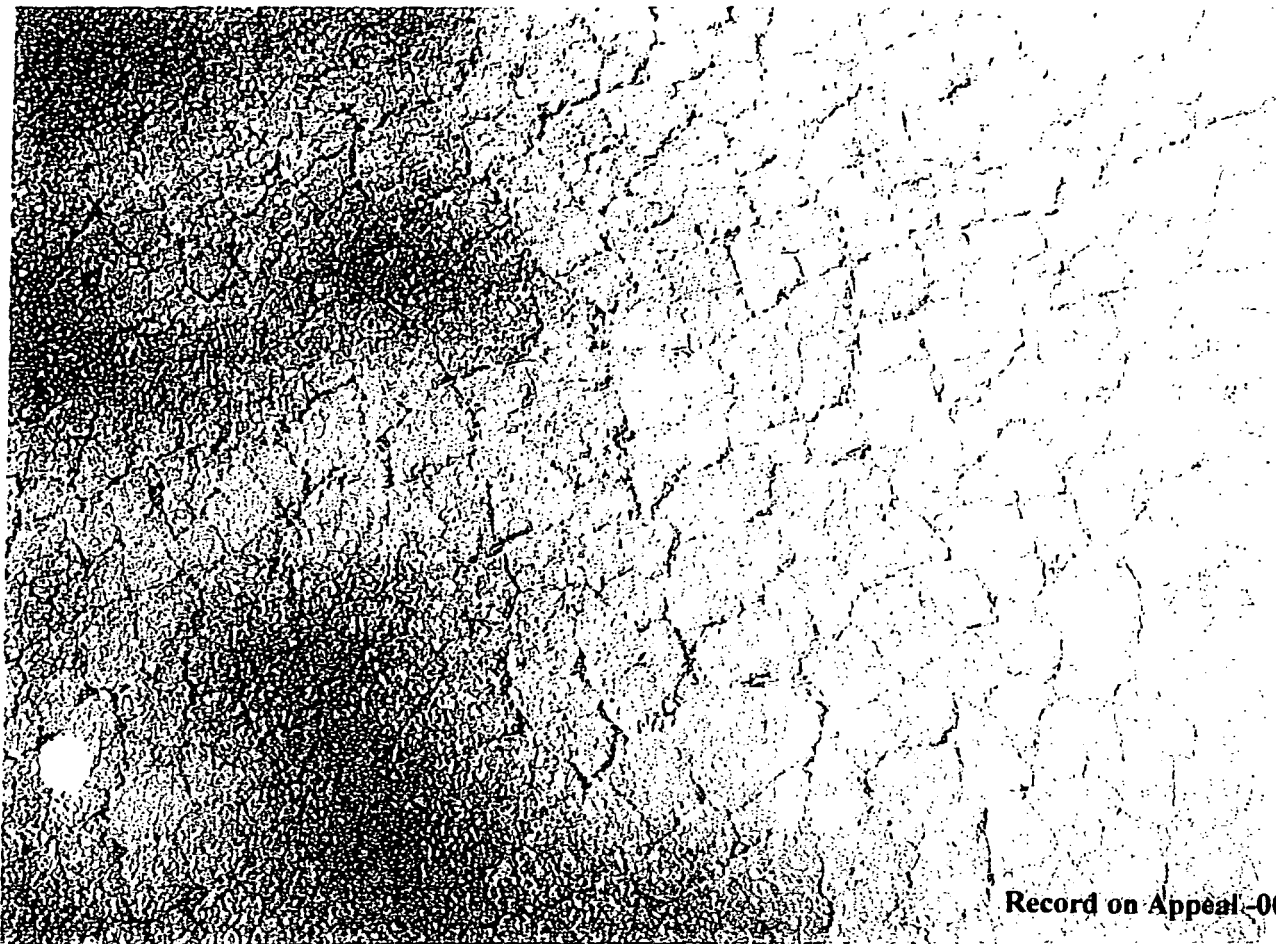
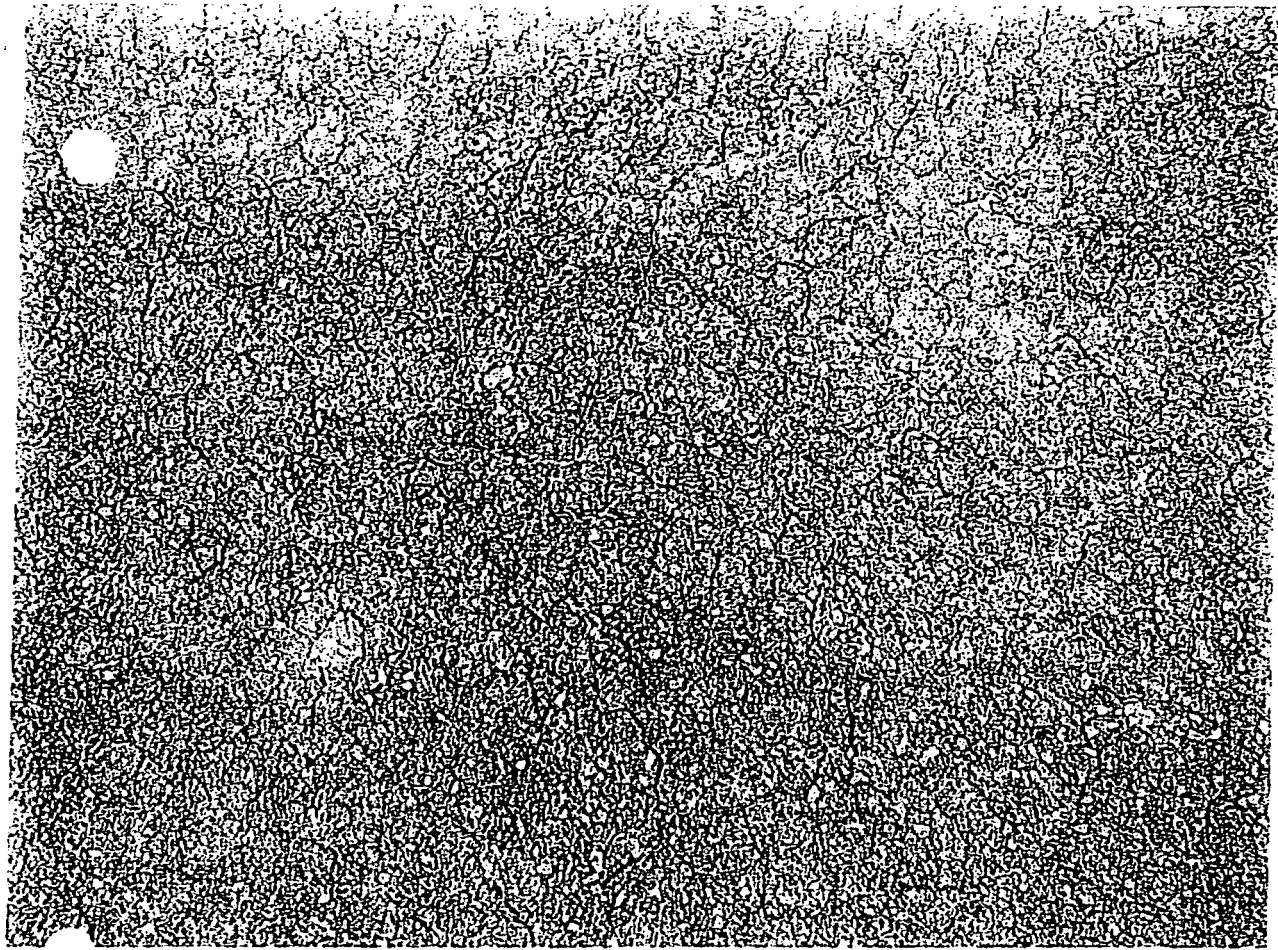
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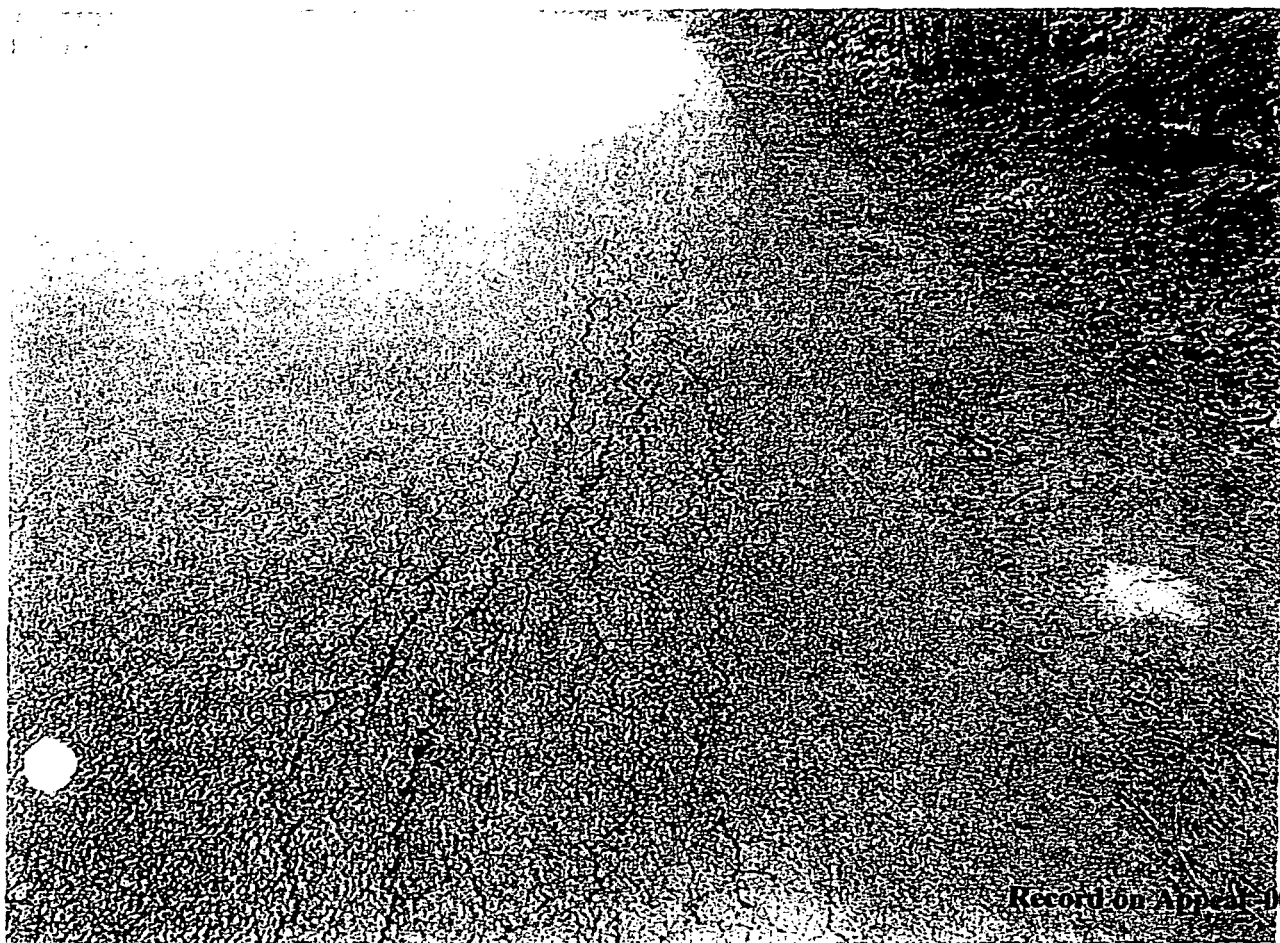
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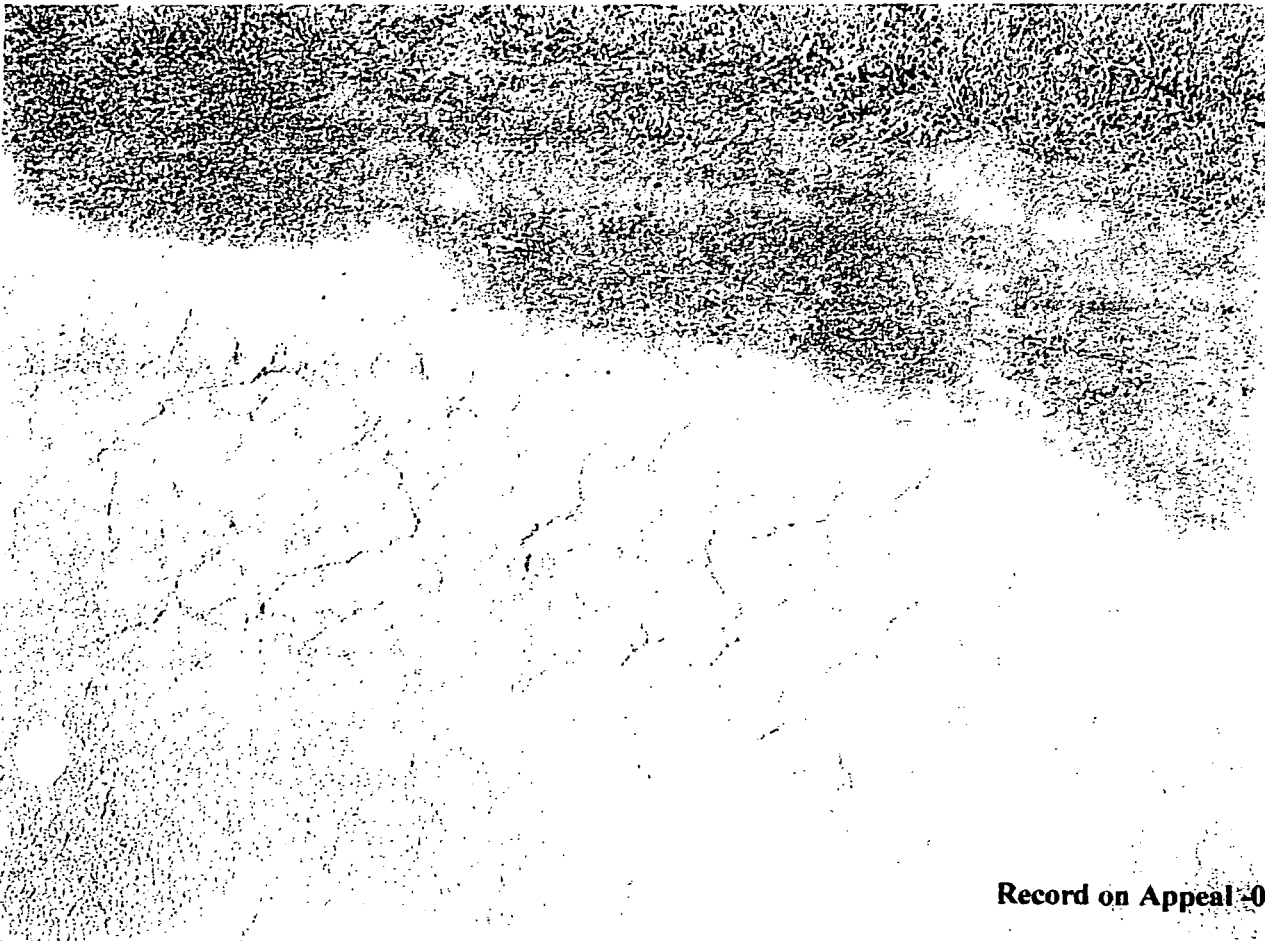
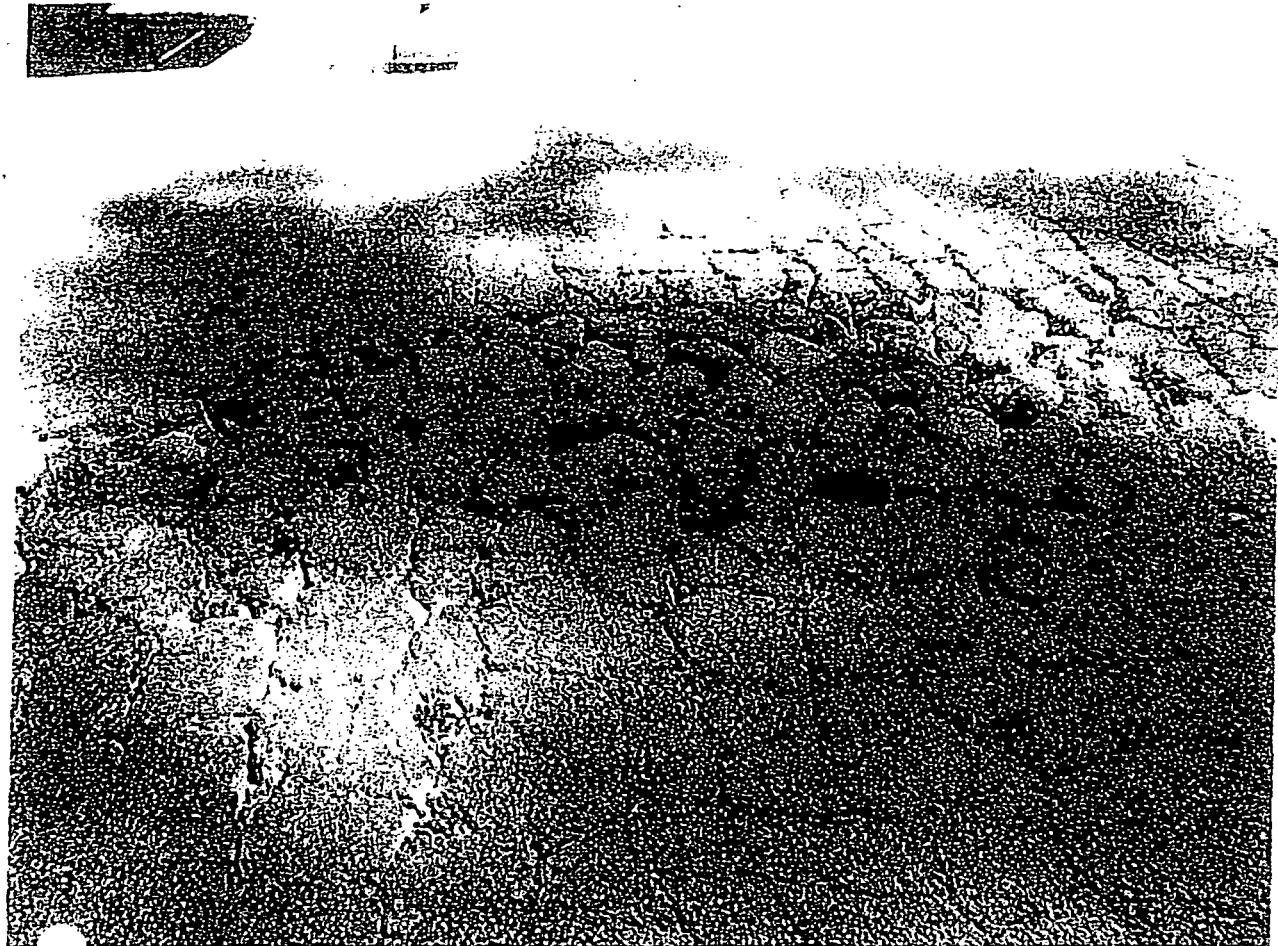
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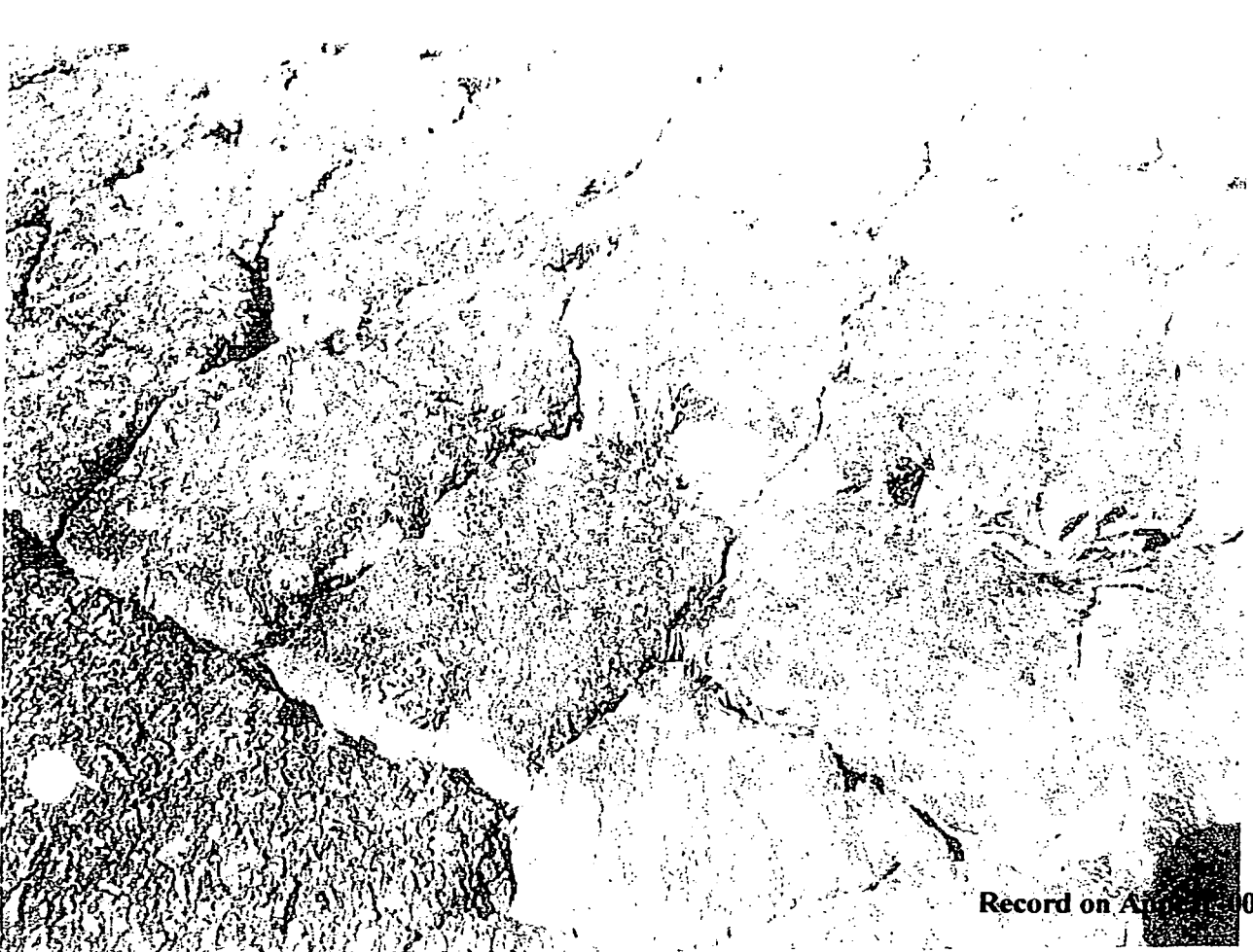
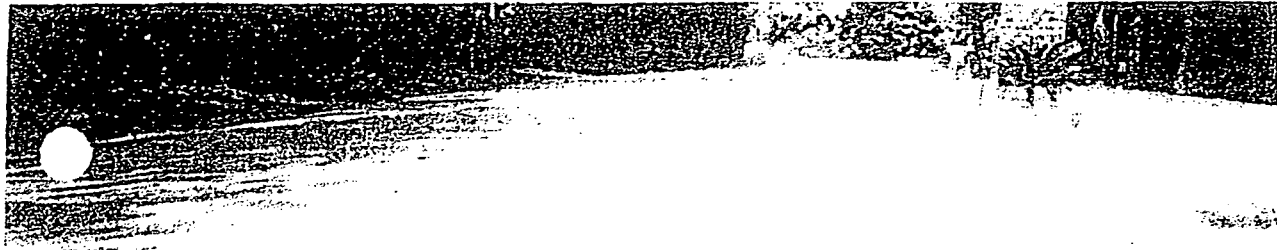


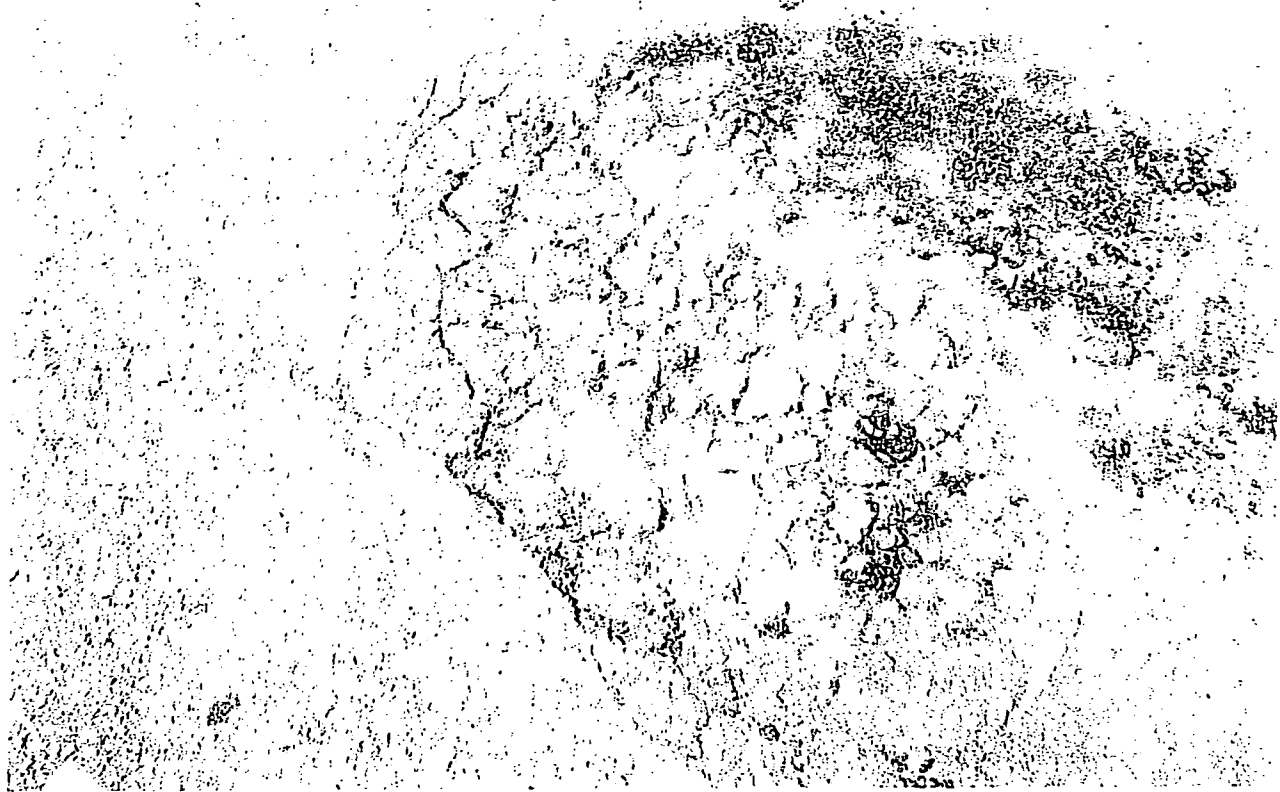
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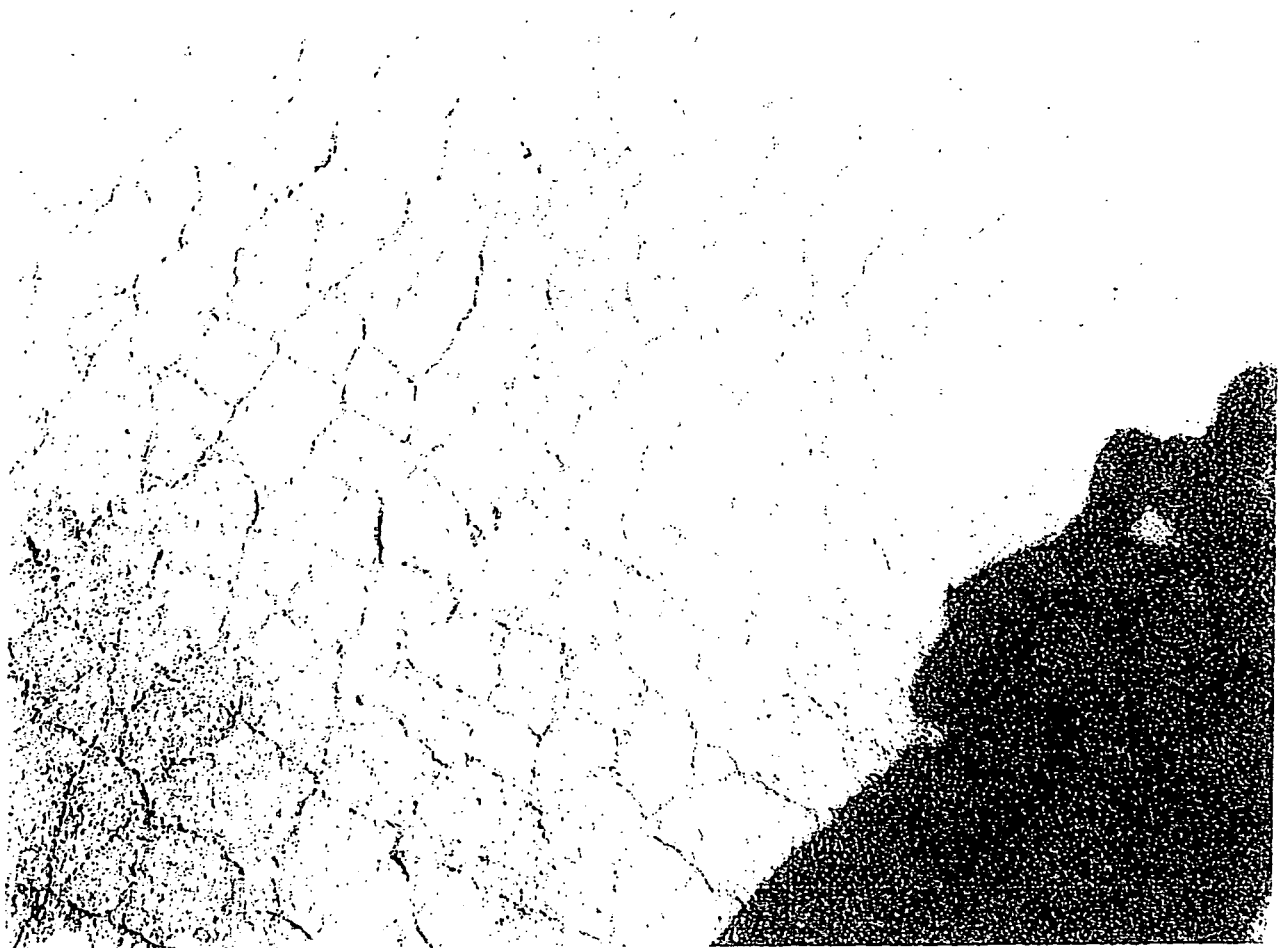
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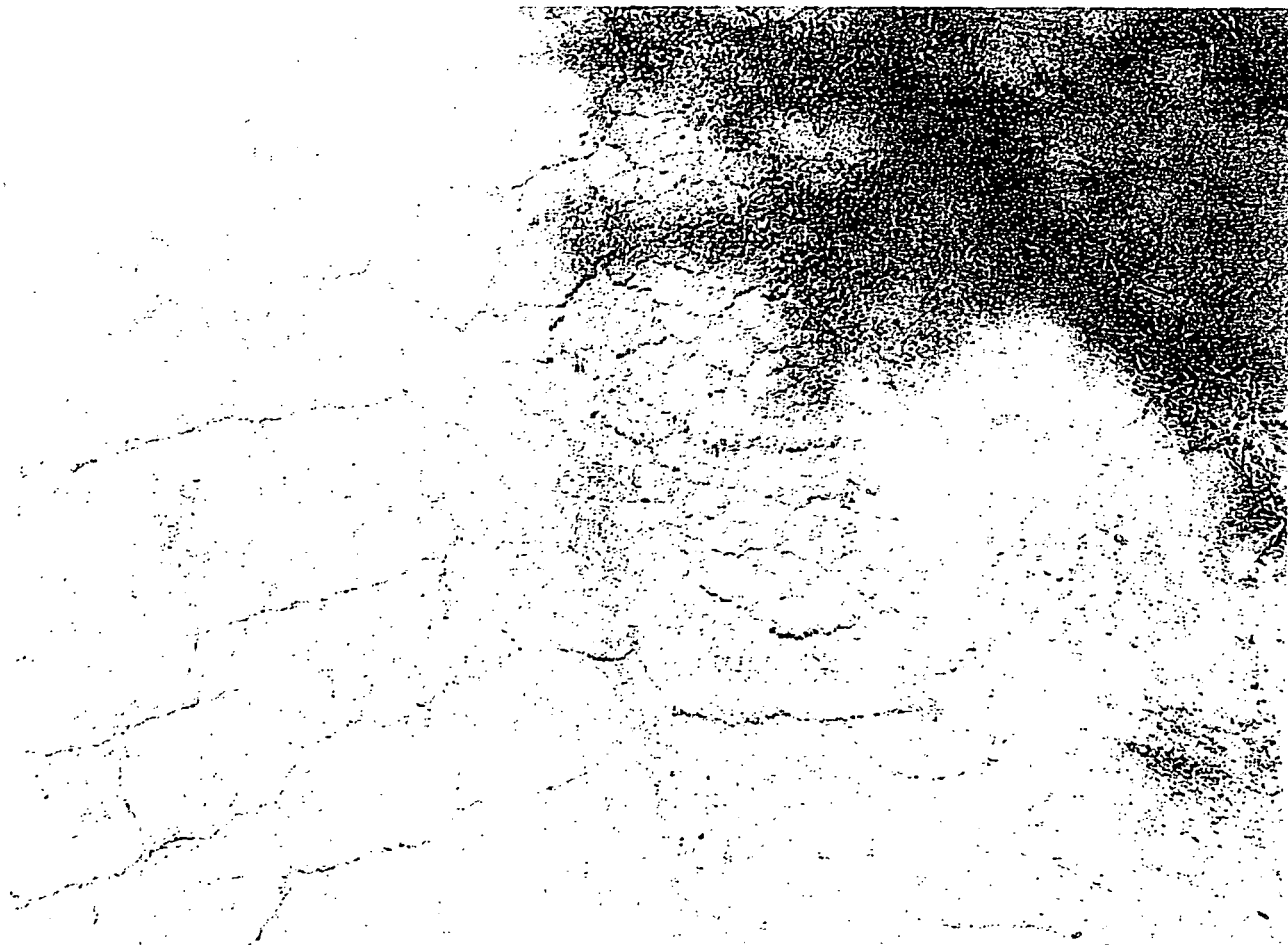






Record on Appeal -000185





THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

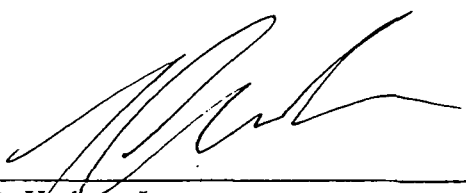
Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all materials proposed to be included by the parties and no matter which is irrelevant to the appeal. Additionally, the undersigned further certifies that the Record on Appeal is in compliance with the Order of the S.C. Supreme Court dated August 13, 2007.



John D. Hudson, Jr.
Shaun C. Blake
ELLIS, LAWHORNE & SIMS, P.A.
P.O. Box 2285
Columbia, SC 29202
(803) 254-4190
ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

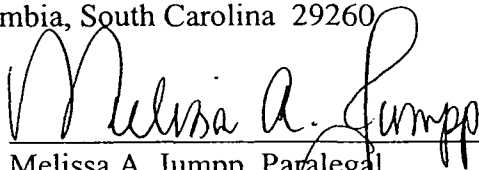
v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC Appellants.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., do hereby certify that I served a copy of Initial Reply Brief of Appellants this the 9th day of September, 2009 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Clay Walker, Esquire
Post Office Box 61140
Columbia, South Carolina 29260


Melissa A. Jumpp, Paralegal

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

Crystal Pines Homeowners Association, Inc.

Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants.

SUPPLEMENTAL RECORD ON APPEAL

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Marcus K. Gore, SC Bar #73647
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Attorneys for Appellants

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II. EXHIBITS

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III. CERTIFICATES

Certificate of Counsel 5

1 A It goes on. You didn't finish the sentence.

2 Q Explain it to me.

3 A Just read it. It says -- you read it. I'm
4 not a good reader.

5 Q Just to be sure we're clear, you can -- you're
6 able to read and understand written English well
7 enough to understand what this document says,
8 right?

9 A Yes, but you stopped in the middle of the
10 sentence.

11 Q And the sentence goes on to say "as nearly as
12 may be practicable in the same condition and
13 repair as originally paved."

14 A That's right.

15 Q Have the roads identified by name in this
16 paragraph been paved?

17 A Some of the names were changed.

18 Q Have the roads identified in this paragraph,
19 whether the names were changed or not, been
20 paved?

21 A Yes.

22 Q Has the development company contributed to the
23 repair of those roads in the same condition as
24 originally paved?

25 A The one time we extended roads, we did repair

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1 Torry Pines Lane and Crystal Pines Drive.

2 Q When was that?

3 A I don't know, exactly; about 1997, maybe, '98,
4 '97 or '98.

5 Q Do the roads identified in this paragraph need
6 additional repair, today?

7 A Absolutely.

8 Q Why doesn't the development company or its
9 successor have a responsibility to repair those
10 roads as originally paved?

11 A This is saying that if we damage -- and we
12 have agreed also with Lexington County Planning
13 Commission -- that if we damage the roads while
14 paving additional roads, we will repair it and
15 put it back to the original, which we did.

16 Q Show me where, in paragraph eleven, the
17 development company is only obligated to repair
18 damage. Show me where the word "damage" is.
19 I'll give you a blue pen, and you show me where
20 it says "damages" is all you have to repair. You
21 can circle the language you think says that.

22 A It uses different language.

23 Q Well, circle the language in paragraph eleven,
24 that you contend --

25 A It doesn't --

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0061330 Bk: 5012 Pg: 0242

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
DECLARATION OF RESTRICTIONS FOR CRYSTAL PINES,
SECTIONS I, III AND IV

WHEREAS, A "DECLARATION OF RESTRICTIONS" FOR CRYSTAL PINES, SECTIONS I AND III (erroneously entitled "DECLARATION OF RESTRICTIONS CRYSTAL PINES - SECTION 1") was filed on January 23, 1984 in the RMC Office (Now, Register of Deeds) for Lexington County in Deed Book 629 at page 316, affirming, to the homeowners of affected real estate in Crystal Pines, certain entitlements and imposing certain responsibilities and obligations;

AND, WHEREAS, A "DECLARATION OF RESTRICTIONS" FOR CRYSTAL PINES, SECTION IV (also erroneously entitled "DECLARATION OF RESTRICTIONS CRYSTAL PINES - SECTION 1") was filed on February 18, 1987 in the RMC Office (Now, Register of Deeds) for Lexington County in Deed Book 827 at page 101, affirming, to the homeowners of affected real estate in Crystal Pines, certain entitlements and imposing certain responsibilities and obligations;

AND, WHEREAS, within both the above-described documents, CRYSTAL LAKE LAND DEVELOPERS, INC. reserved unto itself and its successors and assigns, pursuant to paragraph 15 of each document, the authority to "amend these restrictions from time to time as it may see fit in the best interest of the subdivision";

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that DON E. PHILLIPS, in the State aforesaid, pursuant to the terms of the above-referenced documents, as assignee of CRYSTAL LAKE LAND DEVELOPERS, INC. (which corporation has since dissolved by Articles of Dissolution), and hereinafter occasionally referred to as "Developer" in this document, for and in consideration of the best interests of the subdivision, the clarification of the issues addressed herein and of the various benefits flowing from such amendments to the current and future lot owners and home owners in Crystal Pines, and desirous of conforming the various previous and several declarations affecting the subdivision, does hereby amend the Restrictions as follows:

(New Paragraph Added):

19. Notwithstanding any possible provision or implication to the contrary contained herein (which contrary provisions or implications are here expressly superceded) the individual Owner of each lot in Crystal Pines, Sections I, III or IV shall be responsible

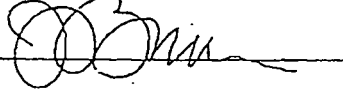
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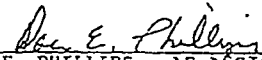
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Rec Fee: 10.00 St Fee: 0.00
Co Fee: 0.00 Pages: 2
LEX. CO. REGISTER OF DEEDS
DEBRA H. GUNTER

for the maintenance of all roads and common areas in the subdivision, such duties to be accomplished in a fair and equitable manner through mandatory contribution to and cooperation with a duly organized homeowners' association (under whatever title it has adopted), which association shall, once such association's formation is approved or ratified by Developer, be independent of and outside the control, authority or responsibility of Developer or Developer's successors or Assigns. Each lot Owner shall join and reasonably participate in such homeowner's association and such Owner shall be bound by the by-laws, regulations, self-imposed rules and duly-enacted resolutions of such Association, including but not limited to the payment of any required dues or regular and special assessments of the association to fund and to accomplish association activities, including, but not limited to, maintenance of all roads, amenities and common areas.

WITNESS the Hand and Seal of DON E. PHILLIPS, AS ASSIGNEE OF CRYSTAL LAKE LAND DEVELOPERS, INC., on December 17, 1998, in the year of our Lord one thousand nine hundred ninety-eight and in the two hundred twenty-third year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered:



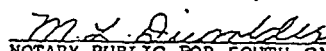


 DON E. PHILLIPS, AS ASSIGNEE OF
 CRYSTAL LAKE LAND DEVELOPERS, INC.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

PROBATE

PERSONALLY appeared before me the undersigned, who first being duly sworn, deposes and says that (s)he saw the above-named DON E. PHILLIPS, AS ASSIGNEE OF CRYSTAL LAKE LAND DEVELOPERS, INC., sign, seal, and as his act and deed deliver the within Deed for the uses and purposes therein mentioned; and, that (s)he, with the other witness whose signature appears herein along with the undersigned's, witnessed the execution thereof.

SWORN TO BEFORE ME THIS
 17th DAY OF December, 1998


 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES: 7-9-03

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

Crystal Pines Homeowners Association, Inc.

Respondent,

v.

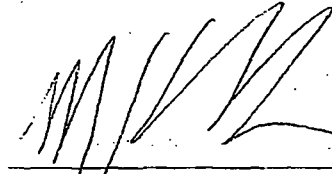
Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Supplemental Record on Appeal contains all materials proposed to be included by the parties and no matter which is irrelevant to the appeal. Additionally, the undersigned further certifies that the Appendix to the Record on Appeal is in compliance with the Order of the S. C. Supreme Court dated August 13, 2007.

October 16, 2009



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James Spence, Master-In-Equity

Case No. 06-CP-32-4364

Crystal Pines Homeowners Association, Inc.

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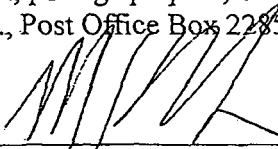
Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC.

Appellants.

PROOF OF DELIVERY

I certify that I have served Respondent's Supplemental Record on on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on October 16, 2009, addressed to their attorney of record John D. Hudson, Jr., Post Office Box 2285, Columbia, SC 29202.

October 16, 2009



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

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OCT 19 2009

SC Court of Appeals

Crystal Pines Homeowners Association, Inc.

Respondent

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants

FINAL BRIEF OF RESPONDENT

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October 19, 2009

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STATEMENT OF THE CASE

I. The Roads of Crystal Pines

In 1979, Appellant Don Phillip's predecessor, Crystal Lake Land Developers, Inc. ("CLLD"), began development of a subdivision in Lexington County called Crystal Pines. (R. p. 81, line 23-p. 82, line 1). By deed dated May 13, 1981 ("Deed"), CLLD conveyed the roads of Crystal Pines to the Crystal Lake Road Company ("CLRC"). (R. p. 125, ¶ 10). Although the Deed conveyed the roads to CLRC, CLLD retained specific obligations regarding maintenance of the roads. (*Id.* at ¶ 11). In particular, CLLD agreed to "carry out or cause to be performed all improvements, maintenance, and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved." (*Id.*). The Deed remains in full force and effect today. (R. 51, lines 13-19; R. p. 135, Fact 2).

Between 1981 and 1986, CLRC operated as an unincorporated association. It served as a primitive version of the homeowners' association for Crystal Pines. (R. p. 45, lines 4-7). On October 4, 1986, CLRC changed its name to the Crystal Pines Homeowners Association ("CPHOA"). (R. 19, lines 9-11; pp. 162-164). It incorporated nine months later. (R. p. 45, line 24-p. 46, line 2; pp. 133-134).

Beginning in 1996, CLLD/Phillips began efforts to transfer their road maintenance obligations to the CPHOA. CLLD's first attempt was the creation of a corrected deed to the roads. (R. pp. 143-145). The proposed deed granted title to the roads to CPHOA instead of the unincorporated CLRC. (*Id.*). In addition to this conveyance, the deed contained an attachment ("Exhibit B") which placed road maintenance obligations on CPHOA. (*Id.*).

On June 16, 1997, CLLD conveyed its interest in the remaining property of Crystal Pines to Appellant Don Phillips ("Phillips"). (R. pp. 141-142). In exchange for title to the property, Phillips paid CLLD \$392,679 and assumed CLLD's mortgage debt. (R. p. 87, lines 13-21; R. pp. 141-142). Shortly thereafter, in July 1997, Phillips dissolved CLLD. (R. p. 84, lines 1-9).

Even after CLLD transferred the interest in the property of Crystal Pines to Phillips, Phillips continued his effort to have Exhibit B executed. Phillips repeatedly proposed Exhibit B to the CPHOA in effort to transfer the road maintenance obligations away from CLLD and himself, and onto the CPHOA. (R. p. 73, line 24-p. 74, line 7; p. 76, line 21-p. 77, line 13; R. pp. 143-146). Despite repeated attempts by Phillips, the corrected deed and Exhibit B were never executed. (R. p. 75, line 23- p.76, line 3).

In 1998, Phillips again attempted to shift the road maintenance obligation away from himself. This time, he filed an amendment to the restrictions governing Sections I, III, and IV of Crystal Pines. (Supp. R. pp. 3-4, ¶ 19). This amendment contained a single new paragraph which obligated the Respondent to maintain the roads of Crystal Pines. *Id.*¹ The revised restrictions did not attempt to transfer ownership of the roads.

The roads of Crystal Pines have been in poor condition for some time. (R. p. 52, lines 16-18; R. p. 53, line 9-p. 55, line 6; p. 78, lines 12-23). In the late 1990's, CLLD/Phillips repaired the roads of Crystal Pines. (Supp. R. p. 1, line 22- p. 2, line 4). These repairs were designed to restore the roads to the same condition as originally paved. *Id.* Despite these repairs, the roads were in need of further maintenance. (R. p. 52, lines 16-18). CPHOA contacted Phillips about repairing the roads, but he refused to

¹ The Master concluded that these restrictions did not shift the road maintenance obligations. This conclusion is not appealed and is therefore the law of the case.

perform additional work. (R. p. 43, lines 11-19; p. 57, lines 17-22). CPHOA, at its own expense, was eventually required to undertake emergency repairs of the roads. (*Id.*, R. p. 55, lines 10-19). In March 2006, CPHOA retained Zack Smith's Paving and Sealcoating ("Zack Smith") to patch particular areas of severe damage. (R. p. 55, lines 10-24; R. pp. 147-149). Even after these repairs, the roads remain in need of repair. (R. p. 52, lines 16-18; p. 53, line 9-p.55, line 6). In June 2007, CPHOA retained Geo-Systems Design & Testing, Inc. ("Geo-Systems") to provide an estimate to repair the roads in their entirety. (R. p. 57, line 23-p. 58, line 23; pp. 165-187).

II. Crystal Pines Boat Ramp

CLLD constructed a boat ramp in Crystal Pines in 1980. (R. p. 95, lines 20-23). From the time of its construction, homeowners in Crystal Pines regularly used the boat ramp with the permission of CLLD/Phillips. (R. p. 95, line 20-p. 96, line 23; p. 97, lines 11-14). In 2004, Phillips abruptly installed a locked gate that prohibited access to the boat ramp. (R. p. 63, lines 6-12; p. 95, line 24-p. 96, line 7). Two years later, Phillips conveyed title to the boat ramp to his son, Wright L. Phillips. (R. p. 36, lines 10-17, pp. 154-161). Wright L. Phillips subsequently transferred title to the boat ramp to Appellant Crystal Pines Yacht Club, LLC in 2007. (R. p. 64, line 21-p. 65, line 1; pp. 154-161). The Yacht Club has continued to maintain the locked gate to the boat ramp. (R. p. 98, lines 6-9).

ARGUMENT

I. The Deed Unambiguously Places Road Maintenance Obligations on CLLD/Phillips.

A. Appellants' Deed Construction Argument Was Not Raised Before the Master and Therefore is Not Preserved.

Appellants seek to have this court construe the Deed in a fashion that was never presented to the trial court. To be preserved for appellate review, an issue must have been raised to and ruled upon by the trial judge. *Payne v. Payne*, 382 S.C. 62, 70, 674 S.E.2d 515, 519 (Ct.App. 2009); *South Carolina Coastal Conservation League v. S.C. Dep't. of Health and Environmental Control*, 380 S.C. 349, 379-80, 669 S.E.2d 899, 914-15 (Ct. App. 2008). "Issues not raised and ruled upon in the trial court will not be considered on appeal." *Id.*

A review of Appellants' brief makes clear that they did not raise this construction at trial. The brief refers to the Deed itself to argue that the Deed is entitled to a particular construction. There are no references to argument or testimony at trial because none was presented that would support this construction.

In fact, this exchange at the hearing explicitly demonstrates that Phillips could not identify the basis for the Appellants' construction that the obligation lies with the Respondent:

- Q: Circle the language [in the Deed] that says the Road Company is responsible for the road maintenance and repair.
A: I'll have to spend some time and read this sucker.
Q: Take your time.
A: Okay paragraph one.
Q: Circle the part of paragraph one that you say obligates the Road Company to maintain and repair the roads.
A: I think the whole document speaks for itself.
Q: So the whole document is what you have to look at –
A: Yes, you do.

- Q: -- to support your position that the Road Company, now the Association, is responsible for the road maintenance.
- A: Correct.
- Q: So you can't point to the specific paragraph in here that says that, can you?
- A: I can't pick the best paragraph; no.

(R. p. 91, line 11-p. 92, line 6). Phillips' testimony makes clear that this construction was not raised at trial.

B. The Deed Unambiguously Obligates Phillips to Maintain the Roads.

The Deed places the obligation to maintain the roads squarely on CLLD (and Phillips by virtue of succession), and the Master's conclusion is therefore correct. At issue is the following excerpt from the Deed:

The undersigned Crystal Lake Land Developer's Inc. by execution of this instrument hereby agrees at its own personal expense to open the unopened portion, as may be necessary for development, of Crystal Pines Drive, Knob Cone Raod [sic], Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described in Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance, and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved.

(R. pp. 125-126, ¶ 11).

Appellants contend that the Master erroneously blended two separate requirements under the Deed. This argument is simply flawed. Indeed, the Deed does impose two separate obligations on CLLD: (a) to open the unopened portion of certain roads; and (b) to "determine and carry out or cause to be performed all improvements, maintenance, and repair of the said roads...." *Id.*

The Master's conclusion regarding CLLD's maintenance obligation is entirely consistent with the Deed's plain language. CLLD was charged with initially opening the

unopened portions of the roads associated with the startup of the subdivision. Once those unopened roads were opened, CLLD was then charged with maintaining those roads.

In addition, the plain wording of the Deed indicates that the obligation lies with CLLD/Phillips. The opening phrase of the paragraph begins by placing obligations on CLLD:

“The undersigned Crystal Land Developer’s Inc....hereby agrees at its own personal expense...” *Id.*

The Deed then describes three separate predicate phrases which obligate CLLD to:

- (a) open the unopened portions of the roads;
- (b) pave the roads; and
- (c) repair and maintain the roads.

Id. Each of these phrases is modified by the general modifier “at its own personal expense.”

To the extent that Appellants argue that CLLD/Phillips’ personal obligation is limited to the first of the two clauses, this argument is a strained reading of the Deed. Although the phrase “at its own personal expense” does not appear in the second clause, CLLD/Phillips’ maintenance obligation is clear. Maintenance of the roads would clearly entail bearing the costs associated with maintaining the roads. Notably, when CLLD/Phillips attempted to shift the road maintenance obligations to the Respondent in Exhibit B, they did not use any phrase regarding expense. (R. p. 144, ¶ a). Rather the proposed language is phrased similarly to the Deed’s obligation. *Id.* (“The Grantee...shall adequately maintain the roadways for use....”).

II. Extrinsic Evidence Reinforces the Conclusion that Appellants Understood the Deed to Obligate CLLD/Phillips to Maintain the Roads.

Appellants claim that CLLD/Phillips' conduct following execution of the Deed is inconsistent with an understanding of road maintenance obligations.

Appellants attempt to misapply the standard of review regarding the Master's finding of CLLD/Phillips' intent. If the court finds a deed ambiguous, intent is a factual finding (*Santoro v. Schulthess*, 2009 WL 1918160, *10 (S.C. Ct.App. 2009)), and factual findings must be affirmed unless there is no evidence that reasonably supports the finding. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct.App. 1997). Appellants ignore the variety of evidence which reasonably supports the Master's conclusions regarding intent. The appellate court's role is to sustain the findings unless evidence to support them is absent, and the Court should give credence to the fact that the Master was in a better position to assess the credibility of the witnesses. *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct.App. 2004).

A. CLLD/Phillips Previously Repaired the Roads.

Appellants state that CLLD was a member of the Road Company with the same obligations as other members of the Road Company. Overwhelming evidence contradicts this assertion. It is undisputed that CLLD/Phillips undertook repairs of Torrey Pines Lane and Crystal Pines Drive in 1997 or 1998 at their own expense. (Supp. R. p. 1, line 22- p. 2, line 4). If CLLD/Phillips was simply another member of the Road Company, they would not have undertaken these repairs without seeking the assistance of the Respondent. Appellants essentially argue that even though CLLD/Phillips is not obligated to repair the roads, they voluntarily incurred the expense. As the Master

concluded, CLLD/Phillips' repair of the roads was consistent with their understanding that they were always responsible for maintenance.

B. CLLD/Phillips' Corrective Deeds Were an Effort to Shift Maintenance Obligations.

Appellants also claim that CLLD/Phillips' actions over the years indicate that they were concerned that the Road Company was never properly incorporated. While this may have been a valid concern of CLLD/Phillips, their efforts to correct this defect also indicate that their primary goal was to transfer maintenance obligations for the roads.

Appellants' argument regarding the corrective deed might make sense if the deed had simply been a conveyance. However, on each occasion that CLLD/Phillips presented the deed (1997, 1999, 2000), they also attached an exhibit ("Exhibit B") to the deed. (R. p. 73, line 20-p. 74, line 7; p. 77, lines 10-13; pp. 143-146). The exhibit's language indicates that CLLD's/Phillips' true purpose in correcting the Deed was to transfer the road maintenance obligations. Exhibit B succinctly states: "[Crystal Pines Homeowners Association] and its successors and assigns shall adequately maintain the roadways for use by vehicular and pedestrian traffic...." (R. p. 144, ¶ a). CLLD's/Phillips' insistence on the inclusion of the language in Exhibit B is consistent with only one understanding: they knew they had the road maintenance obligations and sought to shift them to the Respondent.

C. Phillips' Amended Restrictions Were An Effort to Shift Maintenance Obligations.

In addition to his repeated efforts to have CPHOA agree to the terms of Exhibit B, Phillips also attempted another method to transfer the road maintenance obligations. In 1998, Phillips filed an amended declaration of restrictions for Phases I, III, and IV of

Crystal Pines. (Supp. R. pp. 3-4, ¶ 19). Notably, this document made no effort to transfer ownership of the roads. *Id.* Rather, it added a single new paragraph to the current restrictions which read in part: "...[T]he individual Owner of each lot in Crystal Pines, Sections I, III, or IV shall be responsible for the maintenance of all roads and common areas in the subdivision."²

Again, Phillips' intention is clear. He understood that the road maintenance obligations lay with him and he sought to shift them to CPHOA.

D. Respondent Only Performed Road Maintenance After CLLD/Phillips Refused.

Appellants mischaracterize the testimony of Respondent's members regarding prior repairs to the roads. Respondent indeed did make repairs to the roads, but these repairs were always made under protest. The homeowners requested that CLLD/Phillips maintain the roads, but they repeatedly refused. (R. p. 46, lines 11-19; p. 57, lines 17-22). Appellants ignore the fact that CLLD/Phillips repaired the roads of their own volition while the repairs undertaken by the Respondent were emergency in nature. (R. p. 55, lines 10-19).

E. The Lexington County Guidelines Are Not Binding.

Appellants cite the Lexington County Planning and Development Division Guidelines as the basis for their understanding that the road maintenance obligations lay with the Respondent. The guidelines are merely that—guidelines. They are not authoritative particularly in light of a road maintenance agreement that explicitly places the maintenance obligation with CLLD/Phillips.

² The Master found that the amendments did not shift road maintenance obligations. That finding is unappealed and is therefore the law of the case.

III. The Master's Award of \$460,000 for a Breach of the Deed was Appropriate Because the Evidence in the Record Reasonably Supports the Award.

Appellants raise two arguments in response to the Master's use of the estimate of Geo-Systems and invoice of Zack Smith Paving to measure damages. First, they contend that they were only obligated to maintain the roads as originally paved, and the roads were never originally paved. Second, Appellants argue that the Master should not have relied on the estimates because there was no proof that they represented the proper measure of damages. The argument regarding the paving requirement was never raised, and the Respondent has produced evidence which meets the required standard for proof of damages.

A. Appellants' Arguments Regarding the Paving Requirements Were Never Raised and Therefore are Not Preserved.

Appellants' failure to raise the issue of paving at trial is fatal to their appeal. *Payne*, 382 S.C. at 70, 674 S.E.2d at 519; *South Carolina Coastal Conservation League*, 380 S.C. at 379-80, 669 S.E.2d at 914-15. Appellants argues for the first time on appeal that the original roads were gravel, and CLLD/Phillips had no obligation to maintain them beyond that condition. Appellants' sole basis for this contention is the Deed's reference to gravel roads. Appellants simply did not raise this issue at trial.

Even if it could be construed that Appellants raised this issue at trial, they sought no post-trial ruling from the Master. "When a trial court makes a general ruling on an issue, but does not address the specific argument raised by the party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal." *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct.App. 2005).

Appellants' failure to raise the paving issue in a post-trial motion precludes an appeal of the issue. *Id.*

B. Appellants Consented to the Admissibility of the Estimates and Did not Challenge their Contents.

Appellants consented to the admissibility of the estimate and the invoice. (R. p. 42, lines 3-16). They raised no objection as to their content or calculations, nor did they present any testimony that would contradict the content of either document. In particular, the estimate from Geo-Systems contained two estimates for repaving the roads. (R. p. 170, Section 4). Appellants never challenged the accuracy of either of the proposals. The Master weighed the evidence before him and selected one of the two proposals.

C. Appellants' Construction of the Phrase "Originally Paved" is Inconsistent With the Intent of the Deed.

Appellants contend that CLLD/Phillips are only obligated to maintain the roads in the condition in which they were originally paved. The Deed's use of the phrase "originally paved" is intended to refer to the condition of the roads when they are paved, regardless of when that occurs. Appellants ignore the fact that the roads were eventually paved (R. p. 135, Fact 5), and the Deed anticipates that CLLD's/Phillips' responsibility will be measured from that point forward. When CLLD/Phillips paved the roads, they set the standard for the level of maintenance that they would be required to maintain.

Phillips himself understood that the Deed's reference to paving referred to the future paving:

- Q: Has [CLLD] contributed to the repair of those roads **in the same condition as originally paved**?
- A: The one time we extended roads, we did repair Torrey Pines Lane and Crystal Pines Drive.
- Q: When was that?
- A: I don't know, exactly; about 1997, maybe '98, '97 or '98.

(Supp. R. p. 1, line 22- p. 2, line 4). (emphasis added). Phillips' testimony makes clear that he understood the phrase "originally paved" to indicate the paved condition of the roads *when they were eventually paved* by CLLD.

Appellants' argument would also make the phrase "originally paved" superfluous. Deeds should be interpreted to give meaning to every phrase and avoid superfluous content. *Johnson v. Glens Falls Ins. Co.*, 131 S.C. 253, 127 S.E. 14, 15 (1925); 17A Am. Jur. 2d Contracts § 377. By including the phrase "originally paved", CLLD/Phillips indicated that they expected the roads would be paved at some future date.

D. The Standard of Proof of Damages Sought by the Appellants is Excessive.

Appellants would also ask the Respondent to prove its damages to a particularly high degree of specificity. In contrast to the elevated burden sought by the Appellants, Respondent has met the required burden of proof for damages. "As a general rule, the evidence should be such as to enable the court...to determine the amount of damages with reasonable certainty or accuracy....Proof of the amount of loss with absolute or mathematical certainty is not required...." *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 392, 162 S.E.2d 705, 708 (1968). Evidence of damages is sufficient if "a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a reasonably close estimate of the loss." *Id.* at 392-93, 162 S.E.2d at 708. Respondent provided the court with evidence that permitted the Master to determine damages to a reasonable certainty.

As stated earlier, Phillips concedes that his repairs to the roads were intended to restore the road to the same condition as originally paved. (Supp. R. p. 1, line 22- p. 2, line 1). Respondent's approach to evaluating damages was reasonable in line with Phillips' understanding of the original paving. It retained a professional geotechnical engineer to evaluate the condition of the roadbed and make recommendations regarding how the roads should be repaired. (R. p. 29, line 23-p. 30, line 6).³

The charges for work done by Zack Smith were also appropriate in light of the circumstances. Emergency patching was necessitated by CLLD's/Phillips' refusal to participate in repairs despite the dangerous condition of the roads. (R. p. 46, lines 11-19; p. 55, lines 10-24). Zach Smith's work did not involve upgrading the road condition but rather patching critical areas. *Id.* Contrary to Appellants' assertion, the very nature of patching a road involves restoring it to its original condition.

IV. The Master Applied the Correct Standard for Successor Liability.

Appellants contend that the Master erred by utilizing the common law of successor liability. Instead, they suggest that that Master should have utilized the framework of S.C. Code § 33-14-106 and § 33-14-107. As a preliminary matter, the Appellants never raised this issue at trial nor sought a post-trial ruling. The Master utilized the proper framework for successor liability because Phillips is the successor to CLLD not a mere shareholder who received a distribution. Additionally, the successor liability framework is applicable to individuals as well as corporations.

³ Appellants consented to the admissibility of the estimate and did not challenge Geo-System's qualifications to produce an accurate estimate. His failure to raise the issues therefore precludes a challenge to the evidence presented.

A. Appellants' Argument Regarding the Appropriate Standard for Liability Was Never Raised at Trial or in a Post-Trial Motion and Therefore is Not Preserved for Review.

Appellants failed to raise this issue at trial, and therefore may not raise it for the first time on appeal. *Payne*, 382 S.C. at 70, 674 S.E.2d at 519; *South Carolina Coastal Conservation League*, 380 S.C. at 379-80, 669 S.E.2d at 914-15. Appellants contend that any liability should be apportioned according to the framework of S.C. Code § 33-14-106 or § 33-14-107 rather than the successor liability framework utilized by the Master. Appellants never presented evidence that he was a shareholder who received a distribution from the corporation. Additionally, they did not contest the admission of the deed which showed that Phillips purchased the assets of CLLD. (R. p. 42, lines 3-16; pp. 141-142).

Even if Appellants did raise the issue at trial, they failed to file a Rule 59 motion to preserve the issue for appeal. The failure to make a Rule 59(e) motion asking the trial court to rule on a particular issue not addressed in the order precludes an appeal of it. *Cowburn*, 366 S.C. at 41, 619 S.E.2d at 449. Appellants' failure to raise the statutory framework as the correct standard via post trial motion precludes an appeal of it. *Id.*

B. Phillips Took Title to the Assets of CLLD in an Asset Sale not a Shareholder Distribution.

Appellants' argument is premised on the fact that Phillips is not a successor to CLLD but rather a shareholder who received a distribution. The facts belie this conclusion; rather, it is obvious that Phillips purchased the assets of CLLD in 1997.

Q: ...Then, in 1997, [CLLD] sold the remaining property to you personally.

A: Yes.

(R. p. 82, lines 2-5). The deed conveying the property of CLLD to Phillips shows that he paid \$392,679.95 to CLLD while assuming certain mortgage indebtedness of the company. (R. pp. 141-142). This transaction did not involve a shareholder receiving a distribution. Rather, this is a clear example of an asset sale.

Appellants have presented no evidence that Phillips took a distribution. There is no corporate resolution or other proof of corporate action. Rather, the evidence repeatedly demonstrates that Phillips purchased the assets of CLLD. A purchase of assets from a corporation, even by a shareholder, is distinctly different than a shareholder distribution.

C. Respondent Did Not Seek to Hold Phillips Liable as a Shareholder but as a Successor.

Phillips' liability under the successor liability framework is premised on his status as a successor. It is irrelevant that he also happens to be a former shareholder of CLLD. Successors to corporations are liable for the predecessor's actions in particular circumstances. *Simmons v. Mark Lift Industries*, 366 S.C. 308, 622 S.E.2d 213 (2005). In contrast, the statutory liability of former shareholders is intended to govern an entirely different group. Even if Phillips did take a distribution from CLLD, a fact for which there is absolutely no proof in the record, this merely creates a separate mechanism to attach liability. Phillips' liability as the successor to CLLD is not precluded by his dual capacity as a shareholder. Respondent chose to pursue Phillips' liability as a successor, and the Master applied the appropriate standard for successor liability.

D. Successor Liability Applies to Individuals as Well as Corporations.

Appellants also argue that because Phillips is not a purchasing corporation, the successor liability framework is inapplicable. This argument lacks merit. The language of *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) makes clear that

the successor liability framework is designed to address the issue of successive individuals *or* corporations. *Id.*, 128 S.C. at 428, 123 S.E. at 98. The fact that the exceptions to the traditional successor liability framework are geared toward corporations is irrelevant. The *Brown* court was addressing the liability of a successor corporation and chose to phrase the exceptions in light of the case before it.

Any doubt about the exceptions articulated in *Brown* is resolved by the South Carolina Supreme Court's adoption of *Brown* in *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). *Simmons* notes that the *Brown* exceptions apply to "a successor *or* purchasing corporation." *Id.* at 312, 622 S.E.2d at 215 (emphasis added). The exceptions were not intended to be limited to corporate entities. The rules of successor liability were designed to test the relationship between the entities not their forms. See e.g., *Soo Line R. Co., on behalf of State v. B.J. Carney & Co.*, 797 F.Supp. 1472 (D.Minn. 1992); *Heather Hills v. Carolina Custom Dev. Co.*, 395 S.E.2d 154 (N.C.App. 1990); *Tift v. Forage King Industries, Inc.*, 322 N.W.2d 14 (Wis. 1982).

V. Respondent Established the Necessary Adverse Use for a Prescriptive Easement to the Boat Ramp.

Appellants claim that the Master's finding of a prescriptive easement for the boat ramp is erroneous because there is no evidence to establish twenty years of uninterrupted use. This argument is contradicted by the evidence. As new homeowners moved into Crystal Pines, they were advised of a community boat ramp. (R. p. 61, line 19-p. 62, line 5). Homeowners freely used the boat ramp on hundreds of occasions for many years without interruption. (R. p. 62, lines 16-21; p. 69, lines 22-24). However, in 2004, Phillips suddenly and without warning prevented access to the boat ramp with a locked gate. (R. p. 63, lines 6-12; p. 95, line 24-p. 96, line 7). After installing the gate, Phillips

required a fee to use the boat ramp in the future. (R. p. 63, line 22-p. 64, line 2). This regular use of the boat ramp establishes the necessary use of the boat ramp to meet the requirements necessary for a prescriptive easement. Additionally, Respondent can tack onto the usage of its predecessor if it cannot satisfy the requirement alone.

A. Respondent and Its Predecessor Are Not Distinct Entities.

Respondent does not need to rely on tacking to establish the necessary prescriptive period because Respondent is not a distinct entity from its predecessor. The Master found that CLRC served as the de facto homeowners' association between 1981 and 1986. (R. p. 5, paragraph 5). In 1986, "CLRC changed its name to the Crystal Pines Homeowners' Association." *Id.* The Master recognized that this change was nothing more than a "change...in name only." *Id.*

These findings are findings of fact. As such, they must be affirmed unless there is no evidence to reasonably support the finding. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct.App. 1997). Appellants have ignored the evidence which reasonably supports the Master's findings regarding the connection between the entities. The appellate court's function is to sustain factual findings unless there is no evidence to support them. *Laughon v. O'Braitis*, 360 S.C. at 524-25, 602 S.E.2d at 110. Additionally, the Court should recognize that the Master was in a better position to assess the credibility of witnesses. *Id.*

The succession between CLRC and CPHOA did not involve the creation of a new entity. Rather, CPHOA simply stepped into the shoes of CLRC. The homeowners association evolved from an unincorporated association (CLRC) into a corporation (CPHOA). Respondent therefore does not need to rely on tacking to establish the

prescriptive period because the same entity (albeit one with a different name) has always claimed the boat ramp under a claim of right.

B. Respondent Established the Necessary Privity Between It and Its Predecessor.

Even if Appellants could show that CLRC and CPHOA were distinct entities, the evidence supports a finding of a 20 year prescriptive period. The Master found that Respondent “succeeded to the rights...of CLRC.” *Id.* “‘Privity’ such as will permit the tacking of the adverse uses of a prescriptive claimant and claimant's predecessor in interest is the mutual or successive relationship to the same rights of property.” 28A C.J.S. Easements § 25; see also, *Hindall v. Martinez*, 591 N.E.2d 308, 311 (Ohio App. 1990). Although there is no formal conveyance between Respondent and CLRC, the two entities have maintained an uninterrupted continuity of possession. The privity necessary to tack adverse possession is only privity of possession, not necessarily privity of title. *Dale v. Stringer*, 570 S.W.2d 414, 417 (Tex.App. 1978) (“It is not privity of title but privity of estate or possession which constitutes an essential element of tacking.”); *Smith v. Brown*, 134 N.E.2d 823, 825 (Ind.App. 1956) (“The requisite privity is privity of possession and denotes merely a succession of relationship to the same thing.” 2 C.J.S. Adverse Possession § 155.

C. The Evidence in the Record Supports a Finding of Twenty Years of Uninterrupted Use.

To the extent that Appellants challenge the Master’s finding regarding when the use of the boat ramp began, the Master’s finding is supported by evidence in the record. The dates of usage are a finding of fact which must be affirmed unless there is no evidence that reasonably supports the finding. *Roberts v. Gaskins*, 327 S.C. 478, 486

S.E.2d 771 (Ct.App. 1997). There is ample evidence in the record that Crystal Pines homeowners used the ramp for over twenty years until their usage was abruptly ended by Phillips. The boat ramp was constructed in 1980, and Phillips testified that homeowners regularly used the boat ramp from then until 2004. (R. p. 95, line 20-p. 96, line 23; p. 97, lines 11-14). Respondent's use of the boat ramp only ceased when Phillips installed a locked gate at the entrance. (R. p. 69, lines 19-21).

CONCLUSION

Three of the issues raised by the Appellants were not raised at trial and are therefore not preserved for review: (a) the construction of the Deed; (b) the paving requirements of the Deed; and (c) the proper standard for successor liability. Additionally, there was no post-trial motion to alter or amend the judgment on any of these issues.

Appellants' proposed construction of the Deed contradicts the plain meaning of the Deed's explicit terms. The road maintenance obligations clearly remain with CLLD/Phillips. Additionally, even if the Deed is considered ambiguous, the extrinsic evidence overwhelmingly demonstrates that Appellants understood that CLLD/Phillips retained the road maintenance obligations. CLLD'S/Phillips' repeated efforts to shift the road maintenance obligations to Respondent demonstrate that understanding of the Deed.

Respondent's approach to establishing damages was completely appropriate. It retained experts in the field to provide estimates to repair the roads in line with the current paving of the roads. At trial, Appellants never questioned this approach to damages nor did they provide an alternative measure of damages.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

RECEIVED

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SC Court of Appeals

Crystal Pines Homeowners Association, Inc.

Respondent,

v.

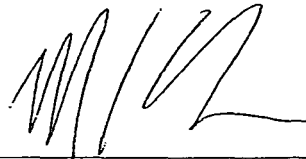
Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Respondent is in compliance with Rule 211(b) of the S.C.A.R.C.

October 19, 2009



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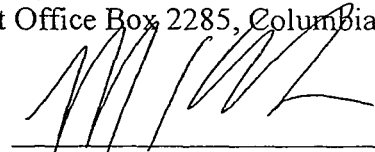
Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants.

PROOF OF DELIVERY

I certify that I have served Respondent's Final Reply Brief on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 2009, addressed to their attorney of record John D. Hudson, Jr., Post Office Box 2285, Columbia, SC 29202.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC. Appellants.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER-IN-EQUITY ERR IN HIS CONSTRUCTION OF THE 1981 DEED ENTERED INTO BETWEEN CRYSTAL LAKE ROAD COMPANY AND CRYSTAL LAKE LAND DEVELOPERS, INC. BY CONSTRUING THE DEED AS PLACING A PERPETUAL CONTRACTUAL OBLIGATION ON CRYSTAL LAKE LAND DEVELOPERS, INC. TO MAINTAIN ALL OF THE ROADS THAT WERE TITLED TO CRYSTAL LAKE ROAD COMPANY?
- II. DID THE MASTER-IN-EQUITY ERR IN AWARDING CRYSTAL PINES HOMEOWNERS' ASSOCIATION \$460,000.00 FOR BREACH OF THE 1981 DEED, WHICH ONLY CONTEMPLATED GRAVEL PAVING, BECAUSE DON PHILLIPS REFUSED TO PERSONALLY PAY FOR THE LEVEL OF ASPHALT PAVING DESIRED BY CRYSTAL PINES HOMEOWNERS' ASSOCIATION IN 2006 AND 2007?
- III. DID THE MASTER-IN-EQUITY ERR BY DETERMINING THAT A FORMER SHAREHOLDER OF A DISSOLVED LAND DEVELOPMENT CORPORATION HAS LIABILITY AS A "SUCCESSOR" UNDER THE "MERE CONTINUATION" DOCTRINE SET FORTH IN *BROWN V. AMERICAN RAILWAY EXPRESS CO.*, 128 S.C. 428, 123 S.E. 97 (1924) RATHER THAN LIABILITY UNDER S.C. CODE ANN. § 33-14-106 OR 33-14-107?
- IV. DID THE MASTER-IN-EQUITY ERR IN FINDING THAT THE CRYSTAL PINES HOMEOWNERS' ASSOCIATION OR SOME OF ITS MEMBERS ACQUIRED AN EASMENT BY PRESCRIPTION OR IMPLICATION TO USE THE BOAT RAMP NOW OWNED BY CRYSTAL PINES YACHT CLUB, LLC?

STATEMENT OF THE CASE

Respondent, the homeowners' association of the Crystal Pines subdivision ("CPHOA"), brought this action against Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC (collectively, "Appellants") in Lexington County, South Carolina on December 14, 2005 seeking an allocation of the rights and obligations of the parties under a deed of real estate, confirming title to a boat ramp and tennis courts located in the Crystal Pines subdivision ("Crystal Pines"), and seeking damages. (R. pp. 18-26.) Appellants timely answered, and Appellant Don Phillips ("Phillips") filed a counterclaim to require CPHOA to enforce Crystal Pine's covenants. (R. pp. 35-38.) CPHOA filed an Amended Complaint on July 19, 2007. (R. pp. 28-34.) On July 20, 2007, the parties filed a Consent Order of Reference. (R. pp. 1-3.) The matter was subsequently tried on September 30, 2008 before the Honorable James O. Spence, Master-In-Equity of Lexington County ("Master"), with an appeal to the South Carolina Court of Appeals.

In an Order filed January 20, 2009 ("Order"), the Master concluded that Phillips was the "successor" to Crystal Lake Land Developers, Inc. ("CLLD"), the now-dissolved corporation that was the development company for Crystal Pines. (R. pp. 9-10.) The court further concluded that as successor, the May 13, 1981 deed (the "Deed") between Crystal Lake Road Co. (the "Road Co.") and CLLD obligated Phillips, personally, to perform all improvements, maintenance and repair of all the roads in Crystal Pines ("Roads"). (R. pp. 6-12.) The court also concluded that the residents of Crystal Pines obtained a prescriptive easement to a boat ramp present in Crystal Pines ("Boat Ramp") owned by appellant Crystal Pines Yacht Club ("Yacht Club") at the time of trial. (R. pp.

13-15.) Finally for purposes of this appeal, the court concluded that property owners of Section IV of Crystal Pines ("Section IV Owners") acquired an implied easement to the boat ramp. (R. p. 15.) Appellants have timely perfected an appeal of this Order by filing its Notice of Appeal on February 27, 2009, and the case is now ripe for decision.

STATEMENT OF FACTS

CLLD owned the Roads in Crystal Pines prior to May 13, 1981. (R. p. 121.) The Roads were not originally paved with asphalt. (R. p. 135.) Rather, "[t]he original private road, approved by the county, was gravel and there was no requirement for future paving." (R. p. 135)

On May 13, 1981, CLLD executed the Deed conveying the Roads to Crystal Lake Road Co. (the "Road Co."). (R. p. 130.) All Crystal Pines property owners, including CLLD due to its ownership of acreage in the subdivision, were members of the Road Co. (R. p. 123.) The Deed contains explicit provisions for how the CLLD could vote as a member of the Road Co. (R. p. 123.) No owners of real property in Crystal Pines were permitted to "disclaim, terminate, or withdraw ... any of his obligations" as a shareholder of the Road Co. (R. p. 123.) These obligations included paying assessments to provide for all of the Road Co.'s "expenditures." (R. p. 124.) It is undisputed that "the collection of maintenance fees for the purposes of maintaining the subdivision roads was agreed to by all lot owners at the time of the contract." (R. p. 136.) (emphasis added)

Under paragraph 1 of the Deed, the owners of real property in Crystal Pines were granted an easement appurtenant to each portion of real property in Crystal Pines for access, ingress, and egress over these roads "to be held and maintained for the use and benefit of such owners...." (R. p. 122.) The Road Co. received title to Crystal Pines

Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane under the Deed, and thus it owned the same as of May 13, 1981. (R. p. 125.) Specifically, the Road Co. agreed to "hold and deal with the same and such other assets as it may receive from time to time...." under paragraph 10 of the Deed. (R. p. 125.) The Deed explicitly contemplates that the Road Co. would incur maintenance and repair costs, and the Road Co. had a right to recover any maintenance and repair costs it incurred as a result of the negligent conduct of the property owners. (R. p. 126.)

CLLD maintained an obligation under the Deed to open additional portions of these same roads in Crystal Pines as may be necessary for development. Specifically, paragraph 11 of the Deed provides:

The undersigned Crystal Lake Land Developers Inc. by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion, as may be necessary for development, of Crystal Pines Drive, Knob Cone Road [sic], Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance, and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved.

(R. p. 125.) Similarly, CLLD retained the right to extended Torrey Pine Lane into other contiguous property owned by CLLD "at its sole option and expense" and "subject to the same terms and conditions as apply to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane...." (R. p. 130.)

While the Road Co. was in existence, it performed all maintenance on the roads, and it was responsible for all costs associated with the repairs. (R. p. 46, lines 2-19; R. p. 57, line 7-13.) CLLD, like every other Crystal Pines property owner, was a member of the Road Co. at this time. (R. pp. 121-132.) The other property owners of Crystal Pines

addressed any issues with CLLD, Phillips, the roads, and "more far-reaching concerns of the development" through the internal conduct of the Road Co. (R. pp. 162-164.) Similarly, CLLD and Phillips were only required to pay for repairs through the payment of - and only to the extent of - their dues to the Road Co. (R. p. 57, lines 7-13.)

The Road Co.'s ownership and maintenance of the roads is consistent with the Lexington County Planning and Development Division Guidelines. (R. p. 135.) The Guidelines explicitly provide:

[T]he developer remains responsible for the road and storm drainage system maintenance until the Final Plat is approved and recorded. For subdivisions with road and storm drainage to be privately maintained, the subdivision lot owners will collectively assume that maintenance responsibility upon approval of the Final Plat[.]

(R. p. 135.) (emphasis in exhibit) On April 25, 1986, the Final Plat of Crystal Pines Section IV was approved by the Lexington County Planning Commission. (R. p. 153.) The Final Plat depicted the boat ramp and referred to the tract of land as "community commons." (R. p. 153.) The boat ramp was first installed in 1980. (R. p. 95, lines 20-23.) Property owners in Crystal Pines were able to use the boat ramp from the early 1980's with CLLD's, and later Phillips', express permission. (R. p. 67, lines 8-19.)

The roads in Crystal Pines were not paved until 1991 (R. p. 135.) George Bugenske ("Bugenske"), who testified at trial, purchased his property in Crystal Pines during 1993 and moved in during 1994, after the roads were paved. (R. p. 67, lines 11-13.) On June 13, 1997, CLLD transferred title of all of its real estate in Crystal Pines to Phillips in exchange for \$392,679.95 in cash and Phillips' assumption of a mortgage in the amount of \$185,470.05. (R. pp. 141-142.) On July 28, 1997, CLLD was formally dissolved with the South Carolina Secretary of State. (R. p. 82, lines 22-25) CLLD made

a final distribution of an unidentified amount to Phillips upon dissolution. (R. p. 84, lines 10-15.)

As early as 1986, the members of the Road Co. intended for the Road Co. to change its name to include the title “homeowners association” but otherwise continue to operate and be governed under the terms of the Deed. (R. pp. 162-164.) On June 30, 1997, Josephine Phillips, wife of Appellant Phillips, filed CPHOA’s articles of incorporation with the South Carolina Secretary of State. (R. pp. 133-134.) Louis A. Lapine (“Lapine”), another Crystal Pines property owner who testified at trial, first purchased property in Crystal Pines during 1999 and moved in during 2000. (R. p. 71, lines 3-6.) Lapine testified that he became involved in the formation of CPHOA in 1999 at Phillips’ request. (R. p. 71, lines 11-20.)

CPHOA’s members, who included CLLD, intended it to be the successor of the Road Co. (R. p. 93, lines 3-7.) Therefore, the Road Co. eventually wound down and was replaced in operations by CPHOA. (R. p. 46, lines 20-22.) Phillips, a resident of Crystal Pines, and individually a member of CPHOA, continued to market some of the parcels of land in Crystal Pines after he received title to the real property from CLLD. (R. p. 93, lines 15-17.)

In 2004, the president of CPHOA provided Phillips with two yellow posts to place on the boat ramp to secure it. (R. p. 95, line 24 – p. 96, line 12.) On December 11, 2006, Phillips deeded the boat ramp to Wright L. Phillips, his son, in exchange for \$50,000.00. (R. pp. 154-161.) On January 25, 2007, Wright L. Phillips transferred the boat ramp to the Yacht Club. (R. pp. 154-161.) Access to the boat ramp is now only available to members or owners of the Yacht Club.

STANDARD OF REVIEW

A case with legal and equitable issues, such as this one, presents a divided scope of review. *Perry v. Heirs at Law & Distributees of Gadsen*, 313 S.C. 296, 299, 437 S.E.2d 174, 177 FN3 (Ct.App.1993). When legal and equitable causes of action are maintained in one suit, each retains its own identity as legal or equitable. *Future Group II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 FN6 (1996). However, the Court reviews all questions of law de novo. *Fesmire v. Digh*, Op. No. 4549 (S.C.Ct.App. filed May 27, 2009) (Shearouse Adv.Sh. No. 22 at 41)

The interpretation and construction of a deed is an equitable matter. *Heritage Fed. Sav. and Loan v. Eagle Lake and Golf Condominiums*, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct.App.1995); *Wolf v. Hayes*, 161 S.C. 293, 159 S.E. 620, 621 (1931). In "Finding of Fact 4," the Master construed the Deed as placing an obligation on CLLD to solely maintain the roads. (R. p. 5.) This Court is entitled to interpret or construe the Deed in accordance with its own view of the preponderance of the evidence. *Fesmire*, Op. No. 4549 (Shearouse Adv.Sh. No. 22 at 41) ("In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence.")

"A cause of action for breach of contract seeking money damages is an action at law." *Laser Supply and Serv., Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139, 143 (Ct.App.2009). "The determination of the existence of an easement is an action at law." *Hartley v. John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 153, 584 S.E.2d 386, 390 (Ct.App.2003). "In an action at law tried by a judge without a jury, the appellate court will correct any error of law, but it must affirm the trial court's factual

findings unless no evidence reasonably supports those findings.” *Frazier v. Smallseed*, 384 S.C. 56, 682 S.E.2d 8, 11 (Ct.App.2009).

ARGUMENT

I. THE MASTER ERRED IN HIS CONSTRUCTION OF THE DEED AS PLACING A PERPETUAL CONTRACTUAL OBLIGATION ON CLLD TO MAINTAIN ALL OF THE ROADS TRANSFERRED UNDER THE DEED, WARRANTING REVERSAL OF THE CASE.

“The rules applicable to the construction of contracts are applicable to the construction of covenants in deeds.” *Houck v. Rivers*, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct.App.1994.) “The primary purpose of all rules of contract construction is to determine the intent of the parties.” *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct.App.2004). In determining the parties' intentions, the court must read the contract as a whole. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). “It is a question of law for the court whether the language of a contract is ambiguous.” *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

“Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract.” *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement; and (2) is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business. *Laser Supply*, 676 S.E.2d at 144. “Once the court decides that the

language is ambiguous, evidence may be admitted to show the intent of the parties.” *Id.*

“The determination of the parties' intent is then a question of fact.” *Id.*

First, the Master erred in his construction of the Deed so as to find a contractual obligation on the part of CLLD to maintain all of the roads. This Court is entitled to interpret or construe the Deed with its own view of the preponderance of the evidence. *Fesmire*, Op. No. 4549 (Shearouse Adv.Sh. No. 22 at 41).

Appellants assert that the Deed, read as a whole, is not ambiguous. (R. pp. 121-132.) Rather, Appellants believe that the Deed unambiguously transfers the roads to the Road Co. and only places an obligation on CLLD to open, at its own expense, the then-unopened portions of the roads with gravel pavement during development and preserve the status of those portions of the roads during development.

The Master did not make a finding in his Order stating whether he deemed the Deed to be ambiguous. However, the Master must have deemed it ambiguous, because he relied on extrinsic evidence to determine the meaning of the Deed. (R. p. 10.) To the extent the Deed is ambiguous, the extrinsic evidence presented at the trial demonstrates that CLLD and the Road Co. intended for the Road Co. to take over the maintenance of the roads, while CLLD remained responsible for providing gravel pavement for the newly-developed portions of the roads and repairing any damages that occurred to the roads as a result of its development.

A. UNDER ITS UNAMBIGUOUS TERMS, THE DEED DOES NOT OBLIGATE CLLD TO MAINTAIN ALL OF THE ROADS.

The Deed was entered into on May 13, 1981. (R. pp. 121-132.) The Deed grants title of the roads to the Road Co. and provides an easement over the roads to the property

owners in Crystal Pines. (R. pp. 121-122.) The Road Co. was formed for the purposes of taking title to the roads and to "hold and deal with the same and such other assets as it may receive from time to time...." on behalf of its members. (R. p. 125.) All property owners in Crystal Pines were required to be members of the Road Co., and they could not denounce their interests in or obligations to the Road Co. (R. p. 123.) The Deed explicitly contemplates that the Road Co. would incur maintenance and repair costs, and the Road Co. had a right to recover any maintenance and repair costs it incurred as a result of the negligent conduct of the property owners. (R. p. 126.) Thus, there is no doubt under the Deed that the Road Co. was created for the very purpose of taking over the roads from the CLLD.

Nevertheless, CPHOA improperly persuaded the Master to find that the following provision of the Deed obligated CLLD, at its own expense, to continue to maintain the roads despite transferring all interest in the same to the Road Co. - of which CLLD was itself a member:

The undersigned Crystal Lake Land Developer's Inc. by execution of this instrument hereby agrees at its own personal cost and expense **to open the unopened portion**, as may be necessary for development, of Crystal Pines Drive, Knob Cone Road [sic], Red Fox Trail, Whippoorwill Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance, and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved.

(R. p. 125.) (emphasis added) At trial, CPHOA cherry-picked certain phrases from the Deed to persuade the Master to adopt an unintended construction of the Deed:

Q: Paragraph 11 starts off, "The undersigned, [CLLD], by execution of this instrument, hereby agrees at its own personal cost and expense" - - **that's what the first two lines say, right?**

A.: It continues to say - -

Q: Is that what the first two lines say?

A: Yes.

Q: If you go down about three lines, does it continue to say, "determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as practicable in the same condition and repair as originally paved"?

A: It says "cost and expense to open the unopened portion" and it continues to say what you just read.

(R. p. 85, line 18 – p. 86, line 9.) The two sections alluded to by CPHOA are in two separate clauses, one containing the "at its own personal cost and expense" phrase and the other containing the "all improvements, maintenance, and repair of the said roads" phrase. CPHOA tried to blend only portions of these two clauses together to depict the Deed as requiring CLLD to maintain the roads, while ignoring the phrases in the sentence that limits CLLD's personal obligation to opening the "unopened portion" of the roads. By adopting this myopic, erroneous view and ignoring every other portion of the Deed, the Master committed reversible error. (R. pp. 5-6; R. p. 9).

B. EXTRINSIC EVIDENCE ESTABLISHES THAT THE PARTIES TO THE DEED INTENDED TO CONVEY THE ROAD MAINTENANCE OBLIGATIONS TO THE ROAD CO.

The Master relied on extrinsic evidence of Phillips' behavior to construe the Deed. (R. p. 10.) Specifically, the Master relied on Phillips' conduct, occurring over fifteen years after the execution of the Deed, to determine the intent of the parties to the Deed on May 13, 1981. The Master found Phillips' conduct of performing repairs of the roads in the late 1990's and his attempt to obtain a corrective deed from CPHOA in 1999

and 2000 as evidence of Phillip's knowledge that the Deed obligated CLLD to repair the Roads. (R. p. 10.)

However, the Master ignored the clear reason in the record why Phillips attempted to obtain a corrective deed in 1999 and 2000. Specifically, Phillips was concerned at that time that the Deed was effective at all because the Road Co. was never formerly created with the Secretary of State.¹ (R. p. 136; R. p. 48, lines 6-13.) (emphasis added). Phillips believed that the Road Co. therefore never "technically accepted the conveyance of roads at Crystal Pines because Crystal Pines Road Company is not a legal entity...." (R. p. 136). Accordingly, in interpreting or construing the Deed with its own view of the preponderance of the evidence, this Court should not adopt CPHOA's misconstruction of the Deed. *Fesmire*, Op. No. 4549 (Shearouse Adv.Sh. No. 22 at 41).

The overwhelming weight of the extrinsic evidence establishes that the parties, in fact, intended for the road maintenance to be performed by the Road Co. rather than CLLD. First, Phillips is the only witness who provided testimony at trial who was involved in the formation of the Deed and had any knowledge of the facts and circumstances surrounding its formation.² Phillips' undisputed statement stipulated into evidence states that "[t]he collection of maintenance fees for the purposes of maintaining the subdivision roads was agreed to by all lot owners at the time of the [Deed]." (R. pp.

¹The parties did not contest the validity of the Deed or the conveyance of the roads at the hearing, and the case was tried and ruled upon as if the Deed was properly entered into and conveyed ownership of the Roads to the Road Co. As this ruling is unchallenged on appeal, it is the law of this case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

²As stated above, Bugenske did not purchase his property in Crystal Pines until 1993 (R. p. 67, lines 11-13.), and Lapine did not purchase his property in Crystal Pines until 1999. (R. p. 71, lines 3-6.) Lapine even testified that the "only thing I knew about the Homeowners' or the Road Company prior to that time was that Mrs. Phillips had incorporated Crystal Pines Homeowners' Association. That's the only activity I knew about." (R. p. 71, line 24 – p. 72, line 3.) (emphasis added).

135-138.) Phillips explained that the parties to the Deed only intended CLLD to open unopened portions of the roads and to repair the damage to those portions of the roads caused during development. (R. p. 86, line 13 – p. 87, line 12.)

Moreover, while the Road Co. was in existence, it performed all maintenance on the roads, and it was responsible for all costs associated with the repairs. (R. p. 46, line 2 – p. 47, line 19; R. p. 57, lines 7-13.) Rather than being separate and apart from the Road Co., CLLD was a member of the Road Co., with dues, voting rights, and all other obligations and benefits of the other property owners in Crystal Pines. (R. pp. 121-132.) CLLD's obligations for regular road maintenance was no different than the other members of the Road Co., and Bugenske admitted that Phillips always asserted that CLLD's obligations for regular road maintenance only extended to its dues to the Road Co. (R. p. 57, lines 7-13.)

This construction is completely consistent with the Lexington County Planning and Development Division Guidelines at that time, which provided:

[T]he developer remains responsible for the road and storm drainage system maintenance until the Final Plat is approved and recorded. For subdivisions with road and storm drainage to be privately maintained, the subdivision lot owners will collectively assume that maintenance responsibility upon approval of the Final Plat[.]

(R. p. 135.) (emphasis in exhibit) CLLD was fully aware of this guideline. (R. p. 135.) There is no conceivable justification why CLLD would voluntarily relinquish the Roads and yet voluntarily retain an indefinite obligation to maintain the roads solely at its own expense rather than the Road Co. – the very entity that CLLD established, participated in as a controlling member, and used as the entity to perform maintenance and repair of the roads from its inception. (R. p. 46, lines 2-13.)

“It is a cardinal rule of contract construction, as cited in *Klutts*, that the court strives to carry out the intent of the parties.” *Wilbur Smith and Assocs. v. Nat’l Bank of S.C.*, 274 S.C. 296, 263 S.E.2d 643, 645 (1980) (citing *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (1977)). The vast weight of extrinsic evidence establishes that the parties to the Deed did not intend for CLLD to be solely responsible for the road maintenance. Therefore, the Master erred in construing the Deed contrary to the parties’ intent. (R. pp. 5-6; R. pp. 9-10.)

II. BECAUSE THE ROADS WERE “ORIGINALLY PAVED” WITH GRAVEL AT THE TIME THE DEED WAS EXECUTED, THE MASTER ERRED BY FINDING THAT A FAILURE TO MAINTAIN AND REPAIR ASPHALT PAVEMENT ON THE ROADS CONSTITUTES A BREACH OF CONTRACT UNDER THE TERMS OF THE DEED.

In order for CPHOA to recover under a breach of contract, it first must establish that Phillips breached some duty owed under the Deed. *Dukes v. Smoak*, 181 S.C. 182, 186 S.E. 780, 781 (1936). Similarly, CPHOA must establish a proper measure of damages flowing from the alleged breach. *Depositions and . . . , Inc. v. Campbell*, 305 S.C. 173, 175, 406 S.E.2d 390, 391 (Ct.App.1991). The Master erred by finding a breach of the Deed because the Deed does not obligate CLLD or Phillips to maintain any asphalt paving of the roads at all, much less the level of paving recommended by Geo-Systems Design & Testing (“Geo-Systems”) and performed by and Zack Smith’s Paving and Sealcoating (“Zach Smith”). Accordingly, the Master’s award for damages based on the CPHOA’s breach of contract claim must be reversed.

A. SINCE CPHOA PRESENTED NO EVIDENCE SUPPORTING THE CONCLUSION THAT THE DEED OBLIGATES ANY PERSON TO PAVE THE ROAD WITH ASPHALT AND TO THE SPECIFICATIONS OF GEO-SYSTEMS OR ZACK SMITH, THE RECORD FAILS TO SUPPORT A BREACH OF THE DEED.

As discussed above, CLLD had no obligation to maintain the Roads at all. However, even under the Master's own finding of fact relating to CLLD's obligation under the Deed, CLLD would have only retained an obligation "to carry out or cause to be performed all improvements, maintenance and repair of said roads **as nearly as may be practicable in the same condition and repair as originally paved.**" (R. p. 5.) (emphasis added) This language comes directly from the Deed. (R. p. 125.) The Order contains no finding as to what "condition" or level of "repair" the Roads were in when they were "originally paved," much less a finding that the Roads were originally paved in asphalt and to the level recommended by Geo-Systems or performed by Zack Smith. The Master could make no such finding because, critically, CPHOA presented no evidence on the original condition or level of repair of the road other than stipulated Exhibit Number Three, which demonstrates only that the roads were not "originally paved" with asphalt at all. Accordingly, there is no evidence to support the Master's conclusions of law that Phillips breached the Deed. (R. pp. 11-12.)

The only evidence in the record relating to the state of the roads at the time of the Deed is as follows: "The original private road, approved by the county, was gravel and there was no requirement for future paving." (R. p. 135.) The record lacks any basis for the Master's conclusion that the Deed requires CLLD or Phillips to maintain the paving of the roads with asphalt in accordance with Geo-System's recommendations. The record also lacks any basis at all for the Master to conclude that the repairs performed by Zack Smith were necessary to restore the roads to their original, gravel-paved state.

Were the Master's decision on this issue allowed to stand, it would result in a

significant and unjustified betterment to CPHOA at Phillips' personal expense. "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct.App.2008).

Where there is no conflicting testimony, or where there is no evidence upon a material matter, the question presented is one of law. *Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71, 74 (1921). The only evidence relating to the status of the roads as originally paved demonstrates that they were not asphalt-paved at all. (R. p. 135.) Although the pavement is in need of repair, there is no holding in the Order that the roads are in a materially worse condition than their original, gravel-paved condition. Accordingly, the Master erred, as a matter of law, by finding a breach of the Deed based on Phillips' refusal to maintain the roads consistent with the new, asphalt paving recommendations of Geo-System's and the asphalt repair work of Zack Smith. The Master's conclusion that Phillips breached the Deed must be reversed.

B. THE MASTER ERRONEOUSLY RELIED ON THE ESTIMATE OF GEO-SYSTEMS AND THE INVOICE OF ZACK SMITH TO ESTABLISH THE MEASURE OF DAMAGES.

The Master determined that Geo-Systems' \$450,000.00 estimate included a 2.5 inch asphalt surface course and a 10 inch macadam base course. (R. p. 7.) For the purposes of this appeal, this finding is uncontested. Similarly, the Master determined that Zack Smith's invoices for asphalt repair work amounted to \$10,000.00. (R. p. 7.)

The Master incorrectly concluded that Phillips breached the terms of the Deed by failing to repair the asphalt pavement as Geo-System's recommended, and, in accordance

with Geo-System's estimate, he erroneously awarded CPHOA damages in the amount of \$450,000.00. (R. p. 11.) The Court further awarded CPHOA an additional \$10,000.00 in damages because the CPHOA paid Zack Smith \$10,000.00 to repave potholes and cracks in the asphalt pavement of the roads. (R. pp. 11-12.) These conclusions and awards are erroneous because there is absolutely no evidence in the record to support the finding that CLLD or Phillips was required to improve the roads so as to maintain a 2.5 inch asphalt surface course, maintain a 10 inch macadam base course, or even repair potholes or cracks in the asphalt as performed by Zack Smith. There is no evidence in the record that Geo-Systems' and Zack Smith's asphalt repair work is consistent with how the roads were "originally paved." (R. p. 5; R. p. 125.)

"Recovery must be supported by evidence of facts, circumstances, and data justifying an inference that the damages awarded are a just and reasonable compensation for the injury suffered." *Norell Forest Products v. H & S Lumber Co.*, 308 S.C. 95, 100, 417 S.E.2d 96, 99 (Ct.App.1992), *aff'd in part, rev'd in part on other grounds*, 310 S.C. 368, 426 S.E.2d 800 (1993). There is no evidence in the record to establish that this recovery is available to CPHOA under the terms of the Deed. Accordingly, the Master erred in awarding judgment for damages in the amount of \$460,000.00 against Phillips for the alleged breach of the Deed. (R. p. 11.) The monetary judgment in favor of CPHOA must be reversed.

III. THE MASTER ERRED BY DETERMINING THAT A FORMER SHAREHOLDER OF A DISSOLVED LAND DEVELOPMENT CORPORATION HAS LIABILITY AS A “SUCCESSOR” UNDER THE “MERE CONTINUATION” DOCTRINE RATHER THAN UNDER S.C. CODE ANN. § 33-14-106 OR 33-14-107.

Second, this decision must be reversed as a matter of law because the Master improperly concluded that Phillips was a “successor” of CLLD under the “mere continuation” doctrine rather than a shareholder subject to the provisions of S.C. CODE ANN. § 33-14-106 or S.C. CODE ANN. § 33-14-107(d)(2). Specifically, the Master found that CLLD transferred its interest in the remaining real property in Crystal Pines to Phillips for the sum of \$392,679.05 and Phillips’ assumption of CLLD’s mortgage indebtedness of \$185,470.05. (R. p. 5.) CLLD was dissolved on July 28, 1997. (R. p. 6.) At the time of the dissolution, Phillips was the sole shareholder of CLLD. (R. p. 6.) At the time of dissolution, CLLD transferred its remaining assets to Phillips. (R. p. 6.)

Phillips does not challenge these factual findings. Rather, Phillips challenges the Master’s conclusion of law that these facts establish that Phillips is a “successor” under the test established in *Brown v. Am. Ry. Express Co.*, 128 S. C. 428, 123 S. E. 97 (1924). (R. pp. 9-10.) In *Brown*, the South Carolina Supreme Court found that:

In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) That there was an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; (c) **or that the purchasing corporation was a mere continuation of the selling corporation;** or (d) that the transfer was pretensive of the transaction fraudulent in fact.

Id. (emphasis added). The Supreme Court affirmed *Brown* in *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) and stated that: “Our opinion in *Brown* sets forth the proper test to determine, in a products liability action,

whether there is successor liability of a company which purchases the assets of an unrelated company.” *Id.* (emphasis added).

The facts found by the Master do not support this conclusion in two important respects. First and foremost, there is a statute that governs the liability of shareholders for the debts of a dissolved corporation that paid the shareholder a distribution. The record contains no holding to determine whether CPHOA’s claim would be deemed a known claim or an unknown claim. Assuming, *arguendo*, that CPHOA’s claim would be classified as an unknown claim, S.C. CODE ANN. § 33-14-107(d)(2) provides a clear statutory scheme whereby a shareholder of a dissolved corporation may be held liable for the obligations of the former corporation:

(d) A claim may be enforced under this section:

* * * * *

(2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

Therefore, because there is no “absence of statute” on the liability of a shareholder for the obligations of a dissolved corporation, the Master should have never reached the rule articulated in *Brown* and *Simmons*.

Second, Phillips is not a “purchasing corporation.” The fact that Phillips is an individual shareholder and not a “corporation” is important in light of the general rule and public policy of South Carolina articulated by the Court in *Brown*:

“It is very plain that, in the absence of a statutory provision on the subject, the acquisition of all the stock, property and assets of a corporation, by an individual or by another corporation, does not of itself make the new

holder liable to pay the debts of the corporation.”

Id. 128 S.C. 428, 123 S.E. at 98 (emphasis added). The Court then laid out the four specific exceptions discussed above. The exceptions are geared solely to “purchasing corporations,” not individuals. This Court should narrowly construe this exception to preserve the general rule and public policy articulated in *Brown* and affirmed in *Simmons* to avoid invasion into the statutory scheme set forth by the Legislature in S.C. CODE ANN. § 33-14-106 & 107. *See Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 482, 636 S.E.2d 598, 614 (2006) (deferring to the statutory scheme adopted by the Legislature because it presumably weighed and debated the advantages and disadvantages of its enactment.)

Therefore, the Master erred as a matter of law by concluding that Phillips is the “successor” to CLLD under the “mere continuation” doctrine. (R. pp. 9-10.) There is no evidence in the record to correct this error, since the Master’s findings of fact does not identify the amount of the distribution (R. p. 6.), and the record contains no evidence of the amount or value of the distribution Phillips received upon dissolution. The Master’s Order finding Phillip’s the “successor” of CLLC must be reversed³.

IV. THE MASTER ERRED IN FINDING THAT THE HOMEOWNER’S ASSOCIATION OR SOME OF ITS MEMBERS ACQUIRED AN EASMENT BY PRESCRIPTION OR IMPLICATION TO USE THE BOAT RAMP.

The Master found that the residents in Section V of Crystal Pines were granted access to the boat ramp pursuant to certain protective covenants filed by Phillips in 1998.

³Phillips asserts that, since the Master misconstrued the contract as obligating CLLD to repair the roads and improperly awarded CPHOA damages for breach of contract, the proper action for the Court to take is reversal. However, even if the Court is not persuaded by Appellant’s first arguments, *supra* pp. 8-16, the Court should nevertheless reverse and remand the Order to require further proceedings to determine the extent of Phillip’s liability under S.C. CODE ANN. § 33-14-106 & 107.

Appellants do not challenge this ruling. However, Appellants do challenge the Master's findings and conclusions that 1) granting access to the boat ramp to all residents of Crystal Pines under the theory that CPHOA has obtained a prescriptive easement and 2) granting access to the boat ramp to the residents in Section IV of Crystal Pines under the theory of implied easement. (R. p. 8; R. pp. 13-15.) The Master failed to make requisite findings of fact to support these legal conclusions, and the record contains no evidence to sustain them.

A. SINCE THE CPHOA DID NOT MAINTAIN 20 YEARS OF CONTINUOUS USE OF THE BOAT RAMP EITHER ADVERSELY OR UNDER A CLAIM OF RIGHT, THE CPHOA CANNOT HAVE A PRESCRIPTIVE EASEMENT.

"The party claiming a prescriptive easement has the burden of proving all elements." *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (S.C. Ct. App. 1997). In order for a party to establish a prescriptive easement, South Carolina requires that: "(1) [t]here must be [a] continued and uninterrupted use or enjoyment of the right for a period of 20 years, (2) [t]he identity of the thing enjoyed must be proven and (3) [t]he use must have been adverse or under a claim of right." *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). The identity of the boat ramp is not disputed or at issue in this case. Similarly, the absence of adverse use is not contested⁴, and the Master did not find a prescriptive easement based on adverse use. Rather, the Master found that CPHOA had continuous use or enjoyment of the boat ramp for twenty years under a claim of right. (R. p. 8; r. pp. 13-15.) This holding is contradicted by the Master's own factual findings and is not supported by any evidence in the record.

⁴The witnesses at trial agree that all use of the boat ramp occurred with Phillips' and CLLD's permission. (R. p. 61, lines 9-18; R. p. 63, lines 1-5; R. p. 96, lines 8-12.) A party cannot adversely possess property while his use is permissive. *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

The Master found that the boat ramp was locked in 2004, discontinuing any use of it. (R. p. 8.) Therefore, CPHOA must have established that it continuously used the boat ramp beginning in 1984 to establish twenty years of uninterrupted use. *Laychur*, 315 S.C. at 367, 434 S.E.2d at 261. The record contains no evidence to support that CPHOA itself used the boat ramp beginning in 1984. Under the Master's findings, CPHOA was not incorporated until June 30, 1997. (R. p. 5.) Moreover, under the Master's findings, the earliest that the CPHOA could have existed was October 4, 1986. (R. p. 5.) Therefore, to established continuous usage dating back to 1984, CPHOA must "tack" someone's prior usage. *Morrow*, 328 S.C. at 527, 492 S.E.2d at 423. The Master made no findings or conclusions relating to "tacking" at all, rendering his conclusion that CPHOA obtained a prescriptive easement erroneous.

"Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude." *Matthews v. Dennis*, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct.App.2005.) (emphasis added). No evidence of a transfer of any servitude or estate to the CPHOA is present in this record. Therefore, the CPHOA cannot tack any person's usage dating back to 1984.

Appellants are aware of no authority in South Carolina to allow a homeowners association to tack the use of previous land owners in a development. Such a holding would be improper, because (as in this case) no transfer of estate occurs between a property owner and a homeowners association. *Id.* Moreover, to allow an entire residential development to tack the usage of some unidentified prior homeowner in that development based solely on the fact that the residents in that development are members

of an association would extend the concept of tacking beyond any principal ever recognized in South Carolina. *See Id.; Morrow*, 328 S.C. at 527, 492 S.E.2d at 423.

Even if this Court was inclined to extend the concept of tacking, the record contains no facts sufficient for it to do so in this case. CPHOA did not identify a single individual's use beginning in 1984 that it could tack. Moreover, there is no evidence to demonstrate how many homeowners were using the property, or that any usage by any person in 1981 through 1985 was sufficient in mode and duration to establish "continuous" use.⁵ Since CPHOA bears the burden of establishing these elements, and the record demonstrates that they failed to meet this burden, the Master erred in finding that CPHOA continuously used the boat ramp between 1984 and 2004. (R. p. 8.)

Finally, even if CPHOA could establish "continuous use" going back to 1984, there is no evidence in the record that the users in 1984 were operating under a "claim of right" as the Master concluded. (R. pp. 14-15.) The testimony of Bugenske and Lapine cannot establish the state of mind of the users in 1984 or the general facts and circumstances that existed in 1984. Bugenske did not purchase his property in Crystal Pines until 1993 (R. p. 67, lines 11-13.), and Lapine did not purchase his property in Crystal Pines until 1999. (R. p. 71, lines 3-6.) The only competent evidence in the record relating to the circumstances surrounding the use of the boat ramp in the 1980's is Phillips' testimony. Phillips' responses to CPHOA's counsel during the hearing unequivocally demonstrate that any use occurring in the 1980's was under his *permission*, not under any "claim of right."

⁵The record refers to usage of the boat ramp by homeowners in the "early 1980's," but it does not identify who the users were, how many users there were, which years are precisely referred to, and how extensive the use of these individuals were during 1984 or subsequent years. (R. p. 96, line 8 – p. 97, line 21.)

Q: From the early 1980's to 2004, the homeowners who owned the property in the subdivision were able to use the boat ramp without having to undo a lock?

A: With my permission, yes.

* * * * *

Q: Were you aware, from the early 1980's through 2004, that the homeowners were freely using the boat ramp to put boats in and out of the lake?

A: Yes, with my permission.

(R. p. 96, lines 8-23.) Therefore, CPHOA failed to meet its burden to present any evidence that establishes that all of its members have a prescriptive easement entitling them to reasonable use of the boat ramp. The Master erred by awarding CPHOA a prescriptive easement, and the award must be reversed.

B. SINCE THERE IS NO EVIDENCE OF NOTICE OF THE PLAT DESCRIBING THE BOAT RAMP IN THE DEEDS OF SECTION IV OWNERS, THE MASTER ERRED IN FINDING AN IMPLIED EASEMENT.

The Master concluded that Section IV Owners of Crystal Pines obtained an implied easement to use the boat ramp. It is undisputed that on April 1, 1986, CLLD filed a plat outlining Section IV of Crystal Pines, and that plat included the boat ramp on the plat. (R. p. 15; R. p. 153.) However, the Master, citing to *Carolina Land Co. Inc., v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16 (1975), concluded that "by virtue of the recorded plat," the Section IV Owners obtained an "implied easement" to reasonably use the Boat Ramp. (R. p.15.) The Master misapplied the rule set forth in *Carolina Land Co.*

The Court in *Carolina Land Co.* required that plats be referenced in the deed to the party claiming the easement before an implied easement arises:

It is generally held that when the owner of land has it subdivided and platted into lots and streets and sells and conveys lots **with reference to the plat**, he thereby dedicates said streets to the use of such lot owners, their successors in title and the public. *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922. We also held in the cited case that the purchaser of lots **with reference to the plat of the subdivision** acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots were purchased.

* * * * *

‘Generally, where property sold is described in the conveyance **with reference to a plat** or map on which streets, alleys, parks, and other open areas are shown, an easement therein is created in favor of the grantee. Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law.’

* * * * *

When J. L. Locke subdivided and platted a portion of his property into lots and streets and sold and conveyed lots **with reference to the plat**, the purchasers and those claiming under them acquired an appurtenant easement in the 30 foot street as delineated on the plat.

Id. at 106, 217 S.E.2d at 19-20 (further citations omitted and emphasis added). The record contains no evidence that the plat was referenced in the Deed of any of the Section IV Owners, or that any of the Section IV Owners had any actual knowledge of the plat at all. Therefore, the Master erred as a matter of law by finding that the requirements for an implied easement as set forth in *Carolina Land Co.* were satisfied. The Master’s recognition of an implied easement must be reversed.

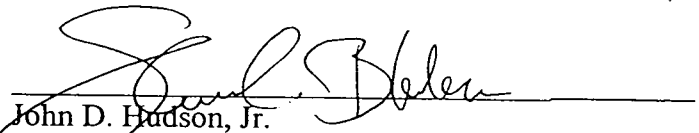
CONCLUSION

For the reasons set forth above, Appellants Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC respectfully request that the Master’s Order dated January 20, 2009 construing the Deed as placing an obligation on

CLLD to maintain the road, finding Phillips as a "successor" to CLLD, awarding CPHOA \$460,000.00 in damages against Phillips, and granting the residents of Sections I through IV of Crystal Pines an easement to use the boat ramp be reversed.

Respectfully submitted,

ELLIS, LAWHORNE & SIMS, P.A

A handwritten signature in dark ink, appearing to read "Shaun C. Blake", is written over a horizontal line.

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Columbia, South Carolina
October 19, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

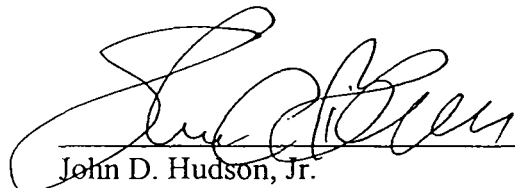
Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellants' Final Brief is in compliance with the Order of the S.C. Supreme Court dated August 13, 2007 as well as Rule 211(b) of the S.C. Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James Spence, Master-In-Equity

Civil Action No: 06-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

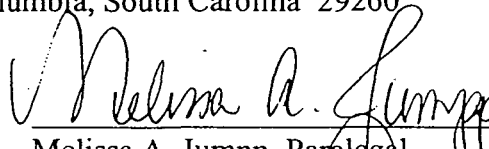
v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC..... Appellants.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., do hereby certify that I served a copy of Appellant's Final Brief this the 20th day of October, 2009 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

“[I]n determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter. *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct.App.2008). Respondent perpetuates a myopic, erroneous interpretation of the Deed in the opening remarks of its Initial Reply Brief by quoting again only one portion of one sentence in the Deed while ignoring both the context of that sentence and the Deed’s related provisions. (Respondent’s Reply, p. 5.)¹ If the Court adopts Respondent’s position on this and the other matters discussed below, then Appellants will suffer a great injustice; in particular when CLLD formed the Road Company to take title and control over the Roads in 1981, it never intended that one day one of its members, Don Phillips, would retain a perpetual obligation to solely, personally maintain all of the Roads in Crystal Pines. Accordingly, Appellants offer this Reply to direct the Court’s attention to the critical portions of the records that rebut Respondent’s positions.

I. APPELLANTS CONSTRUCTION OF THE DEED WAS RAISED AND RULED UPON BY THE COURT, PRESERVING THE MATTER FOR REVIEW ON APPEAL.

Respondent claims that Appellants’ construction of the Deed was not ruled upon by the trial court and therefore is not preserved for review. (Respondent’s Reply, p. 8.) A review of the record demonstrates that the Deed’s construction is preserved for the Court’s review.

Rather than ignoring the construction of the Deed, the parties agreed that the Deed

¹ Respondent mistakenly cites to the quoted section as ¶ 10; the quoted language is found in ¶ 11 of the Deed. (R. p. 125.)

was the "key document" at issue during trial. (R. p. 103, lines 10-13.) The construction asserted by Appellants is entirely consistent with the evidence they placed before the Master. Specifically, Phillips testified that the Master could not parcel out one sentence or section from the Deed to determine the intent of the parties; rather, Phillips explicitly stated that the Master had to look to the language of the entire Deed to determine that the CPHOA is responsible for road maintenance. (R. p. 91, line 11 - p. 92, line 6.) When pressed by Respondent's counsel, Phillips even cited to precise language in the Deed that he testified evidenced the parties' to the Deed intent to have the Roads held and maintained by the Road Company for the benefit of its members. (R. p. 92, lines 8-17.)

Respondent suggests that the fact that Appellants' brief refers to the Deed itself for construction is somehow evidence that the matter was not raised at trial. (Respondent's Reply, p. 8.) This reasoning is faulty. Appellants contend that the Deed is not ambiguous, and therefore the Master erred as a matter of law by relying on extrinsic evidence in construing the Deed. *See Lake View Acres Development Co. v. Tindal*, 306 S.C. 477, 479, 412 S.E.2d 457, 459 (Ct.App.1991) ("Since there is no ambiguity in the description of realty conveyed by the deed, the grantor's intent must be determined from within the four corners of the deed.") The Court should draw no negative inference from the Appellants' reliance on the Deed itself to determine the intent of the parties.

Notably, CPHOA failed to produce *any* witnesses that were part of the negotiations and preparation of the Deed. The only witnesses CPHOA produced at trial were residents who moved into Crystal Pines in the mid-to-late 1990's that attempted to misconstrue and reinterpret the terms of the Deed over a decade after the execution of the

Deed. In the event that the language of the Deed is held to be ambiguous, the Master rejected the arguments raised by Appellants highlighted in their Initial Brief, pages 11-14, and adopted the Respondents' construction of the Deed based on extrinsic evidence of Don Phillips' attempts to address his concerns that the Deed was void because the Road Company was never properly formed with the Secretary of State. (R. pp. 10-11) This ruling against the specific arguments and evidence raised by Appellants at trial is sufficient to preserve the construction of the Deed as an issue on appeal. *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) ("This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e) motion to alter or amend in order to preserve the issue for appeal.")

II. THE COURT IGNORED UNCONTRADICTED EVIDENCE OFFERED BY APPELLANTS WHEN RULING AGAINST PHILLIPS BY FINDING PHILLIPS A "SUCESSOR" OF CLLD AND BY DETERMINING PAVING ALLEGEDLY REQUIRED UNDER THE TERMS OF THE DEED.

Appellants placed evidence before the court that Phillips was a shareholder receiving a distribution and that the Roads were originally paved with gravel. These issues were not a major focus at trial, as Appellants were not obligated under the terms of the Deed to maintain any paving of the Roads. Appellants acknowledge that, upon receiving an unfavorable ruling from the court on the construction of the Deed, they could have more precisely articulated their position through a post-trial motion on the successor liability issue and the alleged paving requirements under the Deed. However, since these precise issues were also already ruled upon by court in the Order, Appellants believe that the Order sufficiently preserves these issues for review. "So long as the

judge had an opportunity to rule on an issue, and did so, it was not incumbent upon ... counsel to harass the judge by parading the issue before him again.” *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct.App.1995) (internal quotations omitted).

On the paving issue, the parties agreed prior to trial to stipulate to ~~to~~ factual evidence that the roads were initially paved in gravel. (R. p. 135.) ~~Despite this evidence,~~ the Master construed the Deed as requiring Appellants to repair the road with two-inch asphalt in accordance with a bid offered into evidence by Respondents. (R. p. 7; R. pp. 11-12.) Since the Master explicitly ruled on the precise question of how the road should be repaved, if it all, the issue of whether there is any evidence to support the Master’s award of damages based upon an erroneous construction of the Deed’s requirements is preserved for review. *Spence*, 381 S.C. at 489, 674 S.E.2d at 170.

Finally, Appellants placed evidence before the Master that Phillips was a shareholder of CLLD when it dissolved on July 28, 1997, and that he received a distribution from CLLD as the sole remaining shareholder. (R. p. 82, lines 22-25; R. p. 84, lines 10-15). The Master even entered a finding of fact consistent with this evidence. (R. p. 6, finding #10.) Despite this evidence, the Master entered a detailed order defining Phillips as a “successor” of CLLD under *Simmons v. Mark Lift Industries*² – without relying on any authority that extends successor liability to shareholders. (R. pp. 9-10.) Since the precise issue raised on appeal was set forth in the court’s Order, this Court may find that this error of law is therefore preserved for review. *Spence*, 381 S.C. at 489, 674 S.E.2d at 170.

²366 S.C. 308, 315, 622 S.E.2d 213, 215 (2005).

III. THE RECORD DOES NOT INCLUDE EVIDENCE TO SUPPORT SOME CRITICAL STATEMENTS MADE BY RESPONDENT IN ITS REPLY BRIEF.

Appellants are conscious of the Court's preference for brevity in reply briefs, and therefore Appellants rest primarily on the arguments set forth in its Initial Brief. However, certain statements in Respondent's Reply Brief require Appellants to briefly draw the Court's attention to the record on appeal.

First, Respondent states that the Crystal Pines Home Owners Association ("CPHOA") operated as an unincorporated association from 1981 until 1986, and that it was incorporated in 1987. (Respondent's Reply, p. 5.) This is inaccurate. The CPHOA was not incorporated until June 30, 1997 (R. pp. 133-134.) This information is critical, as it demonstrates that Respondent's extrinsic evidence pertaining to the construction of the Deed provides no support for the inference Respondent urges. The only evidence in the record regarding Phillips' purpose for seeking a corrective deed is that he believed that the entire Deed may have been null because the Road Company was never legally created through the South Carolina Secretary of State, leaving the title of the Roads still in CLLD's hands. (R. p. 136; R. p. 48, lines 6-13.) No evidence supports the Master's inference that Phillips was trying to "transfer maintenance obligations" when he tried to enter into a corrective deed.

Second, Respondent states that "the Lexington County Guidelines are not binding." (Respondent's Reply, p. 13.) Respondent cites to no evidence in the record, nor to any case at law, to support this bald contention. The guidelines were stipulated into evidence by the parties. (R. p. 135.) The only evidence at trial was that prior to George Bugenske moving into Crystal Pines in the mid 1990's, the Road Company was

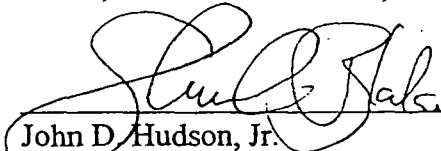
in fact operated in accordance with these guidelines. (R. p. 45, line 24 – p. 46, line 22.) (“We were very disturbed at how it was being run, how it appeared that all of the homeowners had all of the responsibility and all of the costs”) The Lexington County Guidelines, known to both parties at the time they executed the Deed, is powerful extrinsic evidence of the parties’ intent when entering into the Deed. The Master erred by drawing his own inference from Phillip’s conduct over fifteen years after the execution of the Deed to interpret the parties’ intent in 1981.

CONCLUSION

For the reasons primarily set forth and its Initial Brief, Appellants Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC respectfully request that the Master’s Order dated January 20, 2009 construing the Deed as placing an obligation on CLLD to maintain the road, finding Phillips as a “successor” to CLLD, awarding CPHOA \$460,000.00 in damages against Phillips, and granting the residents of Sections I through IV of Crystal Pines an easement to use the boat ramp be reversed. In the alternative, the absence of evidence and findings of fact to support the Master’s conclusions warrants a remand of the case for a new trial.

Respectfully submitted,

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October 19, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Master-In-Equity
James O. Spence, Master-In-Equity

Civil Action No: 05-CP-32-4364

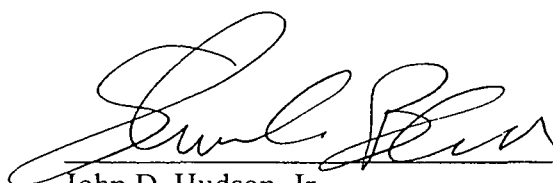
Crystal Pines Homeowners Association, Inc. Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellants' Final Reply Brief is in compliance with the Order of the S.C. Supreme Court dated August 13, 2007 as well as Rule 211(b) of the S.C. Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James Spence, Master-In-Equity

Civil Action No: 06-CP-32-4364

Crystal Pines Homeowners Association, Inc. Respondent,

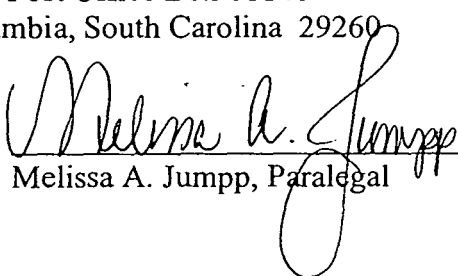
v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC..... Appellants.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., do hereby certify that I served a copy of the Final Reply Brief of Appellants this the 20th day of October, 2009 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

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Melissa A. Jumpp, Paralegal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crystal Pines Homeowners
Association, Inc., Respondent,

v.

Don E. Phillips, Crystal Lake
Land Developers, Inc., and
Crystal Pines Yacht Club, LLC, Appellants.

Appeal From Lexington County
James Spence, Master-In-Equity

Opinion No. 4832
Heard December 9, 2010 – Filed May 4, 2011
Withdrawn, Substituted and Refiled June 23, 2011

AFFIRMED IN PART AND REVERSED IN PART

John D. Hudson and Shaun Blake, both of Columbia,
for Appellants.

Harry Clayton Walker, Jr., of Columbia, for
Respondent.

KONDUROS, J: Don E. Phillips appeals the master-in-equity's finding that Phillips, as successor in interest to Crystal Lake Land

Developers, Inc. (CLLD), is responsible for maintaining roads in the Crystal Pines subdivision (Crystal Pines). Phillips and the Crystal Pines Yacht Club, LLC (the Yacht Club) appeal the master's ruling that residents of Crystal Pines had either acquired or were granted an easement for use of a boat ramp in the subdivision. We affirm in part and reverse in part.

FACTS

Phillips was the sole shareholder and officer in CLLD. In 1979, CLLD began developing Crystal Pines. In 1981, CLLD deeded the roads in Crystal Pines to the Crystal Lake Road Company (the Road Company). All homeowners in Crystal Pines were members of the Road Company. The deed contained the following provision:

The undersigned [CLLD] by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion as may be necessary for development, of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved. The said roads shall be kept free of all obstructions so as to be open for the passage of fire, police, and other emergency vehicle personnel and equipment at all times and by the owners of portion of the real property described in Exhibit "B" hereto and their agents, guests, invitees and employees;

From 1981 through 1986, the Road Company operated as an unincorporated association and simple homeowner's association. In 1987, the Road Company changed its name to the Crystal Pines Homeowners Association (HOA), although it was not technically incorporated until 1997. Beginning in 1996, CLLD drafted a proposed deed granting title to the road

to the HOA instead of the Road Company. The deed contained an attachment that placed road maintenance obligations on the HOA. In 1997, CLLD conveyed its remaining interest in Crystal Pines to Phillips with Phillips paying CLLD \$392,679 and assuming CLLD's mortgage debt. CLLD was then dissolved.

Phillips unsuccessfully tried to have the second deed and attachment executed. In 1998, Phillips filed an amendment to the restrictions governing certain sections of Crystal Pines. The amendment stated the HOA was responsible for road maintenance in Crystal Pines. Phillips repaired the roads in Crystal Pines in the early 1990s, but further maintenance is now required. Phillips has refused to perform any additional work.

Additionally, in 1980, CLLD constructed a boat ramp in Crystal Pines. George Bugenske, a Crystal Pines resident, testified homeowners regularly used the boat ramp. Phillips also testified Crystal Pines residents regularly used the boat ramp, but with his permission. In 2004, Phillips installed a locked gate prohibiting access to the boat ramp and later conveyed title to his son. His son then transferred title to the Yacht Club, which has maintained the locked access.

The HOA filed suit against Phillips, CLLD, and the Yacht Club alleging CLLD and Phillips, as CLLD's successor, were responsible for maintaining the roads in Crystal Pines and claiming an easement to use the boat ramp. The master found in favor of the HOA on both claims, and this appeal followed.

LAW/ANALYSIS

I. Construction of the 1981 Deed

Phillips maintains the master erred in determining the deed placed maintenance responsibilities for all the roads in Crystal Pines on CLLD.¹ We agree.

¹ The HOA contends Phillips's argument regarding construction of the deed is unpreserved because it was not raised to and ruled upon by the master. We

A reviewing court determines, as a matter of law, whether the language in a deed is ambiguous. Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009). A reviewing court considers questions of law de novo. Id. "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning." 30 S.C. Jur. Contracts § 32 Ambiguity (1999) (footnote omitted).

If the reviewing court determines a deed is ambiguous, it must interpret the deed. "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998).

In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.

K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation marks and citations omitted).

disagree. At the beginning of trial, when discussing the exhibits to be submitted, counsel for Phillips stated both sides "have the same documents, and we agree our interpretation is correct, or I should say that I agree, that the Homeowners' Association is responsible for the roads and not Mr. Phillips." Witnesses for both sides were asked to look at the deed and determine who bore road maintenance responsibilities under the document. Phillips testified regarding his belief the deed did not place road maintenance obligations on CLLD. The master clearly ruled against Phillips's construction of the deed when it stated in the order that "CLLD contracted with [the Road Company] to maintain the [r]oads according to the terms of the [d]eed." Because this issue was raised to and ruled upon by the master, it is adequately preserved for our review.

"The intention of the grantor must be found within the four corners of the deed. When intention is not expressed accurately in the deed evidence aliunde may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected." Id. (citations omitted).

We find the deed is ambiguous with respect to road maintenance obligations. Paragraph 11 of the deed discusses the further development of Crystal Pines by CLLD and how that development relates to roads in the subdivision. The deed indicates CLLD will pay to open unopened portions necessary for development and will maintain or repair "said roads as nearly as may be practicable in the same condition and repair as originally paved." Paragraph 11 then discusses the obligation of CLLD to ensure the roads are kept free of obstruction to allow emergency vehicles access to the neighborhood.

The HOA contends Paragraph 11 unambiguously places the burden for road maintenance in Crystal Pines on CLLD. However, the placement of such an important obligation in a paragraph solely discussing the process of opening new roads casts doubt upon the clarity of this obligation. Additionally, "said roads" is not a defined term and Paragraph 13 of the deed seems to indicate the Road Company is responsible for road repair in the subdivision. It states:

Notwithstanding anything to the contrary in this instrument contained, if [the Road Company] shall incur any cost or expense for or on account of any item of maintenance, repair or other matter directly or indirectly occasioned or made necessary by any wrongful or negligent act or omission of any owner . . . such cost or expense shall not be borne by [the Road Company] but by such owner and if paid out the [Road Company] shall be paid or reimbursed to the [Road Company] by such owner forthwith

This paragraph indicates either the Road Company or a particular resident would be responsible for repairing damage to roads. There is no mention of CLLD. Based on the lack of clarity and the seeming inconsistency in the

deed, we conclude the deed is ambiguous, and we must therefore look to the intent of the parties.

Viewing the deed as a whole, its purpose was to convey ownership of the roads in Crystal Pines to the Road Company. Paragraph 10 states the Road Company "shall receive title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane and shall hold and deal with the same and such other assets as it may receive from time to time" The Road Company also had the right to dedicate the roadways to a government entity for perpetual maintenance under Paragraph 22. To place ownership and essentially all control of the roads with the Road Company and leave the responsibility for maintenance with CLLD would be inconsistent.

Because the deed is ambiguous, we may also consider extrinsic evidence to ascertain the intent of the parties. The general rule, as evidenced by Lexington County Development Guidelines, was for homeowners to take over maintenance of private roads once the final plat of a development was approved. According to Phillips's testimony at trial, the deed states CLLD would repair and maintain the roads being conveyed if they were damaged during the process of constructing the new portions of road. He testified:

Q. Is it your position that paragraph 11 doesn't obligate the developer to maintain and repair the roads mentioned here?

A. If you read the whole sentence, it says that if you cause damage, you will repair it; if you don't read the whole sentence, you can take portions of it and put together an entirely different notion, and that is what you have done. . . .

Q. I'm going to borrow Mr. Lapine's pen and ask you, on Exhibit #1, paragraph 11, to circle the words that you contend limit the developer's obligation to repair damage it causes.

A. It would be the whole paragraph.

Q. Then circle the whole paragraph. So you can't point to specific words in the paragraph that limit the developer's liability to repairing damages it causes?

A. You would have to assume that a road was opened, an unpaved portion was opened, and that there was damage done.

The fact that the only mention of maintaining the roads immediately follows the clause concerning the opening of new roads is consistent with Phillips's explanation of CLLD's intent in Paragraph 11.

The HOA argues Phillips's efforts beginning in 1996 to execute a corrected deed with Exhibit B attached evidenced his understanding that CLLD had the obligation to maintain the roads pursuant to the original deed. We disagree. Phillips testified that his purpose in drafting the corrected deed was to ensure the conveyance of the roads to the HOA as an incorporated entity was proper. The inclusion of Exhibit B and Phillips's amendments to the restrictions governing certain sections of Crystal Pines likely reflects his desire to clear up any ambiguity in the original deed. Additionally, the master found that Phillips made some road repairs in the late 1990s. The record contains no testimony regarding this particular point, but the master's order indicates the repairs were made when Phillips "extended the Roads to open new areas of Crystal Pines." That action is consistent with Phillips's construction of the deed. Other than that instance, the testimony indicates Phillips consistently disclaimed personal responsibility for repairing or maintaining the roads in Crystal Pines.

Because we have a broad standard of review in this case and considerable evidence supports Phillips's construction of the deed, we find the CLLD and Phillips are not responsible for repairing or maintaining the roads in Crystal Pines, except to the extent of damage that occurs during further development of the subdivision. Therefore, we reverse the master's finding CLLD is responsible generally responsible for all road maintenance in Crystal Pines. Accordingly, we decline to address two additional issues

raised by Phillips regarding the amount of damages awarded to Crystal Pines or whether Phillips was successor to CLLD. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (declining to address remaining issues when determination of prior issue is dispositive).

II. The Boat Ramp

Phillips argues the master erred in determining the HOA was entitled to an easement for use of the community's boat ramp. We disagree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear, 329 S.C. at 410, 496 S.E.2d at 635. To establish a prescriptive easement, a party must demonstrate (1) continued and uninterrupted use or enjoyment of the right for a period of 20 years, (2) proof of the identity of the thing enjoyed, and (3) adverse use or use under a claim of right. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005).

According to the testimony in the record from Phillips and Bugenske, the ramp was constructed in 1980 and homeowners used it until 2004, when the Yacht Club restricted access.² Phillips claims the homeowners used the boat ramp with his permission. However, some evidence demonstrates the use was under a claim of right, not just with permission. According to Bugenske, homeowners were told when they purchased their lots they had access to the boat ramp and they used the ramp frequently throughout the years with no indication they sought Phillips's permission to do so.

² Phillips argues the Road Company and the HOA are not the same entity for purposes of establishing the twenty-year prescriptive period. However, even if the entities are not the same, a claimant is permitted to tack the time period of a prior owner to his own to establish the required prescriptive period. See Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to establish the 20-year requirement.").

Marketing brochures for the subdivision indicated deep-water access was available to residents.

Detrimental to HOA's case is that Bugenske's testimony only affects the period of time after he purchased his home in 1994, short of the required twenty years. The only evidence in the record from the 1984 to 1994 period is from Phillips himself. Phillips acknowledged homeowners used the ramp, but he claims they did so with his permission. However, in a letter to the HOA in 2002, Phillips indicates the original 1981 deed transferring ownership of the roads also included the transfer of ownership of the boat ramp. The letter states: "Although not specifically mentioned in the deed, the entrance gates and Parcel A including the boat ramp are included in property turned over with the roads." Furthermore, a plat filed in 1986 indicates the location of the boat ramp is in an area designated "community common area."³ Phillips's testimony regarding actual use, coupled with the letter and plat, is at least some evidence the residents were using the boat ramp based on a claim of right during the 1984 to 1994 period. Therefore, we find the master did not err in finding a prescriptive easement in favor of the HOA.

Because we affirm the master's finding the HOA established a prescriptive easement to use the boat ramp, we need not address Phillips's remaining argument regarding an easement by implication in favor of Section IV of Crystal Pines. See Whiteside, 311 S.C. at 340, 428 S.E.2d at 889 (declining to address remaining issues when determination of prior issue was dispositive).

³ Although the year 1986 cannot be used to establish the beginning of the twenty-year prescriptive period, the plat is some evidence demonstrating residents would have understood their use to be a matter of right. The plat and the contents of the letter also discredit Phillips's testimony that residents only used the boat ramp with his permission.

Based on the foregoing, the judgment of the master is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

RECEIVED

JUN 01 2011

SC Court of Appeals

Crystal Pines Homeowners Association, Inc.

Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

Appellants.

RESPONDENT'S PETITION FOR REHEARING

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Attorneys for Respondent

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondent hereby submits its petition for a rehearing. CLLD opened development of the Crystal Pines subdivision in 1981 with the drafting and filing of a deed. At issue is to whom that deed assigned obligations to maintain the roads. Over the past 30 years, CLLD has sold approximately 60% of the land within Crystal Pines to members of the Respondent. The purchases were made based on the representations contained within the deed. CLLD has maintained that it did not intend to accept road maintenance obligations by virtue of the deed, and instead seeks to place the obligations on the Respondent who purchased in reliance on CLLD's deed.

As grounds for the rehearing, Respondent would show unto the Court of Appeals (the "Court") that it has overlooked or misapprehended the following points:

- a) The Court Overlooked the True Nature of the Action and Therefore Applied An Incorrect Standard of Review;
 - b) The Deed Unambiguously Obligates CLLD to Maintain the Roads;
 - c) If the Deed Is Ambiguous, the Court Has Misconstrued Its Meaning;
 - d) The Court Misapplied Its Own Construction of the Deed; and
 - e) The Court Failed to Remand the Case for a Determination of the Damages Caused by the Opening of the Roads.
- A. The Court Overlooked the True Nature of the Action and Therefore Applied An Incorrect Standard of Review.**

The Court reviewed the Master's findings on the deed under an equitable standard of review. This approach overlooked the true nature of the action, one for breach of contract, which required a legal standard of review.

The case of *Slear v. Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1998) is instructive in this regard. The appellants in *Slear* brought an action at law to determine land use rights based on the interpretation of various easements and deeds. The appellate court treated the case as one involving an interpretation of a deed. The Supreme Court reversed because the “pleadings and evidence present[ed] the primary issue of whether or not the deed creates an easement....” *Id.* at 411, 496 S.E.2d at 634. It was not the presence of a deed which drove the standard of review question but rather the primary issue raised by the litigation. *Id.* The primary issue in *Slear* was the existence of an easement which was a question of fact subject to the any evidence standard of review. *Id.* The *Slear* court held that the action was not subject to an equitable determination merely because of the presence of a deed. *Id.*

The Court cites *Slear* for the proposition that interpretation of a deed is an equitable question. That citation misapprehends the application of *Slear*. (Op. at p. *2). The *Slear* court recognized that the litigation’s primary issue dictated the standard of review, not the presence of a deed. Equitable review of a deed is indeed appropriate when the action raises a question about the interest transferred by a deed. See *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 261-62 (2009) (determination of whether easement included roadway based on reference to roadway in deed); *Eldridge v. City of Greenwood*, 331 S.C. 398, 433-34, 503 S.E.2d 191, 209-10 (Ct. App. 1998) (determination of extent of grant of use over railroad); *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 211-12, 494 S.E.2d 465, 467-68 (Ct.App. 1997) (determination of whether deed meant to convey common elements). However, the principle of equitable determination was inapplicable

here, where the question concerned contractual obligations that happen to be contained within a deed.

The mere presence of a deed in *Slear* did not convert the action to one at equity. Instead, the case as a whole had to be evaluated to determine the primary issue. Here, all the aspects of the case point squarely to an action at law:

- Respondent's complaint alleged a breach of contract (R. pp. 31-32);
- Respondent and Appellant both sought a jury trial in their pleadings (*Id.* at pp. 29 and 35);
- Respondent sought actual damages, not specific performance, on its claim for breach of contract (*Id.* at pp. 34);
- The entire case was referred to the Master in Equity "with authority to take testimony arising under the pleadings and to make findings of fact and conclusions of law." (*Id.* at p. 1)¹; and
- The Master awarded actual damages on the claim for breach of contract. (*Id.* at pp. 11-12).²

This case does involve a deed, but the underlying suit is still a straightforward breach of contract action. It should not have been judged by an equitable standard based simply on the presence of a deed. *See Slear*, 329 S.C. at 411, 496 S.E.2d at 634.

Because Respondent's claims are solely legal in nature, the Court should have applied the legal standard of review. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes*

¹ The Court of Appeals has previously held that submission of an equitable cause of action to a jury converted the case to an action at law with review under the question of law standard. *Horn v. Davis Elec. Constr., Inc.*, 302 S.C. 484, 487, 395 S.E.2d 724, 725 (Ct.App. 1990). The situation here is analogous because the parties initially requested a jury trial and then consented to a transfer to the Master to make findings of fact.

² While the complaint did allege equitable causes of action, the Master awarded damages on the breach of contract claim only. (R. pp. 11-12).

Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). There was evidence in the record to reasonably support the Master's findings, and the Court should have affirmed his order. *Id.*

B. The Deed Unambiguously Obligates CLLD to Maintain the Roads.

The Court has misapprehended the meaning of the road maintenance obligations in the deed. CLLD drafted the deed to assure its control over the development and clearly retained the maintenance obligations. There is no dispute that CLLD agreed to open and pave the roads of Crystal Pines. (Op. at *2). The Court identified an ambiguity regarding what roads CLLD agreed to maintain. This ambiguity, however, is simply not present.

CLLD agreed to "determine and carry out or cause to be performed all improvements, maintenance, and repair of the said roads as nearly as practicable in the same condition as originally paved." (R. pp. 125-126, ¶ 11). In the clause that precedes this language, CLLD agreed to transfer ownership of five roads. The paragraph goes on to describe maintenance obligations of "said roads". The antecedent is clear. "Said roads" are those roads which were transferred in the prior clause.

C. If the Deed Is Ambiguous, the Court Has Misconstrued Its Meaning.

In the alternative, if the Court affirms its decision that this case involves an equitable determination of a deed, the deed should be construed to obligate CLLD to maintain the roads.

1. The Court Misapprehended the Extrinsic Evidence Regarding CLLD's Intent.

The Court considered extrinsic evidence and determined that CLLD did not obligate itself to maintain the roads. The Court's review of the extrinsic evidence

misapprehends CLLD's atypical development plan and its repeated effort to shift the obligations.

a. CLLD Did Not Develop Crystal Pines Typically.

The Court noted that the Lexington County Development Guidelines state the general rule that subdivision homeowners take over road maintenance following approval of the final plat. (Op. at *3). While this guideline may reflect the general rule for a typical developer, CLLD is far from a typical developer. Development in Phase I of Crystal Pines began in 1981. (R. p. 135). As of the late 1990's, Phases II and V remained undeveloped. *Id.* CLLD (Phillips) still owns approximately 40% of the land in Crystal Pines, including half of the property which fronts roads (R. p. 59, lines 8-16; p. 101, line 17-p. 102, line 4). After 30 years of development, CLLD still owns a significant portion of the land. This development model is absolutely consistent with a developer focused on maintaining control of all aspects of the development, including road maintenance.

b. CLLD Has Repeatedly Attempted to Assign the Road Maintenance Obligations.

CLLD's intent regarding the obligations is further illustrated by its actions following its filing of the deed. The overwhelming evidence indicates that CLLD repeatedly tried to assign the road maintenance obligations after the deed was filed. If, as the Court held, the deed obligated Respondent to maintain the roads, CLLD's actions were superfluous and inexplicable. As the following examples clearly demonstrate, CLLD knew it had the road maintenance obligations and repeatedly sought to shift them.

On three separate occasions (1997, 1998, 2000), CLLD presented a corrected deed to the Respondent for the roads in question (R. p. 73, line 24-p. 74, line 7; p. 76, line 21-p. 77, line 13, pp. 143-146). On each occasion, CLLD attached Exhibit B to the

proposal (*Id.*). Exhibit B's sole purpose was to transfer road maintenance obligations to the Respondent. CLLD's letter of intent makes clear what it intended to accomplish with the deed and Exhibit B. (R. p. 146). The letter reads:

I will deliver a legal description of the premises and properly transfer the real property to the Crystal Pines Homeowners Association with the performance of assurances. *These assurance are attached as Exhibit 'B'.*

(*Id.* emphasis added). CLLD did indeed intend to confirm transfer of the roads, but only in exchange for Respondent's assurances. Exhibit B makes clear what those assurances were. The first lettered paragraph of Exhibit B specifically obligates the Respondent to maintain the roads. "The Grantee and its successors and assigns shall adequately maintain the roadways for use by vehicular and pedestrian traffic...." (R. p. 000144). CLLD was not merely attempting to convey the roads to the proper entity, but rather to transfer the obligation to maintain the road.

In 1998, CLLD attempted to amend the restrictions for Phases I, III, and IV of Crystal Pines. (Supp. R. pp. 3-4, ¶ 19). Unlike the deeds described above, the amended restrictions made no effort to transfer ownership. Rather, the sole addition to the restrictions was an assignment of road maintenance obligations to the Respondent.

Exhibit B and the amended restrictions make clear that CLLD understood that the deed obligated it to maintain the roads, and it repeatedly sought to absolve itself of that responsibility.

The extrinsic evidence presented by the Respondent reasonably supports an affirmance of the Master's findings on intent. The Court was obligated to affirm the master's factual findings "unless there [wa]s no evidence that reasonably support[ed] those findings." *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct.App. 1994). While

the Court is permitted a broad scope of review, it “do[es] not disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility.” *Jocoy v. Jocoy*, 349 S.C. 441, 562 S.E.2d 674 (Ct.App. 2002).

2. The Deed Should Be Construed Against CLLD.

Even if the Court were to conclude that the deed was ambiguous, it has overlooked two important maxims of construction: (a) a deed should be construed against the grantor; and (b) a deed should be construed to uphold moral obligations.

The Court identified two possible constructions of the road maintenance obligation in the deed:

(a) CLLD intended to maintain “all roads that [it] was conveying to the Road Company”; or

(b) CLLD intended to maintain “just the roads it would open in further development of the subdivision.”

(Op. at *2).

“If there is any ambiguity in a deed, or it admits of two constructions, it will be construed against the grantor and favorably to the grantee.” *Coleman v. Gaskins*, 165 S.C. 301, 163 S.E. 790, 792 (1932); *see also Ward v. Woodward*, 287 S.C. 343, 345, 338 S.E.2d 347, 348 (Ct.App. 1985).

In addition, the deed should be construed to uphold CLLD’s moral obligations. CLLD controlled the contents of the deed and filed it with an expectation that others would rely on the promises within. “When the provisions of a deed are susceptible of two interpretations, one of which recognizes a legal and moral obligation, resting upon the grantor towards a third person, while the other savors of wrong and fraud on his part, the

presumption is that he intended the act in accordance with the moral law, and the rights of such third person.” *Bell v. Gardner & Lacey Lumber Co.*, 85 S.C. 182, 67 S.E. 151, 152 (1910).

The Court’s determination that there are two possible constructions makes the remaining inquiry an easy one. Because the deed must be construed against the grantor and to uphold CLLD’s moral obligation, it must be construed so as to honor CLLD’s obligation to the Respondent. Of the two constructions observed by the Court, it is the first construction (maintenance of all roads being conveyed) which satisfies these maxims.

Respondent, a group of property owners who purchased land from CLLD on the basis of representations contained in the deed, should be protected against a construction of the deed that destroys its understanding of the deed. If CLLD created confusion by drafting an ambiguous deed, it should bear the consequences of the Respondent’s reasonable interpretation of the deed.³ *See Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (“The rule of law is that where the contract is susceptible of more than one interpretation, a doubt shall be resolved against the party whose business it was to speak without ambiguity.”). The construction placed on the deed by the Respondent is reasonable, and the Court should protect Respondent from CLLD’s post hoc interpretation.

³ If CLLD mistakenly obligated itself to maintain the roads, CLLD is not without a remedy. CLLD could seek to reform the deed to correct its mistake, a step it has never undertaken.

D. The Court's Misapplied Its Own Construction of the Deed.

As discussed above, the Court initially read the deed as imposing two possible obligations. CLLD was responsible for maintenance of either (a) all roads that were conveyed by the deed; or (b) all roads to be opened in future development.

The Court, however, ultimately determined that the deed created an obligation to maintain the roads "to the extent of damage that occurs during any further development of the subdivision." (Op. at *3). This was not one of the two proposed constructions of the deed. A rehearing is therefore necessary to address which of the two obligations the Court meant to impose on CLLD.

E. The Court Failed to Remand the Case for a Determination of the Damages Caused by the Opening of the Roads.

Even if the Court's opinion is found to be correct, it has overlooked two outstanding issues.

The Court did not fully absolve CLLD of responsibility for road maintenance. Instead, it held that CLLD was responsible for road maintenance "to the extent of damage that occurs during any further development of the subdivision." (Op. at p. *3). The Court's ruling implies that CLLD would also be responsible for damage already caused to the roads by development. CLLD admitted that it made repairs in 1997/1998 that were necessitated by development of the subdivision. (Supp. R. p. 1, line 22- p. 2, line 4). It is undisputed that the roads are currently in need of repair, but it is unclear to what extent these repairs are due to further development by CLLD. The Court should remand the action for development of further evidence that would determine to what extent the current damage is related to CLLD's development.

Additionally, the Court reversed the Master's ruling on the breach of contract claim, but this was not the sole claim before the Master. Respondent's complaint also alleged equitable bases for relief which were not ruled upon by the Master. (R. pp. 32-33). The Court should remand the action for a ruling on Respondent's equitable causes of action which were not decided in the original ruling. *See Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 510-11, 544 S.E.2d 285, 289-90, (Ct.App. 2001).

CONCLUSION

For the reasons set forth above, Respondent requests that its Petition for Rehearing be Granted.

Respectfully submitted,

WALKER & REIBOLD, LLC



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ATTORNEYS FOR RESPONDENT

May 27, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity
James O. Spence, Master-In-Equity

Case No. 06-CP-32-4364

Crystal Pines Homeowners Association, Inc.

v.

Don E. Phillips, Crystal Lake Land Developers, Inc.,
and Crystal Pines Yacht Club, LLC

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SC Court of Appeals

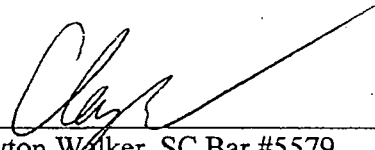
Respondent,

Appellants.

PROOF OF DELIVERY

I certify that I have served Respondent's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on May 27, 2011, addressed to their attorney of record John D. Hudson, Jr., Post Office Box 2285, Columbia, SC 29202.

May 27, 2011



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The South Carolina Court of Appeals

Crystal Pines Homeowners
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v.

Don E. Phillips, Crystal Lake Land
Developers, Inc., and Crystal Pines
Yacht Club, LLC.,

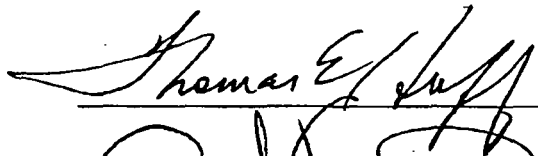
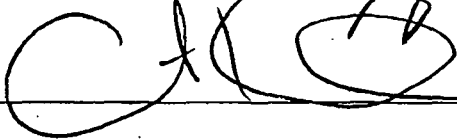
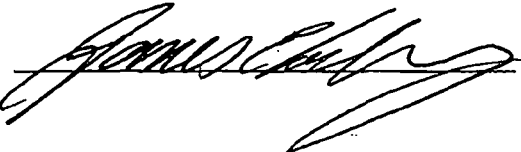
Appellants.

The Honorable James Spence
Lexington County
Trial Court Case No. 2006-CP-32-04364

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied, but that opinion number 4832, filed May 4, 2011, be withdrawn and that the attached opinion be substituted therefor.


_____. J.

_____. J.

_____. J.

Columbia, South Carolina

cc: John D. Hudson, Esquire
Shaun Blake, Esquire
Harry Clayton Walker, Jr, Esquire

FILED
JUN 23 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crystal Pines Homeowners
Association, Inc., Respondent,

v.

Don E. Phillips, Crystal Lake
Land Developers, Inc., and
Crystal Pines Yacht Club, LLC, Appellants.

Appeal From Lexington County
James Spence, Master-In-Equity

Opinion No. 4832
Heard December 9, 2010 – Filed May 4, 2011
Withdrawn, Substituted and Refiled June 23, 2011

AFFIRMED IN PART AND REVERSED IN PART

John D. Hudson and Shaun Blake, both of Columbia,
for Appellants.

Harry Clayton Walker, Jr., of Columbia, for
Respondent.

KONDUROS, J: Don E. Phillips appeals the master-in-equity's finding that Phillips, as successor in interest to Crystal Lake Land

Developers, Inc. (CLLD), is responsible for maintaining roads in the Crystal Pines subdivision (Crystal Pines). Phillips and the Crystal Pines Yacht Club, LLC (the Yacht Club) appeal the master's ruling that residents of Crystal Pines had either acquired or were granted an easement for use of a boat ramp in the subdivision. We affirm in part and reverse in part.

FACTS

Phillips was the sole shareholder and officer in CLLD. In 1979, CLLD began developing Crystal Pines. In 1981, CLLD deeded the roads in Crystal Pines to the Crystal Lake Road Company (the Road Company). All homeowners in Crystal Pines were members of the Road Company. The deed contained the following provision:

The undersigned [CLLD] by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion as may be necessary for development, of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved. The said roads shall be kept free of all obstructions so as to be open for the passage of fire, police, and other emergency vehicle personnel and equipment at all times and by the owners of portion of the real property described in Exhibit "B" hereto and their agents, guests, invitees and employees;

From 1981 through 1986, the Road Company operated as an unincorporated association and simple homeowner's association. In 1987, the Road Company changed its name to the Crystal Pines Homeowners Association (HOA), although it was not technically incorporated until 1997. Beginning in 1996, CLLD drafted a proposed deed granting title to the road

to the HOA instead of the Road Company. The deed contained an attachment that placed road maintenance obligations on the HOA. In 1997, CLLD conveyed its remaining interest in Crystal Pines to Phillips with Phillips paying CLLD \$392,679 and assuming CLLD's mortgage debt. CLLD was then dissolved.

Phillips unsuccessfully tried to have the second deed and attachment executed. In 1998, Phillips filed an amendment to the restrictions governing certain sections of Crystal Pines. The amendment stated the HOA was responsible for road maintenance in Crystal Pines. Phillips repaired the roads in Crystal Pines in the early 1990s, but further maintenance is now required. Phillips has refused to perform any additional work.

Additionally, in 1980, CLLD constructed a boat ramp in Crystal Pines. George Bugenske, a Crystal Pines resident, testified homeowners regularly used the boat ramp. Phillips also testified Crystal Pines residents regularly used the boat ramp, but with his permission. In 2004, Phillips installed a locked gate prohibiting access to the boat ramp and later conveyed title to his son. His son then transferred title to the Yacht Club, which has maintained the locked access.

The HOA filed suit against Phillips, CLLD, and the Yacht Club alleging CLLD and Phillips, as CLLD's successor, were responsible for maintaining the roads in Crystal Pines and claiming an easement to use the boat ramp. The master found in favor of the HOA on both claims, and this appeal followed.

LAW/ANALYSIS

I. Construction of the 1981 Deed

Phillips maintains the master erred in determining the deed placed maintenance responsibilities for all the roads in Crystal Pines on CLLD.¹ We agree.

¹ The HOA contends Phillips's argument regarding construction of the deed is unpreserved because it was not raised to and ruled upon by the master. We

A reviewing court determines, as a matter of law, whether the language in a deed is ambiguous. Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009). A reviewing court considers questions of law de novo. Id. "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning." 30 S.C. Jur. Contracts § 32 Ambiguity (1999) (footnote omitted).

If the reviewing court determines a deed is ambiguous, it must interpret the deed. "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998).

In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.

K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation marks and citations omitted).

disagree. At the beginning of trial, when discussing the exhibits to be submitted, counsel for Phillips stated both sides "have the same documents, and we agree our interpretation is correct, or I should say that I agree, that the Homeowners' Association is responsible for the roads and not Mr. Phillips." Witnesses for both sides were asked to look at the deed and determine who bore road maintenance responsibilities under the document. Phillips testified regarding his belief the deed did not place road maintenance obligations on CLLD. The master clearly ruled against Phillips's construction of the deed when it stated in the order that "CLLD contracted with [the Road Company] to maintain the [r]oads according to the terms of the [d]eed." Because this issue was raised to and ruled upon by the master, it is adequately preserved for our review.

"The intention of the grantor must be found within the four corners of the deed. When intention is not expressed accurately in the deed evidence aliunde may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected." Id. (citations omitted).

We find the deed is ambiguous with respect to road maintenance obligations. Paragraph 11 of the deed discusses the further development of Crystal Pines by CLLD and how that development relates to roads in the subdivision. The deed indicates CLLD will pay to open unopened portions necessary for development and will maintain or repair "said roads as nearly as may be practicable in the same condition and repair as originally paved." Paragraph 11 then discusses the obligation of CLLD to ensure the roads are kept free of obstruction to allow emergency vehicles access to the neighborhood.

The HOA contends Paragraph 11 unambiguously places the burden for road maintenance in Crystal Pines on CLLD. However, the placement of such an important obligation in a paragraph solely discussing the process of opening new roads casts doubt upon the clarity of this obligation. Additionally, "said roads" is not a defined term and Paragraph 13 of the deed seems to indicate the Road Company is responsible for road repair in the subdivision. It states:

Notwithstanding anything to the contrary in this instrument contained, if [the Road Company] shall incur any cost or expense for or on account of any item of maintenance, repair or other matter directly or indirectly occasioned or made necessary by any wrongful or negligent act or omission of any owner . . . such cost or expense shall not be borne by [the Road Company] but by such owner and if paid out the [Road Company] shall be paid or reimbursed to the [Road Company] by such owner forthwith

This paragraph indicates either the Road Company or a particular resident would be responsible for repairing damage to roads. There is no mention of CLLD. Based on the lack of clarity and the seeming inconsistency in the

deed, we conclude the deed is ambiguous, and we must therefore look to the intent of the parties.

Viewing the deed as a whole, its purpose was to convey ownership of the roads in Crystal Pines to the Road Company. Paragraph 10 states the Road Company "shall receive title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane and shall hold and deal with the same and such other assets as it may receive from time to time" The Road Company also had the right to dedicate the roadways to a government entity for perpetual maintenance under Paragraph 22. To place ownership and essentially all control of the roads with the Road Company and leave the responsibility for maintenance with CLLD would be inconsistent.

Because the deed is ambiguous, we may also consider extrinsic evidence to ascertain the intent of the parties. The general rule, as evidenced by Lexington County Development Guidelines, was for homeowners to take over maintenance of private roads once the final plat of a development was approved. According to Phillips's testimony at trial, the deed states CLLD would repair and maintain the roads being conveyed if they were damaged during the process of constructing the new portions of road. He testified:

Q. Is it your position that paragraph 11 doesn't obligate the developer to maintain and repair the roads mentioned here?

A. If you read the whole sentence, it says that if you cause damage, you will repair it; if you don't read the whole sentence, you can take portions of it and put together an entirely different notion, and that is what you have done. . . .

Q. I'm going to borrow Mr. Lapine's pen and ask you, on Exhibit #1, paragraph 11, to circle the words that you contend limit the developer's obligation to repair damage it causes.

A. It would be the whole paragraph.

Q. Then circle the whole paragraph. So you can't point to specific words in the paragraph that limit the developer's liability to repairing damages it causes?

A. You would have to assume that a road was opened, an unpaved portion was opened, and that there was damage done.

The fact that the only mention of maintaining the roads immediately follows the clause concerning the opening of new roads is consistent with Phillips's explanation of CLLD's intent in Paragraph 11.

The HOA argues Phillips's efforts beginning in 1996 to execute a corrected deed with Exhibit B attached evidenced his understanding that CLLD had the obligation to maintain the roads pursuant to the original deed. We disagree. Phillips testified that his purpose in drafting the corrected deed was to ensure the conveyance of the roads to the HOA as an incorporated entity was proper. The inclusion of Exhibit B and Phillips's amendments to the restrictions governing certain sections of Crystal Pines likely reflects his desire to clear up any ambiguity in the original deed. Additionally, the master found that Phillips made some road repairs in the late 1990s. The record contains no testimony regarding this particular point, but the master's order indicates the repairs were made when Phillips "extended the Roads to open new areas of Crystal Pines." That action is consistent with Phillips's construction of the deed. Other than that instance, the testimony indicates Phillips consistently disclaimed personal responsibility for repairing or maintaining the roads in Crystal Pines.

Because we have a broad standard of review in this case and considerable evidence supports Phillips's construction of the deed, we find the CLLD and Phillips are not responsible for repairing or maintaining the roads in Crystal Pines, except to the extent of damage that occurs during further development of the subdivision. Therefore, we reverse the master's finding CLLD is responsible generally responsible for all road maintenance in Crystal Pines. Accordingly, we decline to address two additional issues

raised by Phillips regarding the amount of damages awarded to Crystal Pines or whether Phillips was successor to CLLD. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (declining to address remaining issues when determination of prior issue is dispositive).

II. The Boat Ramp

Phillips argues the master erred in determining the HOA was entitled to an easement for use of the community's boat ramp. We disagree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear, 329 S.C. at 410, 496 S.E.2d at 635. To establish a prescriptive easement, a party must demonstrate (1) continued and uninterrupted use or enjoyment of the right for a period of 20 years, (2) proof of the identity of the thing enjoyed, and (3) adverse use or use under a claim of right. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005).

According to the testimony in the record from Phillips and Bugenske, the ramp was constructed in 1980 and homeowners used it until 2004, when the Yacht Club restricted access.² Phillips claims the homeowners used the boat ramp with his permission. However, some evidence demonstrates the use was under a claim of right, not just with permission. According to Bugenske, homeowners were told when they purchased their lots they had access to the boat ramp and they used the ramp frequently throughout the years with no indication they sought Phillips's permission to do so.

² Phillips argues the Road Company and the HOA are not the same entity for purposes of establishing the twenty-year prescriptive period. However, even if the entities are not the same, a claimant is permitted to tack the time period of a prior owner to his own to establish the required prescriptive period. See Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to establish the 20-year requirement.").

Marketing brochures for the subdivision indicated deep-water access was available to residents.

Detrimental to HOA's case is that Bugenske's testimony only affects the period of time after he purchased his home in 1994, short of the required twenty years. The only evidence in the record from the 1984 to 1994 period is from Phillips himself. Phillips acknowledged homeowners used the ramp, but he claims they did so with his permission. However, in a letter to the HOA in 2002, Phillips indicates the original 1981 deed transferring ownership of the roads also included the transfer of ownership of the boat ramp. The letter states: "Although not specifically mentioned in the deed, the entrance gates and Parcel A including the boat ramp are included in property turned over with the roads." Furthermore, a plat filed in 1986 indicates the location of the boat ramp is in an area designated "community common area."³ Phillips's testimony regarding actual use, coupled with the letter and plat, is at least some evidence the residents were using the boat ramp based on a claim of right during the 1984 to 1994 period. Therefore, we find the master did not err in finding a prescriptive easement in favor of the HOA.

Because we affirm the master's finding the HOA established a prescriptive easement to use the boat ramp, we need not address Phillips's remaining argument regarding an easement by implication in favor of Section IV of Crystal Pines. See Whiteside, 311 S.C. at 340, 428 S.E.2d at 889 (declining to address remaining issues when determination of prior issue was dispositive).

³ Although the year 1986 cannot be used to establish the beginning of the twenty-year prescriptive period, the plat is some evidence demonstrating residents would have understood their use to be a matter of right. The plat and the contents of the letter also discredit Phillips's testimony that residents only used the boat ramp with his permission.

Based on the foregoing, the judgment of the master is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and LOCKEMY, JJ., concur.