

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2013000714

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth

Appellant,

v.

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

Respondents.

CORRECTED RECORD ON APPEAL

VOLUME 10

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SC Court of Appeals

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

HISTORY AND SUMMARY

On August 8, 2012 through August 10, 2012 consolidated cases 2009-CP-26-3596 ("2009") and 2010-CP-26-11320 ("2010") were tried together before this Court. The 2010 case had originally been filed in the Magistrate Court and was removed to this Court by the Defendant.

The Plaintiff in both cases is Ronald Jarmuth, who appeared pro-se. The Defendants in the 2009 case is The International Club Homeowners Association, Inc ("HOA"), Rosemary Toth, individually and as member of the Board of Directors of the HOA, and K.A. Diehl, Inc, the management company for the HOA. The sole defendant in the 2010 case is the HOA. All defendants were represented by common counsel, McNair Law Firm. Henrietta Golding and Alicia Thompson, of McNair, argued the case for the Defendants at trial.

This case was originally scheduled for trial January 17, 2012 but was continued and ultimately referred to this Special Referee for trial by consent of the parties.

As a civil matter, the standard which the advocate of an issue was required to show to prove facts is a low one: more likely than not. The determination of the fit between those facts and the law is a question of law for the court, particularly the applicability of a particular statute to the facts of the case.

Evidence Issues

Although Defense Counsel had paper copies of all of Plaintiff's proposed exhibits to which Defense Counsel objected to (at the beginning of trial) well before the original trial date, January 17, 2012, it did not submit a Motion in Limine at that time nor did it prepare and submit one to the Court prior to the August 8th trial date, although it had complete knowledge of Plaintiff's exhibits not later than July 30, 2012. The same can not be said

regarding Plaintiff's prior knowledge of Defendants' exhibits.

At the beginning of trial the Plaintiff asserted that he had served the Defendants approximately 7000 documents in discovery, primarily in 2009, most in paper, and that all of his exhibits for trial had been hand served on defense counsel no later than July 30, 2012, in the same paper form and as numbered as which was ultimately introduced as Plaintiff's evidence at trial. Plaintiff asserted that the additional documents which he had not identified as exhibits for trial but had set aside as potential evidence for impeachment purposes had been served on Defense Counsel well before the original January 17, 2012 trial date. Plaintiff noted that on January 17, 2012 the Chief Judge of the trial court, Hon. Judge Steven John, had entered orders of compliance pertaining to Plaintiff's 2009 motions to enforce subpoenas issued by Plaintiff in 2009 against non-parties who had not complied. He also ordered the Defendants to produce certain documents. Plaintiff stated that the documents which resulted were served on Defendants in paper form as exhibits for trial prior to July 30, 2012.

Plaintiff asserted that except for Defendant's three oversize aerial photos, he had never been served a single document in paper form by Defense counsel. Plaintiff's list of Defendants documents – actually a set of “screen prints” of the computer file listing of the files which Defendants had served – showed that prior to May 23, 2012 Defense had served him 217 documents (files) and that on or about July 17, 2012 Defense had served one more file on a CD. Defense Counsel did not controvert any of this.

Plaintiff then objected to what he called “Trial By Ambush”, noting that he first saw the list of exhibits that Defense Counsel proposed to use at trial in an email he opened half a day before trial – August 7, 2012 - which was emailed to him by Defense Counsel after hours on August 6, 2012. Plaintiff objected to the fact that he had not seen the Defense's actual exhibits in paper form or other until minutes before the trial began. Defense Counsel did not controvert that either. Plaintiff offered the Court the list of Exhibits which Defense Counsel had served him on January 13, 2012, just prior to the original trial date, and compared it to the list of Exhibits which Defense Counsel had placed on the Plaintiff's trial table minutes before the trial began, and explained that there were numerous exhibits on Defendant's August 8th list – the documents served in the courtroom immediately before trial – that were not on the January 13 list, and that in many instances the same exhibit number now was used for a completely different document. Defense Counsel did not controvert the point that Defense Counsel had not actually served on Plaintiff the set of Exhibits it had intended to use at trial January 17th, and which were reflected in it's January 13 list.

Further, Plaintiff asserted that the descriptions (names) used by Defense Counsel for the files in the CD discovery were completely different from the captions used for the trial exhibits, and that because Defendants actual trial exhibits lack the “Bates” numbers, it was impossible for Plaintiff to track Defendants' trial exhibits to the discovery exhibits, upon which Plaintiff would have marked cues to use in questioning witnesses when Defense used it's exhibits at trial. Plaintiff asserted that if the Court compared the CD list and the January list with the August 8th list, it would be seen that many of the August 8th exhibits

had never been given to Plaintiff prior to the trial.

Defense Counsel objected to a series of Plaintiff's exhibits, without specifying the nature of the objections. Defense never asserted that it had not been served any document on the list, either in discovery or in the form of being hand served the trial exhibits, and never controverted the authenticity of any of Plaintiff's documents.

Plaintiff stated that he had no objection to the Court using any document presented to it which would contribute to the Court's decision making – subject to Plaintiff objecting to authenticity or alteration issues when a document was introduced or used by Defense. One such instance arose during the course of the trial.

Plaintiff noted that four of Plaintiff's documents objected to by Defense Counsel consisted of letters between attorneys, numbered 351, 352, 353, and 354. Plaintiff explained that these were documents used by Plaintiff in the deposition of Defendant Rosemary Toth, that all concerned "Capital Contributions", a major question in litigation, and Plaintiff asked the court to note that none of these four documents carry with them attorney – client privilege because (1) at least one of the addressees was not counsel, at the moment the letter was written (or received) for any of the Defendants in the matter for which the exchange of correspondence occurred; and (2) that Plaintiff had lawfully come into possession of these from one or the other of the attorneys or their clients, and thus for either reason no privilege existed. The Court examined the documents and concludes that no privilege exists for any of these and that they are admissible because they bear on an issue in litigation – that being Capital Contributions.

PLAINTIFF'S ORDER OF PRESENTATION OF THE CASE

A significant dimension of Plaintiff's case is a request for Declaratory Judgment as to the rights and obligations of "The Association"¹ through the application of the South Carolina Non-Profit Corporation Act in particular, as well as several other federal, state, and county regulatory structures. Plaintiff also asked the court to declare the pre-emptive impact such regulations and the common law have on various provisions of the Covenants.

Beyond that, Plaintiff put before the Court the question of whether, for the purpose of interpreting the covenants that apply to the property subject to regulation by the Covenants, certain sections of the Covenants were still enforceable by virtue of the fact that amendments to the covenants had been filed which were declared as "waived", and which Plaintiff asserted equated to "deleted".

¹ "The Association" is defined in the Covenants. One issue before the Court is which of four corporations is "The Association" with rights and obligations under the Covenants and Bylaws. Irrespective of that, Plaintiff asked the Court to state the rights and obligations of "The Association", regardless of which it might be, created by application of Statutes, Regulations and Ordinances related to certain aspects of The Association's conduct of business.

Plaintiff's presentation of the case overlaid acts of the Defendants on the interpretations of law which Plaintiff asserted to determine whether such acts, or failures to act, were voidable or, in some instances, actionable against some or all of the Defendants.

UNDERLYING FRAMEWORK / SCHEME OF GOVERNANCE

The Law, the Facts, and the Acts of the Defendants divide themselves into three groupings:

1. The Use of Property within the Community – which should be governed by Horry County Ordinances, South Carolina Statutes, and proper Covenants.

2. The Operation of South Carolina homeowners associations in general and the Defendant Association in particular as South Carolina Non-Profit Corporations – which should be governed by the Articles of Incorporation and legally adopted Bylaws; and

3. The tortuous acts of the Defendants, individually and collectively, towards Plaintiff and while in control of the Defendant Association – which must be assessed in the light of the common law and the controlling documents, depending on whether a particular act related to the property, to an individual, or to the association.

Plaintiff pointed out the confusion among the homeowners and the members of the board of Defendant IHOA that he was seeking to resolve through the declaratory aspects of his lawsuit. Plaintiff stated that the confusion arises because the same persons, organizations and actions have conflicting contexts in each of the three groupings (regimes) and the Court was asked to resolve the confusion – by declaring which aspect of the covenants, the bylaws, and the governmental regulatory scheme applies and does not apply to which of the groupings. In particular, the Court was asked to identify those provisions of the covenants, bylaws and association rules which are pre-empted by government action or common law.

The Court is asked to note and to apply the pre-emptive hierarchy of regulatory regimes: Statutes, ordinances, common law, covenants and lastly rules.

Use of Property

Plaintiff argued that the use of property within a subdivision is governed first by the controls on development imposed by Horry County and the agreements reached between developers and the planning commission regarding how the property will be developed, and secondarily by those lawful obligations and restrictions imposed on property within the subdivision prior to sale which meets the criteria for particular servitudes to become proper covenants which touch and run with the land.

County Development Regulations

Plaintiff argued that subsequent to a subdivision being approved by the Planning Commission no aspect of it which is contrary to explicit agreements reached between the developer and the commission which is explicitly stated in an approval document, such as a signed plat, may be altered without being granted a modification by the Planning Commission. Plaintiff argued that many of the problems of which he complained is traceable to developers ignoring the limitations on development of the planned unit development (in which Plaintiff lives) reached voluntarily between the developers and the commission.

Plaintiff also argued that many of the problems of which he complained are likewise traceable to developers placing restrictions and obligations within the covenants which are not legitimate covenants running with the land, but rather constitute personal services contracts which do not survive the transfer of ownership or which from the start do not satisfy the requirements set forth in the Statute of Frauds to form a valid contract.

Defendant took the testimony of an expert witness of their designation, Jeffrey W. King, to justify the way the covenants, bylaws and rules were implemented in Horry County in general and in this subdivision in particular. He admitted to no actual knowledge of the circumstances which surrounded the creation of the covenants, bylaws and rules relating to the subdivision and had not spoken to any of the people who were so involved. Under cross examination, he was unfamiliar with the statutes relating to the formation of non-profit corporations, name changes, recording and indexing of deed related documents, as well as those statutory provisions relating to the governance of such non-profit corporations. He admitted to having never written a scholarly article on the subjects about which he was testifying, had never taught a class on any of these subjects, and had no particular advanced specialized education. He asserted that his expertise arose from creating the legal documents over many years to create subdivisions and home owner associations. Under questioning, he was unable to cite any case law to justify his opinions. Plaintiff observed, for the record, that all Mr. King was stating was the legally untested habit of the community.

Mr. King ultimately conceded that modifications to what was agreed upon between the county and a developer would require a granted application for modification, and that a developer was not permitted to make a modification to any aspect for which an agreement, reflected on a Plat, perpetuated restrictions and obligations relating to development of the subdivision. He conceded that alterations adding additional property or houses to a subdivision, changing building densities, or changing the agreed status of roads would require an enhancement to entrance roadways, additional amenities and open areas, and expanded capacity / modification to the storm water drainage system.

State Regulation

Upon questioning, Mr. King justified the absolute control developers exercised for many years over communities and over the homeowners associations associated with them

on the basis of habit, i.e., that is what they had been doing. He was unaware of any statutes or case law that permitted or prohibited this practice.

**Formation and Control of Home Owner Associations
- Bylaws, Articles, and Boards of Directors -**

Plaintiff first pointed out that, unlike all surrounding states, South Carolina has not created a Homeowner Statute to modify or extend the Non-Profit Corporation Act to reflect the special circumstances of planned unit developments and homeowner associations, and that the problems this created are well known to the legislature, and to the Senate Judiciary Committee in particular, which has debated potential homeowner association legislation for years. Without such legislation, Plaintiff pointed out, non-profit corporations organized under the general act must comply fully with the statutes within the act. Plaintiff pointed out that prior to 1977 it was illegal in South Carolina to sell condominiums because the title conveyed was not associated with a specific piece of property on the ground, and that a similar situation existed with regard to time – sharing until the legislature created a special act for those as well. Plaintiff argued that a major origin of mis-understandings in Horry County is the wide spread assumption that what is permitted in neighboring states is likewise permitted in South Carolina. Plaintiff attributed much of the problem to multi-state developers, such as D.R. Horton, who used the same procedures in every development and in every state they built in. As a consequence, developers have been representing that their habits reflect the law, which is untrue in South Carolina, as Plaintiff stated he would prove.

Mr. King testified that much of his experience related to developments in North Carolina, which has a homeowner association act. In support of his conclusions he stated only that none of the developments and associations he had a hand in forming had thus far been sued to challenge the manner of creation and operation. Plaintiff's observation in the vernacular is that "they got away with it because their victims didn't know better".

Mr. King stated that the circumstances of this subdivision were typical for Horry County, these being as follows:

- a. The developer names a homeowner association and imposes an obligation on homeowners to join it by placing such an obligation in the covenants that run with homeowner lots.
- b. The developer writes the bylaws for the association and attaches them to the covenants, often many years before the association is actually incorporated – by others – and does not separately record, attest to them, or index them to the association name.
- c. Sometime thereafter the named association is incorporated by the developer as the Declarant.
- d. For many years thereafter the developer runs the association without giving a voice or a vote to the homeowners who he requires to be paying members of the

association. During that period the developer sets and collects assessments to support amenities and areas of the development which the developer continues to own and control.

Plaintiff argued that these local practices are illegal and unsupported by any court decision. Mr. King, the defense's expert witness, was unable to cite any statute or case law in support of the practice he was describing.

DECLARATORY INTERPRETATION OF RIGHTS AND OBLIGATIONS UNDER THE SOUTH CAROLINA NON-PROFIT CORPORATION ACT

At trial and within the Plaintiff's Complaint the Court was asked to interpret certain provisions of the South Carolina Non-Profit Corporation Act as they applied to homeowner associations in general and to the Defendant association in particular. Plaintiff explained that this would control whether certain acts or failures to act, to be presented later, were ultra-vires acts performed without authority, or intra-vires acts performed with a conflict of interest or perhaps performed in a manner not meeting the standards the Non-Profit Corporation Act, or the Bylaws, sets for directors and officers.

WAS DOES THE LAW REQUIRE THAT THE INITIAL BOARD OF DIRECTORS AND THEIR SUCCESSORS HAD TO BE ELECTED, NOT APPOINTED?

Plaintiff read the following text from the statute:

SECTION 33-31-205. Organization of corporation.

- (a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at a call of a majority of the incorporators:**
 - (i) to elect directors and complete the organization of the corporation; or**
 - (ii) to elect a board of directors who shall complete the organization of the corporation.**

Plaintiff stated that on March 1, 2001 the IHOA was incorporated depending on Pl # 552 the Defendant Association's Articles of Incorporation with the Secretary of State's file stamp for authentication. The document was not challenged by defense counsel.

The Court was asked to take judicial notice of controlling issues of fact set out in that document:

1. Defendant IHOA was incorporated per SC 33-31-202 of the Act which made it subject to the Non-Profit Corporation Act. Paragraph 1.
2. Defendant's Legal Name is exactly as follows, with name separation set out in paragraph 2 of the document: "International Club Home Owners Association". With no "LLC" or "Inc" after it. Plaintiff pointed out that there are many corporations whose names are distinct only by use of a suffice such as "Inc" or "LLC" and that the presence or absence of same is legally significant.

3. That Defendant IHOA is a "mutual benefit corporation"; paragraph 3.
4. That the corporation has members; paragraph 4.
5. That paragraph 8 of the Articles did not state any of the options provided for (SC 33-31-202) for governance of the IHOA. The Declarant wrote as the corporation's purpose that it is a "Homeowners Association" which would have inherent meaning if South Carolina has a Homeowners Act – which it doesn't.

The Court is asked to take judicial notice that these are the options which the Declarant was permitted to state in Paragraph 8 of the Declaration, but chose not to:

SC 33-31-202 (c) The articles of incorporation may set forth:

- (1) the purpose for which the corporation is organized which may be, either alone or in combination with other purposes, the transaction of any lawful activity;
- (2) the names, addresses, and zip codes of the individuals who are to serve as the initial directors;
- (3) provisions not inconsistent with law regarding:
 - (i) managing and regulating the affairs of the corporation;
 - (ii) defining, limiting, and regulating the powers of the corporation, its board of directors, and members, or any class of members; and
 - (iii) the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;
- (4) any provision that under this chapter is required or permitted to be set forth in the bylaws.

Plaintiff asserted that to be effective the supplemental rights and obligations regarding the association stated in the covenants would properly have to be stated instead in the Articles, and that absent such a supplementation in the Articles, the operation of the Association is exclusively controlled by properly adopted bylaws.

The Court is asked to take judicial notice that the Articles did not supplement the Bylaws in any way.

6. That the sole Declarant for the Association was "Ken Grover; paragraph 9 of the Articles. The Court was asked to take judicial notice that Ken Grover was not the Declarant of the Covenants which contain what is purported to be the Bylaws of the Defendant Association.

7. That the Articles did not name initial directors; paragraph 10.

Plaintiff asked the Court to declare that per SC 33-31-205, quoted supra, since the Articles did not name any initial directors, at the initial meeting all the initial directors must be elected and the organization of the corporation must be completed.

SECTION 33-31-205. Organization of corporation.

- (a) After incorporation: (2) if initial directors are not named in the articles,

the incorporator or incorporators shall hold an organizational meeting ... (i) to elect directors and complete the organization of the corporation;

Plaintiff asserted that the meaning of "organization of the corporation" includes adoption of bylaws After incorporation as provided by separate statute.

Plaintiff asked the court to declare that ipso facto any directors who took office after the association was incorporated without being elected (i.e., appointed) were illegally in office, that they had no authority to act for the defendant corporation, and thus all their subsequent acts were ultra vires and void.

Plaintiff explained the authority for this is contained in the following statute:

SECTION 33-31-304. Ultra vires. (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by derivatively.

Defense counsel did not controvert the applicability of this statute.

The Plaintiff asked the Court to interpret the Act's provisions regarding Byalws and to declare that the legally effective bylaws of the Defendant IHOA could not be adopted by the Declarant of the Covenants who was neither an incorporator of the IHOA nor a member of it's board of direcrots.

The applicable statute is:

SECTION 33-31-206. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

The Court was asked to note that R. Scott Pyle, the Declarant of the Covenants, was not the incorporator (Ken Grover) and because the Bylaws (Plaintiff's 548) were stated only once – as Exhibit C to the Covenants, Plaintiff's 547, the Bylaws were stated prior to the later incorporation and it is conclusive that R Scott Pyle was never a member of the Defendant IHOA's board of directors. This was uncontroverted.

Plaintiff also asked the Court to take judicial notice of, and he proffered that, the minutes of the meetings of the successive boards of directors do not reflect the adoption of the Bylaws by the membership or by the board. This was uncontroverted.

The Court is asked to declare that the Bylaws set out in Exhibit C of the Covenants are not legally effective bylaws of the defendant IHOA.

Plaintiff asserted that 33-31-206 which allows for the directors to adopt bylaws is limited to the obligation of the initial directors to adopt bylaws at the initial meeting if the incorporator had not already adopted bylaws, and Plaintiff asserted and asked the court to declare that subsequently the authority to adopt or alter bylaws is controlled by the section of the Act which provides for "amendment". Plaintiff asserted that the legislators would not have envisioned a situation where a corporation would operate for twelve or so years without any bylaws.

Plaintiff asked the Court to declare that because there are no legally effective bylaws, the provisions of the Act which allow for alternative if stated in bylaws do not apply and that instead the default provisions of the Act control operation of Defendant IHOA.

Plaintiff next addressed the issue that the Defendant IHOA is asserting that provisions of the putative bylaws and the IHOA's rules apply not just to the operation of the IHOA, but also to the use of property. Plaintiff reminded the court of the parallel regimes – use of property and non-profit corporation operations. Plaintiff asserted that sub-section (c) of the statute makes it clear that the domain of bylaws is exclusively the operation of the corporation with which they are associated, and no further, and that controls over areas of members lives beyond the operation of the association are without statutory authority:

SC 33-31-206(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

The Court is asked to declare that even a voluntary enrollment or participation by a homeowner in the Defendant IHOA does not constitute a non-revocable consent to any provision relating to homeowner property. The Court is asked further to declare that any provision in a non—profit corporations bylaws or rules which attempt to extend the authority of a non-profit corporation to enforce limitations on acts of members not performed in their capacity as an officer or employee of the association or not related to the use of association property is beyond the legally enforceable authority of the association.

The Defendants did not controvert any of Plaintiff's assertions relating to the Bylaws, except to state without citation to statute or case law that a developer could restrict the operation of a hypothetical future corporation through the filing by an unrelated individual of bylaws with the name of that unincorporated corporation on the bylaws.

The Court is asked to declare that any provision of The Bylaws or the Association's rules relating to the use of land not currently owned by Defendant IHOA are void as a matter of law.

DISTINCTIVE NAMES

Plaintiff asked the Court to declare even one word distinctions in names between corporations is legally significant and sufficient to identify who the corporate party associated with a contract or legal document is. The statute cited by Plaintiff is:

SC 33-31-401. Corporate name. (b) a corporate name must be distinguishable upon the records of the Secretary of State from the name of any other corporation, or partnership [doing] business in South Carolina

Plaintiff asked the Court to take notice of the fact that the Secretary of State allow the recording of names of separate and distinct corporation distinguishable by a single word or abbreviation, such as LLC versus Inc.. By way of example the Court was asked to note the separate existence of the International Club Association and the International Club LLC, one being a non-profit corporation and the other being the golf course in the PUD.

Plaintiff stated that this is a controlling aspect of law because it would be used later in the case to settle the question of which is "The Association" which has obligations and rights under the Covenants.

Defense counsel did not controvert the legal significance of a distinction of even one word in the name of a corporation.

MEMBERSHIP

Plaintiff asked the Court to settle the issue of admission, resignation, and obligations of members of a non-profit corporation. Plaintiff asserted and asked the Court to Declare that Covenants to property do not provide the legally effective definition of members and their rights, arguing that this arises out of the South Carolina Non-Profit Corporation act and provisions of the Bylaws not in conflict with the Act.

SC 33-31-140 Definitions (24) states that
"Membership" refers to the rights and obligations a member has pursuant to a corporation's articles, bylaws, and this chapter.

The Court was asked to note that the Covenants pertain to a designated area of property which exists whether or not a non-profit corporation is related to that land or not, and that existence of a corporation does not depend on the existence of a specified land – although membership in a non-profit corporation may be conditioned on some limiting criteria, such as residence in some area, engagement in a trade, or some other objective and

legal distinguishing criteria.² At trial before this point, the Plaintiff had already asked the court to declare that governance of a non-profit corporation arises strictly from it's articles of incorporation, bylaws and The Act. Various defense witnesses confused the covenants with the term "Articles" which conclusion Defense Counsel never helped it's witnesses to resolve.

If the Court has not already done so, the Court is asked to declare that the "rights and obligations a member" arise exclusively "pursuant to a corporation's articles, bylaws" and the Act.

- Requirement to Involuntary be a Member of a Homeowner Association -

The Court was next asked to interpret SC 33-31-601. Admission. And -620, Resignation.

Subparagraph 601 (Admission) reads that

"(b) No person may be admitted as a member without his consent."

Plaintiff noted that in states with home owner association statutes, a requirement to join is stated and enforceable. Plaintiff asked the Court to take judicial notice that the legislature is aware of the issue of involuntary membership in homeowner associations, and that the legislature enacted such a provision with regard to horizontal property regimes – condominiums – in 1977, and legislation relating to the sale of time shares in a later year – but never homeowner associations associated with subdivisions in general. Clearly this was not a legislative oversight. More importantly, a statutory requirement to associate with others is an infringement of personal liberty not taken lightly and may not be inferred from legislation. Such an infringement is not to be found in The Act and Plaintiff asks the Court to declare that the law in this state is that homeowners not living in condominiums or other multi-family regimes may not be compelled to join a homeowner association.

Defense Counsel never controverted Plaintiff's assertion of the effect of the statute.

Plaintiff asks the Court to declare that, as a matter of law, in South Carolina no homeowner not living in a multi-family area subject to the Horizontal Property Act may be forced to join a home owner association.

- Resignation -

Likewise subsection SC 33-31-620,. Resignation. Reads

² While eligibility criteria might include persons of a certain race or national origin, this doesn't mean these "gate keeper" provisions are still legally enforceable after the passage of civil rights legislation banning use of race, religion, age, familial status, or national origin as criteria.

“(a) A member may resign at any time.”

Plaintiff referred to the membership in a homeowner association as being in the nature of a personal contract, and pointed out that the statute of frauds requires that obligations with a duration of more than two years requires a contract in writing with the terms signed individually by each party to the contract, and contracts of indefinite duration are not allowed. Plaintiff also asserts that the only binding terms associated with such a contract are those set out in definite terms in the contract, and that guidelines or rules that change from day to day without the agreement of a contracting party do not satisfy that requirement.

A Personal Contract does not transfer from person to person and if somehow related to property, such as an agreement to mow lawns, does not survive the transfer of title.

None of this was controverted by Defense Counsel.

The Court is asked to declare that in South Carolina, outside of Horizontal Property Regimes related to condominiums and similar establishments, no homeowner can be forced to remain a member of a homeowner association.

- Contractual Obligations And Debts -

The Court was also asked to declare members of homeowner associations chartered as non-profit corporations can not be forced to pay the debts of such homeowner associations, even if collection attempts by said associations are termed “assessments”.

The Act reads:

SC 33-31-612. Member’s liability to third parties. A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or *obligations of the corporation*.

The Court was asked to take notice that the Defendant IHOA has at least one judgment against it through a case in this court, where a sub homeowner association sued the Defendant IHOA. Irrespective of how the consent judgment came about, The Villas Home Owner Association is not a member of the IHOA and thus is a “third party”.

Plaintiff put into evidence the IHOA’s General Ledger entry where it paid \$10,000 of that judgment from IHOA funds and asked the Court to take Judicial Notice of the “Mutual Release and Settlement Agreement” filed in this court on May 17, 2011, Villas at International Club v IHOA, 2009-CP-26-3211, where the IHOA agreed to pay the Villas \$20,000 immediately and an additional \$43,200 over 48 months, which money is not a sum concerning the operation of the IHOA owned common area and will come from the assessments imposed on homeowners. These points and facts were not disputed by Defense Counsel.

Plaintiff also pointed out that contracts between the IHOA and others who are not members of the IHOA are contracts by the association with third parties, and that these include the HTC cable contract, the waste management contract, and even the contract with the management company, co-defendant KA Diehl.

Plaintiff asks the court to declare that "Acts" within the scope of the statute includes contracts entered into by a homeowner association.

The Court is asked to declare that the plain language of the statute is that a homeowner is not liable for, can refuse to pay, is not contractually bound by, and may not be assessed for money owed by a non-profit to a third party by virtue of a homeowner association contract or otherwise.

Defense Counsel did not controvert any of this.

-- IHOA HAS NO DEFINED OBLIGATIONS OR MEMBERS --

Plaintiff asserted to the Court that by virtue of the fact that Covenants running with land do not control the operations of a non-profit corporation, covenants are not a source of authority to define the membership of an incorporated homeowner association.

Plaintiff also pointed out that the governance of a non-profit corporation arises from it's Articles and Bylaws and The Act.

The aforesaid SC 33-31-140 Definitions (24) further provides that the rights and obligations of membership arises exclusively from the incorporated home owner assoications' "articles, bylaws, and this chapter."

Plaintiff has asked the Court to Declare that the Articles do not declare who the members are nor their rights and obligations, and that the Defenadant IHOA has no legally effective Bylaws.

That being so, the Court is asked to declare that members of the Defendant IHOA have no obligations towards the IHOA except such as they create by separate enforceable individual contract, and their rights are the default rights stated in The Act.

The Court is further asked to Declare that Criteria limiting membership must be stated in the Articles or Bylaws of a non-profit corporation and that because of the lack of legally effective Bylaws for the Defendant IHOA and the omission of optional criteria in Paragraph 8 of the Articles, the membership of the IHOA as a corporation has no limiting criteria and is open to all.

-- TERMS OF OFFICE --

A Question before the Court is whether terms of office for members of the Board of Directors are fixed, and when the term of office begins to run and ends. The practice of the IHOA has been to hold the annual meetings at different dates during the year across the entire spectrum of months, and for board members to assume the office the day they are elected (without the resignation of the predecessor) irrespective of when the predecessor took office.

Plaintiff asks the Court to Declare that the acts of an individual who takes office before his term begins to run are ultra-vires since such an individual lacks authority.

Plaintiff asks the Court to Declare that the beginning of a term of office is related only to the date that the first Director in the line of succession took office and not to the date of any particular election.

Plaintiff used the example of the federal system with elections in November and inauguration in February.

Plaintiff read into the record the names of and dates board members took office to show the lack of uniformity and the source of the problem. Further, the on-going practice of replacing directors immediately upon appointment or election means that there is no uniformity in terms of office – and when directors are appointed to fill the remaining terms of directors who resigned, those remaining terms in practice often are longer or shorter than an exact multiple of years from the appointment or election of the individual they have been appointed to succeed.

The Act provides that per SC 33-31-805 Terms of directors generally.

(a) The articles or bylaws may specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five years. In the absence of a term specified in the articles or bylaws, the term of each director is one year. Directors may be elected for successive terms. ...

(c) Except as provided in the articles or bylaws: (1) the term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

It has been pointed out that the Articles of the IHOA are silent on this matter and that the IHOA has no legally effective bylaws. That being said, the putative bylaws (Plaintiff's 548) provides as follows:

Bylaws Article 4. BOARD OF DIRECTORS Section 2. Term of Office.

“... at each annual meeting ... the Owners holding at least a majority of the

total votes cast at such meeting shall select approximately one-third (1/3) of the directors (whose terms are then expiring) for terms of three years.

The Court is asked to Declare that if the IHOA has no legally effective Bylaws, the term of office for members of it's Board of Directors, per SubSection 805 of The Act, is one year, Plaintiff asks the Court to Declare if and only if by some reason the IHOA does have legally effective bylaws, that the terms of office for directors are three years.

Section 805(c) provides that the default term for a replacement director expires at the next annual meeting of members at which directors must be elected. That section provides an exception if legally effective bylaws have some other provision.

The putative Bylaws in Article 4 Section 3 Removal provide that if a vacancy in office occurs, the appointed replacement shall complete the director's three year term (or less for initial directors).

Plaintiff asks the Court to declare, since there are no legally effective Bylaws for Defendant IHOA, that appointed replacement directors serve until the next annual meeting and election which is what subsection 805(c) provides – not until the end of any term of office.

Plaintiff asks the Court to declare that variations in when elections are held do not stretch or contract terms of office..

-- Beginning of Initial Term and of Annual Terms of Office --

Plaintiff read from the putative Bylaws in Article 4, Section 3, Annual And Special Meetings of Membership, that

(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

Plaintiff entered into evidence the Articles creating the Defendant IHOA which shows that the IHOA was incorporated on March 1, 2001, Plaintiff's# 552, and the 2001 Calendar, Plaintiff's 116 which shows that the second Saturday of March, 2001 is March 10, 2001. No other date was designated by the Board because, per the absence of any Board Minutes to the contrary, which was uncontroverted, no annual meeting of members was held in 2001.

If the Court holds that the putative bylaws of the IHOA are legally effective, the Court is asked to declare that the term of office of IHOA board members begins on March 10 of each year, irrespective of when each annual election is held.

The Act does not accept the premise that the Incorporator or Initial Board will not provide for annual elections in the Articles of that the Declarant will fail to timely create

Bylaws. Subsection 701 of the Act provides that

- (a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.**

To resolve this problem, if the Court declares that the IHOA's putative bylaws are legally ineffective, the Court is asked to set the annual term to when the initial board was appointed, rightly or wrongly.

Plaintiff entered into evidence his Exhibit 300 which is the first recorded meeting of the IHOA's board of directors for which there exists minutes. This was uncontroverted by Defense Counsel. This perpetuates that on September 10, 2002 there was a "Developer Representative" and a "Builder Representative" governing the IHOA.

Plaintiff asks the Court to declare that, if there are no legally effective bylaws for the IHOA, that the term of office for directors begin and end on September 10th of the year a term expires.

Defense Counsel did not controvert that this as the first meeting of the board nor that through today in actual practice IHOA board terms end and begin at no fixed date.

-- ELECTIONS --

Plaintiff alleged that it was illegal for the Developer to fail to hold elections until September, 2007, and instead to simply appoint and remove directors at will.

Plaintiff alleged that not one of the board members appointed by the Developers owned units or property in the PUD and thus were not members of the association. This was not controverted by Defense Counsel.

Plaintiff asked the Court to declare that any persons appointed by the Developer were illegally in office and their acts were ultra-vires. This was not controverted by Defense Counsel.

Plaintiff asked the Court to declare that any appointed board member who served beyond the annual meeting following his appointment was illegally in office and any official act of such individual was ultra-vires. This was not controverted by Defense Counsel.

Plaintiff and Defense Counsel both agreed that Plaintiff's predecessor to Plaintiff's property was sold to her, Cheryl Essex, on September 27, 2001 (Plaintiff's 566), and that at least since that date the IHOA had members eligible to vote.

Section 33-31-804 of the Act provides that the IHOA had to have an election. If Bylaws, the election had to be held on the second Saturday in March, 2002, Plaintiff's 2002 Calendar at 117. If not, there should have been an election at least some time in 2002. The statute reads:

- (a) If the corporation has members entitled to vote for directors, all the**

directors, except the initial directors, must be elected at the first annual meeting of members, and at each annual meeting thereafter...

Plaintiff noted that the putative Bylaws provided for appointment of directors by the Developer at the initial meeting – which was required to be March 10, 2001 if the Bylaws were followed, with one director's term expiring in March 2002 and another in March 2003. Plaintiff pointed out the bylaws required an election and if this was followed the homeowners would control the board through two of three elected board members in March 2003. It was not controverted that no election was held until September 2007.

Plaintiff thus asks the Court to declare that no directors of defendant IHOA were legally in office until September, 2007 at earliest. The Defendant's expert witness, Mr. King explained this as being the common practice of developers in Horry County, but could cite no provisions of the putative Bylaws, statutes or case law to support this.

The Court is thus further asked to declare that the acts of the board were all ultra-vires until at least September 2007 by virtue that the directors illegally held office.

In further support plaintiff cited to the minutes of all meetings of the board, which he put into evidence, which perpetuated the almost random appointment and dismissal without resignation of board members by developers through September, 2007. Plaintiff read the names and employment of all the board members through September, 2007 and it was uncontroverted that each one of them represented either a Builder or the Golf Course (not as a member) and that none of them resigned to create a vacancy requiring a replacement. This was uncontroverted. Plaintiff explained that this meant that almost every decision involved a conflict of interest or potential conflict of interest with their employer.

-- LIST OF VOTERS --

Plaintiff asserted that he had repeatedly demanded the Members List for Voting and that he had never been provided same. Defense Counsel elicited a statement from KA Diehl employee Beckie Abel that at one point she had emailed Plaintiff a list of names from the IHOA's web site, such as they appeared on it. Abel conceded that this list reflected what some members put on the web site for social networking and that it was not created from any authoritative list of owners nor used for elections. Defense Counsel and her witnesses did not controvert Plaintiff's repeated demands for the Voter List as described in the Act and that Defendants never provided same. They admitted that these requests were proximate in time to elections between 2007 and 2009. In explanation, Defense Witness Abel stated that she considered the information which Plaintiff requested to be "confidential" but was never able to cite to any provision of the Covenants, the Bylaws, or a statute which stated the same.

Defense Witness Abel spoke of her extensive training with the Community Association Institute, which she conceded is a trade organization and whose credentialing is not recognized by South Carolina for purposes of licensing, and that CAI is not recognized

as an educational institution in any way. Abel cited that she manages dozens of homeowner associations and has done so for years and that she is familiar with the requirements of The Act to provide information to homeowners.

The Act reads:

SC 33-31-720 Members' list for voting.

(a) a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting and shall list the members show the address and number of votes each member entitled to vote at the meeting ... [and] a list of members entitled to vote at the meeting but not entitled to notice of the meeting.

(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting

(d) If the corporation refuses to allow a member [to] copy the list, the court may summarily order the inspection or copying at the corporation's expense and may postpone the meeting and may order the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order.

...

(g) A member may inspect and copy the membership list only if (i) his demand is made in good faith and for a proper purpose; (ii) he describes with reasonable particularity his purpose; and (iii) the list is directly connected with his purpose.

Plaintiff asks the Court to award his court costs required to "obtain the order" for the list of voters per the Act.

It was not controverted that on July 24, 2008 Plaintiff demanded to copy the voter list to communicate with other Pl # 333. nor that on April 28, 2009 Plaintiff made another like demand Pl # 358, nor that on September 3, 2009 Plaintiff repeated his demand. Pl # 361. It was not controverted that in 2009 Plaintiff has also made a like request in discovery and that Defense Counsel provided no discovery until October 3, 2011 years later. Plaintiff pointed out that he never was provided a current members list for voting, through the Act as a homeowner nor as Plaintiff.

At trial Plaintiff produced, read and introduced into evidence the statute to determine what constitutes a members list for voting, Plaintiff's 226, SC 33-31-720.

Plaintiff read Abel the elements of such a list: Section (a) of the statute provides that the list will include, for each homeowner entitled to notice of the meeting – which includes those ineligible to vote, the name of such member. The statute also provides for those homeowners eligible to vote their individual addresses and number of votes each member is entitled to vote at the meeting.

Abel complained that when Plaintiff asked for members' voting status it was not

stated by the Act exactly that way. She said that this justified KA Diehl, who also is the registered agent for the IHOA, and the IHOA to give Plaintiff nothing. Upon questioning she admitted that names and addresses and number of eligible votes are not privileged – never citing where this notion of privilege came from. The phrase “Privacy Act” being applicable to homeowner associations was stated by Board President William Freiboth, who testified, board member Maureen Sullivan, who testified, and by Diehl employee Abel. The Court is asked to declare that South Carolina has no “Privacy Act” applicable explicitly to non-profit corporations and Freiboth and Abel admitted that no statement of privacy rights has ever been given to any member, and no member has ever been asked to subscribe to same. Plaintiff’s statement that to sign up to the IHOA web site included a pre-requirement to surrender privacy rights went uncontested.

Plaintiff pointed out that during the course of this litigation the IHOA, on a regular basis and at the expense of the IHOA, used it’s access to homeowner names, addresses, and email addresses to give it’s side of matters to the members and used it’s denial to prevent Plaintiff from giving his side of events. This was especially important to Plaintiff because it prevented him from relating the inaccuracies of Defendant’s defamations – prevented “damage control”. This represents a violation of the implied covenant of good faith and fair dealing, which Plaintiff explicitly incorporated into his Complaint.

The Court is asked to impose punitive damages on both KA Diehl and the IHOA for obstructing Plaintiff’s prior access to the members list for voting, and to include in it’s final order a provision that the Defendant IHOA, and it’s employees or agents, must in the future provide such a list within ten days of such a request to any homeowner requesting same.

-- BOARD ACTIONS WITHOUT MEETING --

Plaintiff made the uncontroverted assertion at the deposition of former IHOA president and defendant IHOA Rosemary Toth, and at trial, that Toth in particular and the board in general had been signing contracts – all of them prior to at least 2007 – without a vote of the board or a record of the approval of contracts and other actions.

Plaintiff proffered that from 2002 through 2010 the minutes of the meetings of the board of directors, all offered as evidence and accepted as such by Defense Counsel, do not reflect the board not approving any single contract. This includes the annual contracts with KA Diehl, the management company; the garbage contract; the November 3, 2003 “Golf Course Agreement”; the October 30, 2003 “Cable Contract” with HTC; and the various grounds maintenance contracts.

Plaintiff proffered that through at least the end of 2011, the Architectural Review Board Committee did not have on record minutes for any meeting and that the Board did not have records of ever having held an “appeal hearing” with a homeowner over an ARB issue, nor relatedly ever having ever approved a single fine or deprived a single homeowner of any privilege or right, including a vote.

Testimony had been offered by many witnesses, including Plaintiff, that fines and sanctions had been imposed none-the-less. Plaintiff introduced into evidence many of the annual contracts with the Diehl management company, at least one with a grounds maintenance company, the HTC Cable Contract, and the Golf Course Agreement, none of which have corresponding approvals in the minutes of contemporaneous meetings of the board of directors.

Maureen Sullivan, a former member of the board of directors called by Defense Counsel, testified at trial that no single board member, including the IHOA "President", has any more authority than any other board member. This was uncontroverted by Defense Counsel. Also uncontroverted was Plaintiff's assertion that the duties of the IHOA President consist of preparing the agenda for meetings and presiding over the meetings.

Neither the Putative IHOA Bylaws nor the Act provide a board president any more authority.

Section 33-31-1601 (a) of the Act requires that the minutes of the board record all actions taken by directors or members (by vote of the members at a meeting of the members) whether within a meeting or outside of a meeting. No threshold is set which premises some level at which a decision need not be recorded (such as a dollar amount). Personnel matters are not excluded by the statute's requirement.

The statute requires that these records of actions be retained as "permanent records" of the corporation. The Court is asked to declare that, by the standard of "more likely than not", the absence of a record of an action in the minutes means the action did not occur – that it was not approved by the Board.

Subsection 1601(a) explicitly includes "all actions taken by committees" within the ambit of the statute.

The Act specifically addresses actions taken outside meetings of the board or of committees. It is noted that no action is an action of the corporation unless it was taken by a committee within it's delegated authority or by the board itself. There is no provision to extend decision making authority to a contractor acting independently – such as the unregulated police actions of KA Diehl's "enforcement squad" which issues fines on it's own in violation of the provisions of the putative Bylaws relating to "Procedure".

Section 33-31-821 of the Act, Action without meeting, explicitly mandates that any proposed action taken by a board or committee outside of a meeting must FIRST obtain

"written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken."

The statute provides further that the action may not be taken – is not effective – until AFTER

"(b) ... the last director signs the consent,"

The first such "out of meeting" consent of the Board of Defendant IHOA is to be found in 2011. No such "out of meeting" consent is to be found for any act of the Architectural Review Committee (and the ARB keeps no minutes of any of the decisions it makes at a meeting).

The Court is asked to declare that any action taken by the IHOA Board or it's committees that is not reflected in the minutes of a meeting of the Board or the Committee is an action taken per SC 33-31-821(b) "Without Meeting" and is void unless the mandate of that Subsection is to be found.

The Court is asked to declare that it is more likely than not that actions not found as approved at a meeting in the minutes were never approved by the board and were under taken without approval, and are thus null and void.

The Court is asked to declare that every action, specifically including contracts predating 2011 for which no approval can be found within the minutes of a committee or the board, are null and void for want of the authority to act.

In her deposition Defendant Toth admitted that the Board agreed to spend perhaps as much as \$20,000 for a campaign of defamation against Plaintiff – and that the approvals of these large expenditures was made with no record left behind. At trial defense witness Maureen Sullivan, a board member at the time who was present when the decision was made, admitted that the action was taken outside a meeting without the requisite approval signatures of every member of the board. Per the statute the decisions to spend the money to support the defamation campaign were "ineffective" until the last director signed the consent, which never happened.

Plaintiff asks the Court to order that the costs of the mailing, as evidence by the general ledgers (# 538) be repaid by the members of that board singularly and collectively, to the IHOA itself. The Court is asked to note that co-defendant Rosemary Toth is present as a named defendant in her individual and board capacities.

The sums paid to Carolina Mail House for the defamatory mailing are listed in Plaintiff's # 537 and # 538, which were obtained by subpoena in conjunction with a FOIA to the US Postal Service and by discovery demand against the IHOA, to which the Chief Judge of this Circuit ordered compliance.

The sums absolutely tied to the mailing are identified by IHOA's general ledger comment, "Legal Lawsuit Information". All are dated June 17th, 2009.

The entries are \$ 1.55, \$ 536.15, \$ 1,319.88, \$ 1,857.58 totaling \$ 3,715.46.

Plaintiff forgoes asking the Court to order the repayment by members of prior boards directors to the IHOA for the costs of contracts awarded without evidence of approval in the minutes of the board.

-- COMMITTEES --

Plaintiff proffers that both sides are in agreement that every "committee" of the IHOA except the ARB is a "committee" as contemplated by The Act and the putative Bylaws.

Both sides are also in agreement that only the IHOA Board and the ARB make substantial decisions, take "actions" as contemplated by The Act.

The IHOA has asserted, in the deposition testimony of Rosemary Toth and in the trial testimony of current IHOA President William Freiboth, that the ARB is NOT a committee of the IHOA and that it derives its authority independently of the IHOA.

Defendants did not controvert that the ARB gets all its resources – money, use of facilities, support by the HOA contractor (to include attendance by Diehl employees at ARB meetings) through the IHOA contract; that the ARB has no contract in its own name with KA Diehl; and that there is no record of the ARB ever issuing a single letter to anyone over its own name. It was further uncontroverted that all correspondence which supposedly originates as a result of ARB action is written and issued by HOA's contractor Diehl.

Beckie Abel, an employee of co-defendant Diehl, testified at trial that although Diehl is entitled to charge the IHOA for time spent supporting the ARB (attending ARB "meetings" aka "decision hearings"), Abel testified that Diehl has never done so. Under cross examination she admitted that Diehl could do so at any time and that the labor for writing and the expense of mailing ARB "decisions" was done under the IHOA contract, for which there is a charge of at least \$10 (per the KA Diehl contracts admitted into evidence) for each ARB decision. It was also uncontroverted that KA Diehl spends considerable time and expense "policing" the neighborhood for "ARB Violations" at the expense of the IHOA – a specific provision of the IHOA contract.

At trial Plaintiff cited to numerous meetings of the minutes of the Board of Directors that each ARB member is recruited and appointed by the IHOA Board. It was also admitted and uncontroverted that the ARB frequently presents reports to the IHOA at IHOA board meetings, and that said reports are grouped together with the reports of other IHOA committees under the heading "Committee Reports" or a variation of that.

It was further uncontroverted that the ARB "Guidelines" are submitted to the IHOA board for approval.

Plaintiff entered into evidence the April, 2008 "ARB Guidelines", Pl #600. The Court was asked to examine this and the other ARB Guidelines. On the Front page of the document it reads, "International Club Homeowners Association Architectural Guidelines". It does not read that these are the guidelines of the "Architectural Review Board". On the second page at the top it does not say that these are the guidelines of the ARB of the Internatinoal Club (PUD or otherwise) but instead says in plain language that

these are the guidelines of "The International Club Homeowners Association, Inc Architectural Review Board". Just below is a statement that the ARB is appointed by the IHOA Board. Paragraph 2 cites exclusively as the ARB's authority the Covenants. It does not cite any separate authority of IHOA Board decisions of the putative Bylaws of the IHOA.

On page 7 of the document homeowners are instructed to send applications to "The International Club, c/o Architectural Review Board" or to hand deliver the application to the IHOA's registered agent, KA Diehl.

Plaintiff likewise entered into evidence the 2010 ARB Guidelines, Pl # 371, Pages 1. 2 and 7 repeat almost word for word the content of the 2008 version which indicates that the ARB is not an independent entity. This is also the same in the 2011 ARB Guidelines, Pages 1, 2 and 7, Pl # 385.

In the putative Bylaws is a section, 12.3 relating to "Computation of Annual Assessment". It relates as follows:

"The Common Expenses to be funded by the annual Assessments may include, but shall not necessarily be limited to, the following: ... 12.3.6 The expenses of the Architectural Review Board which are not defrayed by plan review charges;"

In Section 3.1 of the Covenants it provides that

"The Association shall be authorized but not required to provide the following services: ... (d) To set up and operate the Architectural Review Board as provided for herein."

Section 8.1 of the Covenants, Enforcement leaves the ARB without any enforcement authority. The Section recites who has enforcement authority:

"The Developer, the Association, and any Owner shall have the right to enforce ... all of the restrictions, conditions, covenants ... imposed by the provisions of this Declaration, or of any rules or regulations now or hereafter promulgated by the Association.

There is no authority for a separate ARB to enforce any restrictions on land use of it's own making, or even for the ARB to enforce a putative covenant violation.

At trial Plaintiff pointed out that whether or not Section 7.2 of the Covenants is deleted or not (the requirement to seek prior approval of the ARB), the enforcement of covenant provision remaining in force is unchanged. The ARB was never within the enforcement regime.

The import of whether the ARB is a committee of the IHOA goes to the IHOA's

liability for the actions of the ARB. Defendants claim that the ARB is an entity in it's own right defining rights of rule making and enforcement separate and independent of the IHOA – from the covenants. With a deletion of Section 7.2 of the covenants the dubious claim of the ARB for enforcement authority goes away – if it ever existed.

Plaintiff asserts that he has satisfied the burden of proof for the Court to Declare, as it is asked to do –

- (1) That the ARB is a committee of Defendant IHOA; and
- (2) That the IHOA is responsible for the acts of the ARB.

There remains one more problem which Plaintiff stated in the Complaint and at trial. Section 33-31-825 of the Act. Committees, requires that

“Each committee shall have two or more directors who serve at the pleasure of the board. “

Plaintiff has stated, and it was uncontroverted at trial, that prior to filing this complaint and innumerable thereafter, Defendant IHOA was informed of this requirement. Plaintiff profers that the answer of the Board, as exemplified by Defendant Toth and current Board President Freiboth at their depositions, and as verified by Freiboth and former board member Sullivan during testimony at trial, is that each committee has one “observer” from the board and that no board member is a member of any committee.

Plaintiff asserts that the statutory word “Shall” is mandatory, that this is a critical element for the legitimacy of committee actions, and that the knowing and consistent disregard of this through the entire history of the IHOA to the present renders each and every committee action null and void.

Plaintiff asks the Court to Declare that because of this, all acts of the ARB are null and void, and to futher order that in the future all committees of the IHOA include two voting members of the board of directors.

Committee Records and Open Meeting Requirement

It has previously been shown that the record keeping requirement of the Board aplies to the committees as well. The Act goes further.

33-31-825. Committees (c) Sections 33-31-820 through 33-31-824, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board, apply to committees of the board and their members as well.

At trial Plaintiff explained how the ARB conducts it's business in secret, without any general notice of meetings to homeowners – because they are not allowed to observe the ARB's operation. There is nothing in the Act nor the Covenants nor the Bylaws which

give any homeowner an expectatino of privacy from anything he places in an ARB application. At Plaintiff's # 601 is Plaintiff's July 21, 2009 ARB swingset application, which contains information available from the Recorder of Deeds or which can be seen by the naked eye from the street. Further, it is every homeowner's right to enforce the covenants, either pre-emptively or post-emptively, and thus there is good cause for homeowners to know what another homeowner may propose to do – perhaps across the lawn from a particular homeowner. It is noted that there is no requirement to post something akin to a sign noticing a zoning change application in conjunction with a forthcoming architectural change. These changes include additions to homees, often increasing the footprint, height and depth substantially, or placing a fence on a common property boundary. Not only is there no prohibition on knowledge of what is planned, it is good public policy to allow it.

At trial Plaintiff cited to a court decision, Arcadian Shores HOA v Cromer, 644 SE 2d 778, 373 SC 292, in which the SC Court of Appeals in 2007 held that ARB regulations can not act independently from covenants and can not restrict the free use of property. The Court held that it is only explicit provisions in covenants, not regulations, which control, implying that ARB's do not have independent authority to control homeowner behavior in areas subject to covenants.

The Court is asked to Order that all meetings of all committees be noticed in advance to the homeowners as provided in The Act and that all deliberations of all committees be conducted openly and "on the record", and that permanent minute records of meetings and acts of each committee be maintained and made available for inspection.

-- Stnadards of Conduct and Prohibited Intra – Vires Acts --

At trial Plaintiff provided examples, which were uncontroverted and supported by evidence, that directors made a number of "intra vires" acts which Plaintiff asserted were violative of the Standards of Conduct for Officers and Members of the Board set out in The Act.

One example was the Golf Course Agreement, Plaintiff's # 357, November 3, 2003. From the minutes of the board of directors surrounding that date is a fact that R Doug Brown was a sales manager / employee of Developer / Builder DR Horton. Plaintiff put into evidence Plaintiff's # 390 through 394 and 705 through 707, and Plaintiff's worksheet at # 389. Also in evidence is Pl # 301 and 303 which together give the actual amounts that the golf course paid from 2003 through 2011. The later two are the minutes of the two board meetings in 2003 which perpetuate what the board agreed to do with regard to the golf course debt.

Plaintiff read from the November 20, 2003 minutes # 303, Section III, Financial Reports, B Accounts Receivable which stated that the action of the board was to – which as Plaintiff read to the court, was limited to

“waive the golf course's monthly assessments through the end of 2003 in

exchange for a parcel of land approximately 1/2 acre to be given to the Association for the purpose of completing a parking area for the residents' center. The motion passed unanimously."

In the minutes of the prior meeting, September 10, 2003 #300 it is recorded that Developer / Builder DR Horton had just fired the entire pre-existing board and appointed all members. Except for Charles Flynn, builder (owner of Sunbelt), all other board members were (upon information and belief) Horton employees.

As perpetuated in the May 16, 2003 Developer Agreement (#557) between Horton and Sunbelt, the two builders were to bear the entire financial burden off all aspects of the amenity center complex. The site for the land had been provided by Plantation, the original developer, on August 22, 2002 (Pl #554). The builders had miscalculated and when a certificate of occupancy had been sought from the county, the county found that there was insufficient parking. This was uncontroverted at trial.

It was thus the financial burden of the employers of everyone on the board to acquire the additional land to satisfy the parking lot requirement. It was not the obligation of the IHOA to purchase additional land.

From the November, 2003 Golf Course agreement entered into by Horton employee Doug Brown on behalf of the IHOA, #558, page 1 itself,, it can be seen that the Accounts Receivable due the IHOA amounted to \$58,000. This was an equitable property of the IHOA. The agreement by the Developer board to use IHOA accounts receivable to buy land that the developers had an obligation to buy constituted a clear conflict of interest under The Act. By passing the expense to the IHOA the board members gave a direct financial benefit to their employers.

As Plaintiff pointed out it got worse. The deed to the extra parking lot was recorded on August 4, 2004 Pl # 560 at Deed Book 2771 Page 1480. At page 1482 of the deed book is the sworn statement before a notary that the value of the second parking lot was \$ 5,000.

It is clear that no member of the board acting in good faith would trade a collectable debt of \$ 58,000 for a \$ 5,000 piece of land that someone else owed one at no charge. Plaintiff asserts that Doug Brown's act rose to the level of criminal fraud – but is likely beyond the statute of limitations. The golf course agreement was not made available to homeowners, ever, and was found by Plaintiff in the offices of KA Diehl only immediately before filing suit – after KA Diehl shut Plaintiff (as homeowner) out when Plaintiff started relating this to other homeowners.

It gets worse, as Plaintiff testified at trial. The board had authorized forgiveness of the 2003 golf course assessment in exchange for "1/2 acre" and instead Doug Brown secured "0.25 acres". Doug Brown's agreement, which Rosemary Toth honored and the current Freiboth board is also honoring (although the golf course hasn't paid anything in 2011 and 2012 and almost nothing in 2010) also contained provisions giving his DR Horton master – and himself – enormous other financial benefits in exchange for a reduction in the

golf course's assessments which the board did not authorize him to do.

Plaintiff read from the contract while testifying. The unauthorized additions which Doug Brown made, from the agreement #558, included a free golf course membership for Brown himself, which he held at least through 2007. As detailed at trial it also included

*** Seventy Five (75) discount golf memberships for Horton to use as inducements in the sale of houses.**

*** Twenty (20) free rounds of golf per month for Horton to use for it's employees or for marketing purposes in the sale of Horton houses.**

*** Horton use of the entire golf course clubhouse at \$ 50 per event for marketing events, a financial benefit to Horton.**

*** Horton got free and unlimited use of the golf course school building to use as an on-site sales office.**

*** Horton received irrigation of Horton owned property forever using golf course water at a cost TO THE IHOA of \$ 150 per month.**

*** The Debtor Golf Course, which was entitled to nothing, got the IHOA to repair and maintain the Golf Course owned two ponds at the front entrance to the Golf Course Club House – forever – at IHOA expense.**

*** Although the IHOA Board approved in exchange of \$ 58,000 in 2003 assessments for the \$ 5,000 property, Doug Brown went beyond this and gave the Golf Course, through this year, a \$ 583,000 reduction of assessments through the end of 2012, for which the IHOA received nothing in exchange, and which was not authorized by the Board.**

The Act requires per SC Code 33-31-830. General standards for directors. That "(a) A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; "

And Section 33-31-831 Director conflict of interest of the Act provides that

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. ...

(d) For purposes of this section, a director of the corporation has an indirect interest in a transaction if: (1) another entity in which the director has a material interest is a party to the transaction;

The issue of this agreement as an indirect amendment to what the Covenants require for assessments was raised at trial later in addressing amendments to covenants.

This case does not seek any money from the Golf Course in it's capacity as a land

owner subject to the covenants.

The IHOA did not even get the 1/2 acre the Board approved in exchange for the one – time forgiveness of \$ 58,000 in 2003 assessments. It got half the land, 0.25 acres, worth \$ 5,000..

The Court is, however, asked to void the act of Doug Brown – the November 20, 2003 “Golf Course Agreement” (Pl # 558) in entering into the agreement with the golf course, and with his employer Horton, because of the clear conflict of interest documented on the face of the agreement and the obvious fraud to the IHOA, as well as it being an ultra-vires act because the board authorized something much less and completely different than the contract Doug Brown signed. The agreement also was not undertaken “in good faith” and was a prima facie conflict of interest.

-- DOES THE ALTERATION BY THE BOARD OF THE METHOD ASSESSMENTS ARE COMPUTED REQUIRE AMENDMENT TO THE COVENANTS OR BYLAWS --

The practical question before the Court is whether the Board, on it's own, can choose to use a method to compute assessments which is different from that specified in the Covenants? A related question is whether the method of computing and collecting covenants must be uniform across all those subject to the Covenants.

This arises because the 2003 Golf Course Agreement signed by Doug Brown set out an assessment calculation methodology absolutely different from the method specified in the Covenants. Rather than a flat rate it had an escalating schedule.

Beyond that, comparison of statements made by the Board over the years after with the amounts collected as perpetuated in the General Ledgers indicates that it is more likely than not that the bench mark numbers upon which the escalating schedule was based were not the benchmarks specified in the Covenants. The homeowners have never been told, even through today, about the true amounts paid by or collected from the golf course.

This is also an inconsistent policy because the Board has never altered the payment schedule for a single homeowner who fell behind in assessments but rather has sent the debts to foreclosure.

This was all plead and not controverted at trial.

The alteration of payment schedules stated in the Covenants is seen as a situation that could be repeated in the future. The obligations of owners subject to the covenants to pay the schedule specified in the covenants – to which they willingly subjected themselves – and the limits on Boards to evade the mandate to apply the Covenant specified schedule – must be declared by the Court to avoid future litigation and to clarify responsibility for the current financial situation of the IHOA via massive evasion of assessment obligations by the Golf Course with the willing assistance of Boards from 2003 through the present.

This argument is independent of the question of Which is "The Association" because it arises from the Covenants, not the identity of The Association.

The Rate of Assessments stated in the Covenants (Pl #547) is found in Article VI, Covenant for Maintenance Assessments:

Section 6.5. Rate of Assessment. Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) ... Also, the owner of the golf course shall pay an assessment which equals fifty (50) times the rate of Unit owners who also pay for the costs of the recreational amenities; ...

The covenants set the benchmark for the golf course at the rate set for single family homeowners. The Golf Course assessment is inflexibly tied to that benchmark at a fixed multiplier. The covenants require uniformity based on the single family benchmark. This was stated at trial and was not controverted

It was stated at trial and admitted by Toth and Freiboth at their depositions that cable tv and waste management charges are explicitly stated as assessments and the IHOA considers the collection process stated in the Covenants for unpaid assessments – liens on real property - as applicable to unpaid cable tv and waste management charges.

The "fifty" multiplier for the Golf Course is an element of the "Rate of Assessments" mandated in the Covenants and is reasonable considering the wear and tear that Golf Course customers put on roads and the benefit the Golf Course gets from grounds maintenance of entrance roads. Former Board Member Sullivan testified at trial that enhancing golf course financial viability benefits property values.

The Rate of Assessments stated in the Bylaws (Pl #548) is found in Section 12, "Assessments", Subsection 12.3, "Computation of Annual Assessments"

It shall be the duty of the Board at least thirty (30) days prior to the commencement of the Association's Assessment period to prepare and adopt a budget covering the estimated Common Expenses during the coming year The total annual Assessments shall be divided among the Units with appropriate lesser amounts assessed against any Units not having the right to use the recreational amenities.

From this it can be seen that the IHOA Budget is, as was uncontroverted at trial, a spending based budget, or as Plaintiff put it, they decide what they want to spend and make income fit rather than find what the income is and live within the IHOA's means.

The Bylaws imply that the benchmark single family rate is equal to the projected amount to spend divided by number of single family homes, plus 50 (for the golf course). Thus if the Golf Course does not pay at a rate of 50 units the rate for a single family homeowner is driven up. The Covenant mandated "50 unites" is a mandatory input to the

computation formula set by the Bylaws and no discretion is allowed the Board.

From the Golf Course agreement it can be seen that the Golf Course multiplier was changed by Doug Brown from fifty (50) to twenty (20) for 2004 rising at the rate of 3 units per year to fifty (50) in 2014. Except that the Board has never enforced that schedule either. See Plaintiff's 389. For example, in 2004 single family homeowners paid \$ 45 per month. In that year the Golf Course actually paid \$ 8,400 which divided by 20 units and again by 12 months yields a supposed golf course base rate of \$ 35 per month. This discrepancy widened to the point that in 2010 single family homeowners paid \$ 88 per month and the Golf Course computed base rate was \$ 6 per month – under the regime of Defendant Rosemary Toth, who incidentally never revealed the actual golf course payments to the homeowners. The current board likewise has hidden the actual golf course assessment / payment scandal from the homeowners. This was one of the issues that Plaintiff was bringing to the attention of homeowners when Plaintiff was “shut out of the records” in early 2009.

The Act directly addresses the steps mandated to accomplish a change in the rate of assessments:

SC 33-31-1021. Amendment of the bylaws by directors and members. ... (d) an amendment to the bylaws which relates solely to the dues required for membership and which establishes or changes an amount for, or method of computation of, dues, must be approved by the members.

The arrangement reached between the Golf Course and Doug Brown, for the IHOA changed the base rate and the method of computation for the Golf Course.

It was not controverted at trial that the Covenants and Bylaws were not amended with regard to assessments for the Golf Course so how Covenants and Bylaws can be amended is irrelevant. Suffice it to say that The Act requires such amendment by the VOTE OF MEMBERS and that was never attempted.

Plaintiff asserts that the alteration of rate of assessment specified in Covenants and Bylaws equates to such an act being outside the authority of the Board member or officer who did so – and thus makes it Ultra – Vires.

Plaintiff reiterates what he asked at trial for the Court to do: Enter an order that no officer or board of Defendant IHOA has the authority to create a policy, take action, or enter into an agreement that changed the base rate or method of computation of assessments stated in the Covenant or Bylaws; Ordering further that the officer or board member(s) who did so or acted in concert to implement same are responsible to make up the loss to their non-profit association; Finding that such is an Act in Bad Faith under “The Act”; and enjoining any Association subject to this Court’s personal jurisdiction from enforcing or operating under the 2003 or any follow on agreement.

**-- LANDSCAPING / GROUNDS MAINTENANCE BY IHOA CHARGED TO
HOMEOWNERS BY ASSESSMENTS --**

The Court was asked to Declare and state a definition to resolve the extent of enforceable homeowner obligations arising from his purchase of land (in the PUD) to for landscaping and grounds maintenance of property other than his own. This definition also can be said to state the "rights" of the Association under the same scenario to involuntarily collect funds from homeowners through assessments to maintain landscaping and grounds that the homeowner does not own.

At trial Plaintiff introduced various exhibits relating to definitions of servitudes, covenants and personal service contracts and asked the court to take judicial notice of many relevant cases. The relevance of none of this was controverted, although the viability of various definitions set out by "Blacks Legal Dictionary" as exhibits was challenged – but not what said exhibits resolve or define.

At trial Plaintiff asserted that many of the mandates in the Covenants are not enduring obligations that touch and run with the land but rather personal service contracts which either do not meet the requirements of the statute of frauds or which terminate with the resale of property. Of particular import were cases which found that covenants that require the payment of a sum of money is, in certain circumstances, a personal services contract, not a covenant that touches and runs with the land, or not an enforceable obligation at all.

It was not controverted at trial that assessments include the expense of maintaining private property, to include land owned by the Developer (DR Horton), the golf course, and certain homeowners, as well as to maintain the shoulders of roads which everyone agreed is, in the least, dedicated to the county and maintained and controlled by the county (posting of speed limits, lane marking, flood abatement, encroachment permit requirement enforcement). It was also uncontroverted that the Defendant IHOA in particular and no Association in general ever owned the road to include it's shoulders. It was not controverted that the Developer and Builder did not own or control another area, Tournament Boulevard (known originally as the "Highway 17 Connector" aka "Kaminski Road").

At trial Plaintiff presented a framework, which was uncontroverted, whereby in a true covenant running with the land the covenants impose on an owner of property an OBLIGATION NOT to do something, since everything else is a right. Plaintiff cited numerous cases which uniformly extolled the free use of land – rights to use – except where clear and explicit limitations were imposed. Plaintiff's framework stated that with regard to someone else's land, a servitude could provide a RIGHT but not an obligation relating to land, this generally being called an easement. The cases cited depict OBLIGATIONS relating to property of other as being personal services contracts, not proper covenants.

Within easements – which apply to the property of others to which another has a right of use, the Servient easement holder has an obligation to maintain the property and

not to obstruct the rights that the Dominant easement holder has relating to property the Dominant easement holder does not own. The Dominant easement holder has rights, the Servient easement holder obligations.

Plaintiff also presented an uncontroverted application of the concepts of horizontal and vertical privity as they apply. Uncontroverted case law presented related that real covenants which run with the land must be associated with ownership of property and the transfer of title at some point. In a real covenant that runs with the land, Plaintiff asserted, no one who does not actually own land can have an obligation to do anything with a certain property. Uncontroverted case law was presented that such an obligation is a personal services contract, not a covenant that touches and runs with the land. Likewise for a person to be able to enforce a covenant restricting the free use of property, there must be a vertical path in deed from the person attempting to enforce a restriction back to another person who, when the restriction was imposed, had horizontal privity in the property – owned the property upon which the restriction was imposed.

In this context Plaintiff points out to the Court that he innumerably asserted in Court that no special case law nor statutes exist in South Carolina excepting situations involving homeowner associations and planned unit developments from the general case and statutory law relating to ownership of property in general. That is, the obligations of a homeowner in an area where a homeowner association is involved is no different from the obligations of a homeowner in a non-HOA environment, and the rights and obligations of homeowners in both situations are tempered by the unmodified concepts of servitudes which pre-existed the establishment of homeowner associations. The confused assumption that habit is law arises from the fact that the same developers use the same procedures and documents in Horry County (and South Carolina) that they do in states with Homeowner Association statutes.

At trial Maureen Sullivan testified that maintaining the property of others at the expense of homeowners with money collected through assessments is in the interest of property owners because, as she put it, it enhances property values. This is a very subjective statement. It also evaded the issue that at no time did the Defendant IHOA ever own the golf course, the roads, the Horton property, or the homeowner property that the IHOA collect money to maintain via easements. At trial it was agreed that the only property³ the IHOA owns is the Amenity Center area and several retention ponds.

Section 1.6 of the Covenants defines “Common Areas” as

“all real and personal property now or hereafter owned by the Association for the common use and enjoyment of the Owners or designated by the Developer as Common Areas,”

³ Excluding the issue of the Madrid Drive “parking lot” in The Glens multi-family area ownership of which the IHOA never agreed to accept when Horton deeded it to the IHOA without an act of the IHOA Board to accept same, no IHOA board member’s signature being on the deed either.

It was uncontroverted that the Developer has never designated any area not owned by the Association as "common areas". It is also noted that the Covenants do not give The Association the right to designate non-HOA owned land as "common areas" – only the developer.

Relating to the grounds maintenance purposes of assessments the Covenants tie it to Association owned land, stating as follows:

Section 6.2. Purpose of Assessments. The Assessments levied by the Association shall be used exclusively ... *in the Subdivision* ... for the improvement, protection, replacement, operation, and maintenance of the Common Areas and the Recreational Amenities

At trial Plaintiff presented unrefuted evidence, through Plats and Deeds, that the subdivision never included the area of "the front entrance" – International Club Drive --- going to the south of The Villas condominium area, past "The Grand Vistas" and meeting Tournament Drive aka Highway 17 Connector. No part of the subdivision even abutted Highway 17 property (which per the dedication plat was owned prior to dedication to Horry County by "Kaminsky, owner / dev of" Prince Creek developer of Prince Creek" Pl # 409.

It has been pointed out that Bylaws of a Corporation are not covenants that run with the land and properly define only the operations of the corporation. Plaintiff has cited to The Act in this regard.

The putative Bylaws of the IHOA do provide that the IHOA can spend money to do practically anything it wants to do – so long as it is within "the Subdivision".

12.1 Purpose of Assessments. The Assessments for Common Expenses provided for herein shall be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit and enjoyment of the Owners and occupants of the Subdivision, and maintaining the Subdivision and improvements therein

It is important to note that both the Covenants and the Bylaws agree that the scope of property to be maintained is in the subdivision, and the Covenants is clear that when maintenance is to be done it must be on property "owned" at the moment by the Association.

It was undisputed that "The Subdivision" was defined first by the Murrells Inlet Golf Plantation Plat, February 1, 1997, Pl #450, and later the Lantana Plat, May 14, 1999, Pl # 451. Another document which was addressed in this context is the Plat referenced in the Covenants (Pl # 457), that being at Plat Book 160 Page 79 January 15, 1999 which lays out not the subdivision but the areas which Plantation AD was subjecting to the Covenants, this document neither being submitted to the Planning Commission nor approved by them as an alteration to the subdivision.

The first question for the Court relates to the expenditure of money involuntarily collected by assessments to maintain land which is NOT common property and which was never owned by either a homeowner or the IHOA, and which is not owned by the IHOA at the time maintenance is to be done.

The Court is asked to Declare that no provision in The Covenants relating to the PUD, Pl # 547, nor in the document that Defendant IHOA asserts is it's Bylaws, Pl # 548, imposes a legally enforceable obligation on homeowners in the PUD to pay money for the maintenance of land not owned at the present time by the IHOA.

The second question for the Court relates to the expenditure of assessments to maintain property owned by the IHOA as "common property" in the context of servitudes distinguishing between personal service contracts and covenants which touch and run with the land and which create obligations relating to one's land and rights relating to the land of another.

The Court is asked to Declare that no provision in The Covenants or the Bylaws, as identified supra, which requires the payment of money to maintain property owned by the Association is enforceable as a real covenant that touches and runs with the land.

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SALE OF ASSETS NOT USED IN THE NORMAL COURSE OF BUSINESS.

The issue before the Court is

(1) May the IHOA, which is a non-profit mutual benefit corporation (per the Articles, Pl #Pl # 552, sell assets not used in the normal course of business without the affirmative vote of the members; and

(2) What the Defendant IHOA in particular may or may not do with the proceeds of the sale of assets not used in the normal course of business.

Assets used in the normal course of business is inventory and supplies. Everything else constitutes assets NOT used in the normal course of business, such as real property and rights.

Sale of Assets

The issue of sale is addressed by The Act as was explained at trial Pl 243..

SECTION 33-31-1202. Sale of assets other than in regular course of activities.

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, other than in the usual and regular course of

its activities on the terms and conditions and for the consideration determined by the corporation's board if the proposed transaction is authorized by subsection (b).

(b) Unless this chapter, the articles, or bylaws, require a greater vote the proposed transaction to be authorized must be approved:

(1) by the board; AND

(2) by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less;

Section 11.1 of the Bylaws, "Condemnation", requires that the sale of real property can only occur

"by condemnation or eminent domain, or [it may be conveyed] in lieu thereof by the Board acting on the agreement of at least seventy-five (75%) percent of the total vote of the Association"

At trial Plaintiff put into evidence a document sent by the IHOA board to the IHOA membership on April 6, 2010 signed by Defendant Rosemary Toth and titled "International Club HOA Notice of Special Meeting". Defense Counsel did not controvert it's authenticity. Plaintiff read the document and pointed out to the Court that it explicitly rejected any vote of the membership, stating "This is not a voting meeting of the Membership" and that it was to "formalize" the agreement between the IHOA Board and Central Electric. Page 2 of the document perpetuated that the Board was going to distribute \$ 50,250 to homeowners and to place \$ 10,000 into an account "for contingent purposes" which Plaintiff asked the Court to conclude meant contingent landscaping expenses since this was about destruction and restoration of landscaping at the front entrance.

In testimony Maureen Sullivan agreed that every member of the Board at the time, including Rosemary Toth, agreed on the sale, not taking a vote, and the distribution of the money.

At trial Plaintiff also introduced into evidence a page from the IHOA 2011 General Ledger (Pl #395) perpetuating that the IHOA had used the \$ 10,000 landscaping "contingent" money to pay a judgment arising from a lawsuit in this court against the IHOA to The Villas, the prevailing PUD sub-association. A copy of the Order was introduced in court and a computation work sheet summarizing information in the Order and relating that the total was in the order of magnitude of \$ 50,000. The document was not controverted.

Maureen Sullivan testified that the payment of landscaping restoration money received from Central Electric to The Villas for unrelated tortuous conduct of the IHOA was a related "contingent expense". Plaintiff contested this. Miss Sullivan verified the unanimous decision of the Board to sell, not to require a vote, and as to the disposition of the money received.

At trial Plaintiff also put into evidence the Minutes of the April 19, 2010 Special Meeting, PI #360, which reiterated the statements in the announcement. Ms. Sullivan also conceded that at the meeting some members of the IHOA demanded a vote. Ms. Sullivan stated, under oath, that this occurred, but stated that the Board chose to disregard this because the members did not have a right to make the demand. To paraphrase what she said, "a vote was not within the announced purposes of the meeting".

The Court is asked to note that allowing the erection of overhead utilities is directly prohibited in the Covenants, Section 7.23, which has an absolute ban on overhead utilities. While Central Electric might ultimately have been able to do so by Court Order in a condemnation by eminent domain, any voluntary act permitting the erection of overhead utilities was contrary to the covenants and Ultra Vires.

Disposition of the Proceeds

At trial Plaintiff went on to detail that The Act first goes on to say that the default for a non-profit corporation is that it is not permitted to make any distribution of the proceeds of a sale of property not used in the normal course of business:

SC 33-31-1301. Prohibited distributions. Except as authorized by Section 33-31-1302, a corporation may not make any distributions.

The two exceptions stated in Subsection 1302, Authorized Distributions, are

(a) A mutual benefit corporation may purchase its memberships

which has nothing to do with the distribution of proceeds from funds received to mitigate the destruction of landscaping, and

(b) Corporations may make distributions upon dissolution in conformity with Sections 33-31-1401 through 33-31-1440 of this chapter.

which is likewise irrelevant since the IHOA was not in dissolution. Plaintiff asks the Court to note that, as a matter of explicit law, a non-profit corporation is not permitted to distribute the proceeds from the sale of assets OF ANY TYPE under any circumstances.

The Bylaws provide further guidance on what MAY be done with the proceeds:

11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then unless within sixty (60) days after such taking ... at least seventy-five (75%) percent of the total membership of the Association, shall otherwise agree, the Association shall restore or replace such improvements so taken, to the extent practicable, on the remaining lands ...

11.1.2 Condemnation Unimproved area If the taking or sale in lieu thereof does not involve any improvements to the Common Areas, or if there are funds remaining after any such restoration or replacement of such improvements is completed, then the award, proceeds or net funds shall be retained by and for the benefit of the Association.

Per the Bylaws which the IHOA purports to be operating under, regardless of whether the proceeds relate to an improved or unimproved area, no distribution is permitted.

At trial Maureen Sullivan conceded that homeowners did not lose or exchange anything to justify any payment to them and that homeowners do not have a property right in the common areas.

Is roadside landscaping assets used in the regular course of business?

Plaintiff argues that the type of assets used in the regular course of business is inventory for sale. The HOA is not in the business of selling landscaping or even easements which destroy landscaping. Landscaping is of the same nature as store fixtures, or a swimming pool.

The reason that the statute does not address assets used in the course of business is that it is obvious that if an entity is in business to sell something, that is not an unusual event and does not require regulation.

This is independent of the question of what may be done with the proceeds of such a sale which has already been covered. Plaintiff's suit asks how may such a sale be authorized, because if it does not follow the designated procedure, a sale is ultra-vires and in bad faith, since every citizen is presumed to know the law.

The absolute ban on distribution does not depend on how the funds came to be received.

BOARD MEMBER LIABILITY FOR UNLAWFUL DISTRIBUTION (CENTRAL ELECTRIC PROCEEDS)

Plaintiff argues that the area whose landscaping was destroyed by installation of Central Electric power towers and whose irrigation systems were destroyed by the movement of heavy construction equipment over it was an "improved area" because it was not in its natural state. It includes trees and landscaping which the IHOA had only recently installed --- under the ambit of a Horry County Planning Commission encroachment permit. Plaintiff thus argued at trial that per Bylaws 11.1.1 the remaining funds were restricted to being used to "replace such improvements so taken, to the extent practicable, on the remaining lands". This relates to the use of \$ 10,000 "contingent" money received from Central Electric to pay part of the judgment against the IHOA in favor of The Villas.

The \$ 50,250 distributed to homeowners is another story. Per The Act, it is a "prohibited distribution" under any circumstances.

The Act also is clear that every member of the Board of Directors is obligated, individually and collectively, including Co-Defendant Rosemary Toth, to repay all of the \$ 50,250 to the IHOA and, if the Court agrees that the \$10,000 "contingency" fund is restricted, the additional \$ 10,000.

The Act States:

SC 33-31-833. Liability for unlawful distributions.

(a) Unless a director complies with the applicable standards for conduct described in Section 33-31-830, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

Plaintiff asks the Court to find that every member of the Board of Directors of the IHOA violated the statute-relating to unlawful distributions; that the damage to the IHOA that resulted is in the amount of \$ 60,250, and that Defendant Rosemary Toth, who was a board member and president of the IHOA at the time, individually and collectively with every other board member is responsible to repay the \$ 60,250 to the IHOA.

The Court is further asked to declare that the distribution was an "ultra vires" act, and that the directors are ineligible for reimbursement by insurance.

-- MEMBERS OF THE ASSOCIATION --

Plaintiff has asserted that the Covenants exist within the framework of defining the use of property, and that the Articles and Bylaws of a corporation exists within a framework defining how the corporation shall operate.

Plaintiff in his Complaint and at trial has asked the Court to Declare whether and to what extent the Developer and the Golf Course is a legally voting member of the IHOA. This does not depend on nor affect a determination of whether and to what extent the Developer or the Golf Course is subject to the covenants.

It has already been shown that the Golf Course is subject to the Covenants because the covenants control the owner's obligations relating to the use of land and the Deed to the Golf Course explicitly included a provision subjecting the Golf Course to the Covenants.

It has already been shown that the Covenants have no provenance over the non-profit corporation (The Association). No provision in the covenants regarding number of votes in the Association or otherwise are enforceable. One must turn to the Bylaws, if any, to determine who is a member of the IHOA and who can hold office on the board.

The Act ties membership to the right to vote as stated in the Articles or Bylaws of a corporation.

SC 33-31-140. Definitions. (23)(a) "Member" means a person entitled, pursuant to a ... corporation's articles or bylaws ... to vote on more than one occasion for the election of a director or directors or any other matter which under the terms of this chapter requires approval by the members.

(b) A person is not a member by virtue of any of the following:

(A) any rights the person has as a delegate;

(B) any rights the person has to designate or appoint a director or directors;
or

(C) any rights the person has as a director.

The Bylaws refer to the definition of Owner in the Covenants which state as follows:

Section 1.27. Unit

Section 1.27. Unit, shall mean and refer to: (i) those portions of the Subdivision identified as "Lots" or "Units" ... with any residential dwelling or other improvements situate thereon; (ii) the land (or an undivided interest therein, as the case may be) under each townhouse, condominium unit ...

Section 1.22. Owner, ... shall mean and refer to one or more persons or entities, including the Developer, who or which own(s) fee simple title (or beneficial or equitable title) to any Unit of record, ... Said term "Owner" shall also refer to the personal representative of a deceased Owner or an Owner who has been adjudged an incompetent.

The Covenants thus relates owners to ownership of a lot with a dwelling of some sort on it which unit is a single or multi-family home, sold or unsold. It does not relate to undeveloped property.

The Bylaws relates back to the Covenants definition of owner. Section 2 of the Bylaws defines a member as follows:

(a) All persons who are Owners as deemed in the Declaration shall be members of this Association, ... The rights and privileges of membership, including the right to vote and to hold an office in the Association, may be exercised by a member or a member's spouse,

Per case law cited by Plaintiff at trial, a provision that was not stated can not be assumed or applied by extension. It was plainly obvious when the covenants and bylaws were written that developers have employees, and the Declarant noted occasions where an owner might want some one other than himself to serve in office. The Declarant limited that to "spouses" of owners and omitted "employees or representatives".

There is no provision for an "employee" or representative of an owner to hold office, only a "spouse" of a member. This is relevant because through 2007, every board member was an employee of the developer and no board member owned a unit.

At trial and in depositions, Toth, Freiboth, and Maureen Sullivan all stated that the Golf Course is not a member of the IHOA because it does not own a unit. Plaintiff concurs in that. This does not affect the Golf Course obligation to pay assessments which arise from the Covenants, not from the Bylaws. The defendant IHOA, however, has continuously maintained that the Golf Course has none – the – less fifty five (55) votes in the operation of the Association, the IHOA. At trial Maureen Sullivan stated that the golf course has never cast a vote, but she admitted that she has no factual basis to make that statement. This fifty five votes arises only from the Covenants because the Bylaws are entirely silent about Golf Course votes, stating only that the Developer has some sort of weighted voting per the covenants. Parenthetically, while the Developer per Section 2 may have been able to cast some weighted vote at elections, this did not give him the right to have no elections at all.

It has thus been demonstrated, as a matter of law, that:

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

Plaintiff thus asks the Court to Declare and Order the above six (6) conclusions of law, with the clarifying declaration that this not with standing, the Golf Course is subject to the Covenants.

-- End of Division 1 --

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

- DIVISION 2 -

PEBBLE CREEK IS NOT SUBJECT TO THE COVENANTS

Plaintiff presents an abbreviated version of the arguments at trial where he argued that because of a lack of an equitable interest in the Pebble Creek property at the time the Declarant signed the covenants (made the declaration) and because of no proof at all that the covenants as filed were accepted by the purchaser of Pebble Creek (who purchased the property before the Covenants were signed and filed), Pebble Creek is not subject to the Covenants (Pl # 547) or Bylaws (Pl # 548).

Plaintiff presented extensive case law which related that to have enforceable covenants running with the land the Declarant, at the moment that he made the declaration, has to have horizontal privity / an equitable interest in the land to be so obligated.

The weight of the cases was that all ambiguities or doubts are to be resolved in favor of the free use of property.

At his deposition, the Declarant himself, R Scott Pyle, stated that he had no personal knowledge into the circumstances of the Covenants and that he merely signed the covenants when they were presented to him by an un-named attorney. He testified to the effect that he is a finance person, and admitted that neither he nor his company, Plantation AD, had ever built or sold a single house. They were, as he admitted, engaged in the resale of property for other builders.

All exhibits or documents referred to were introduced into evidence and were uncontroverted by Defense Counsel.

The Deed of Sale from Plantation AD to Sunbelt was signed AND WITNESSED by

both sides on January 29, 1999, Plaintiff's # 545 page 1. From that moment Plantation AD no longer had an equitable interest in Pebble Creek. The witnessed signature for the sale by Plantation AD on January 29, 1999 is on page 2 of the deed to Pebble Creek. The witness statement for the buyer is on page 4 of the deed, with the witness signature also being January 29, 1999.

Sunbelt at that moment became the successor developer to Plantation AD. Plantation AD continued to be the owner and developer of the remainder of the Murrells Inlet Golf Plantation PUD, as it was still known to the Horry County Planning Commission at that time (Pl # 450) until May 14, 1999 when the PUD became known as "Lantana PUD" (Pl #451) per documents filed with the Planning Commission and approved that day.

The Deed of Sale from Plantation to Sunbelt is at Deed Book 2117 Page 1401, Pl #545. At trial Plaintiff read from the deed and noted that there was a blank where the Deed Book / Page of Covenants COULD have been entered, but was not. Since no covenants had been declared on the date the sale was made obviously no book / page was available.

If Sunbelt, having seen the Covenants that Plantation declared and filed for the remainder of the PUD, had liked those Covenants, Sunbelt as the owner of Pebble Creek could have – but did not – make an identical declaration of covenants for Pebble Creek. Sunbelt did not do so. Sunbelt as equitable owner after January 29, 1999 was the only entity capable of making a covenant declaration binding on Pebble Creek.

Plaintiff proffered to the Court that he obtained every deed and every plat directly from the Recorder of Deeds of Horry County to assure authenticity. Plaintiff asserted that he provided copies of these to Defense Counsel early in 2009, to perpetuate the documents.

At trial Defense Counsel Henrietta Golding presented what she had a copy of the Deed of Sale to Pebble Creek which had the blank filled in with what is the Book / Page of the Covenants. First, this is an impossibility because the Book / Page could not have been known on January 29, 1999 when the sale was consummated, because the Book / Page of the Covenants were only assigned by the Recorder of Deeds on February 8, 1999, when the Covenants were presented to the Horry County Recorder of Deeds for indexing and filing (Pl # 547).

Secondly, at Court, Plaintiff challenged whether what Defense Counsel presented was the deed of sale. Upon information and belief, after consulting Defense Counsel's list of evidence and the documents themselves only presented FOR THE FIRST TIME to Plaintiff minutes before trial began, Plaintiff finds that Defense Counsel did not have this deed in her set of evidence. The only copy she had was the copy Plaintiff gave her Pl # 545.

Indeed, Defense Counsel is a victim of her own haste and of the similarity between the Deed to Sunbelt, Pl # 545, and the Deed to the Golf Course, Pl # 544, which later deed was immediately before the Sunbelt deed in the set of evidence Plaintiff provided Defense

Counsel (prior to the original January 17 2012 trial date).

Page 1 of The Golf Course Deed looks very much like Page 1 of the Pebble Creek deed and both are hard to read. On Page 3 of the Golf Course Deed is the Covenant's Book Page and on Page 3 of the Sunbelt Deed is a blank where it could have been entered. The pages are almost boiler plate one of the other. Yet they are not the same.

At trial Plaintiff challenged the Court to verify, from the Recorder of Deeds, that indeed the Sunbelt Deed on page 3 has a blank where covenants could have been entered. This would not have been a problem if the Covenants had been attached to the Sunbelt Deed as an Exhibit – a plain and simple resolution of a lack of a book page. But they were not. All ambiguities are to be resolved in favor of the free use of property. Courts are not allowed to speculate on why something is not present or what might have been when it comes to Covenants.

At trial it was noted that the Covenants Pl # 547 were not even signed until January 31, 1999, two days later (page 27). This is the earliest that it can be asserted that any "Declaration" was made and at that point the Declarant had no equitable interest in Pebble Creek.

The declaration signature of R Scott Pyle as the Declarant was never verified by a notary – ever.

On February 5, 1999, seven days after the sale, a notary took the oath of a person who did not sign the declaration that swearing person witnessed R Scott Pyle sign the Covenants – which is hearsay – but Pyle never appeared before a notary to have his signature on the Covenants affirmed. Page 27 of Covenants.

Plaintiff noted that SC 30-7-20 requires witnessing of such a document AND recording and holds that the document is not effective until both the witnessing of the signature (which never happened) and the recording has been accomplished.

Plaintiff pointed out that per SC 30-7-90 the world was only on effective notice of the covenants after the filing and indexing with the Recorder of Deeds had been accomplished.

The Covenants were not indexed and filed until February 9, 1999, eleven (11) days after the sale of Pebble Creek to Sunbelt. Pl # 547 Page 1.

Plaintiff pointed out that per the Restatement Third of Servitudes, when a covenant is imposed it must be in writing and final form and to be enforceable proven that the document presented was the document agreed to at sale. The Covenants fail at this point.

Plaintiff also pointed out that the Restatement Third of Servitudes requires that the Declarant have horizontal privity at the moment of the Declaration; the Covenants fail at this point.

Plaintiff also pointed out that the Restatement Third of Servitudes requires that the purchaser of property have legally effective notice of the servitude at the time the purchase was made; and legally effective notice was not given until February 8, 1999, ten days too late; the Covenants fail at this point.

At trial Plaintiff asked the Court to take judicial notice of Black's on Privity.

Plaintiff then invoked the following case law:

South Carolina Courts are bound by the appellate decisions of sister states when South Carolina has no directly applicable case law

"South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants" -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)

There must be privity of estate between the parties to the covenant. Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 907-08 (1978). "We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity.

The loss of Plantation's equitable interest and horizontal privity occurred "when there was an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court asserted: that in interpreting the sale the terms are limited to what is written on the deed itself. The court wrote that the terms do not include any "secret purpose or intention on the part of one of the parties, stored away in his mind ... "

Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) which was an appeal from Horry County.

**THE ASSOCIATION WITH RIGHTS AND OBLIATIONS UNDER THE
COVENANTS IS THE
MURRELLS INLET GOLF PLANTATION ASSOCIATION, INC**

At trial it was uncontroverted that the Covenants (Pl # 547) in Section 1.3 defined The Association as the Murrells Inlet Golf Plantation Association Inc. Plaintiff stated that hereafter he would refer to this as "MIGPA".

Plaintiff proffered to the Court that there are four South Carolina Corporations with degrees of claim to being The Association:

1. MIGPA an actual South Carolina Non-Profit Corporation whose uncontroverted documentation Plaintiff put into evidence.
2. The International Club Association, Inc, an actual South Carolina Non-Profit Corporation whose uncontroverted documentation Plaintiff put into evidence. Plaintiff stated he would refer to this as "ICA".
3. The International Club LLC, with a similar name but which is the "for profit" golf course.
4. The International Club Home Owners Association Inc, which is yet another actual South Carolina non-profit corporation, which Plaintiff refers to as IHOA.

But which is "The Association"?

Plaintiff related that The SC Non Profit Corporation Act 33-31-401 (b) requires a non-profit corporation's name to be unique from any other organization doing business in South Carolina. Pl 216.

Plaintiff cited to Section 1.5 of the putative Bylaws of IHOA (Pl # 548) which state that

By-Laws of the Association shall mean and refer to those By-Laws of Association which govern the *administration and operation of the Association*

Upon questioning by Defense Counsel Plaintiff testified that he had recorded and indexed Bylaws for MIGPA with the Horry County Recorder of Deeds. Plaintiff noted that these, not those at Exhibit C (Pl # 548) are the only bylaws indexed to MIGPA.

Plaintiff cited to Section 2.5 of the Covenants to support the point that ownership of Amenities in the PUD does not make the owner thereof "The Association" because this section allows Amenities to be owned and operated independently of those owned and operated by "The Association" and that the Covenants do not even require The Association to own or operate Amenities at all. Section 2.5 allows the establishment of "Private, Semi-Private, or Public Clubs and Facilities".

Plaintiff pointed out that the Covenants even grant the Developer and the

Association the right to impose “fees and charges for the use of Recreational Amenities” that they own which sets up a regime of parallel and optional amenities facilities, for homeowners to optionally choose between.

Plaintiff then made the uncontroverted assertion that at the moment the Covenants were indexed and filed, February 8, 1999, the Covenants gave “The Association” riparian rights in the Ponds and Streams of the PUD: Plaintiff cited to Section 4.17. Wells and Effluent.

Plaintiff asked the Court to take notice of and to conclude that this gave MIGPA, the HOA named in the original covenants, the right to sell the water for irrigation, perhaps to the golf course.

A corporation imbued with equitable riparian rights can not be deprived of those rights without it's consent. A grantor of rights can not unilaterally withdraw those rights after the grant and assign them to another entity. This is exactly what the effect would be if The Association is now some other corporation.

Plantation AD had benefit of counsel & R Scott Pyle testified at his deposition that Counsel, not he, wrote the covenants.

Section 33-31-404 Names Change Filing Requirements Pl 217 provides explicit requirements as to what filing requirements must be done to have a binding and legally sufficient name change. The key element is to put the world on notice by indexing the old and new names and the names of any related entities. This was not done.

There has never been a “MIGPA” name change recorded with the Secretary of State or the Horry County Recorder of Deeds, nor one which even came close to meeting the filing requirements. Subsection (d) makes clear that no modification to anything which came before a purported name change is effective – such as changing a pre-existing covenant – unless the filing is properly done.

REQUIRED NAME CHANGE INDEXING WAS NOT DONE

Section 30-9-40 of the South Carolina Code provides that immediately after the filing of a written instrument the register of deeds or clerk of court shall “enter it upon the proper indexes in his office, which constitute an integral, necessary, and inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever.” Further, section 30-9-40 provides:

“The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record, but the recordation of a deed, mortgage, or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the

indexes."

(emphasis added). This requirement was stated in Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (citing Bradley v. Guess, 165 S.C. 161, 163 S.E.2d 466 (1932)) –

According to Section 30-9-40 "proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all."

The Thomas decision goes on to note that Section 30-9-10 of the South Carolina Code (Rev. 1991) establishes the manner in which to accomplish proper indexing and provides that an instrument conveying land should be indexed,

"alphabetically, under the names of the grantor and grantee. See S.C. Code Ann. § 30-9-10 ("[R]eference shall be had by means of two indexes, both containing the year of registry, names of parties, . . . the alphabetical arrangement of one being according to the names of the parties who executed the writings and of the other according to the names of the parties to whom they were executed.").

When construed together, sections 30-9-10 and 30-9-40 require that to provide proper notice, an instrument conveying an interest in land, including a covenant, must be indexed alphabetically under the names of both the grantee and grantor.

There is nothing in the records of the Horry County Recorder of Deeds indexing the covenants or any bylaws to the International Club by any name variation.

**IT IS MORE LIKELY THAN NOT THAT THE DEVELOPER
DID NOT INTEND TO CHANGE THE
NAME OF THE ASSOCIATION
AND THAT HIS INTENT WAS LIMITED TO THE PUD NAME**

On May 10, 2000 the Developer, Plantation AD, Amended the Covenants. Plaintiff
551

The Amendment stated that the Developer desired to "amend the Declaration in certain particulars". It also said that the Developer "desired to add additional property owned by it".

The Amendment Reads: Pl # 551

1. The name "Murrells Inlet Golf Plantation" is hereby changed to International Club. Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club". The Declaration shall now be referred to as the Declaration of Covenants and Restrictions for International Club.

Amendments 2 through 5 each recited that all the Developer desired to do was to add property and to change the name of the PUD.

See Amendment #2, 4/29/2003 PI #555
Amendment #3, 3/29/2004, PI #559
Amendment #4, 12/28/2004, PI #561
Amendment #5, 8/20/2008, PI #563.

All subsequent amendments recite the following: (PI 563)

WHEREAS, by Amendment to Declaration of Covenants and restrictions for Murrells Inlet Golf Plantation (Now International Club) dated May 8, 2000 and recorded May 9, 2000 in Deed Book 2258 at Page 1453, Horry County records, Developer / Declarant changed the name of the subdivision subject to said Declaration to "*International Club*";

The recital never states an intent to change the name of the association.
Per Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007

... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

The developer, Plantation AD, was actually indifferent about this because Plantation never filed anything related to the name change with the Planning Commission.

It was only after Horton bought out Plantation AD's remaining property on April 29, 2003 – Plaintiffs # 556, on June 19, 2003 that someone, Horton, actually filed documents with the Planning Commission using the International Club PUD name – Plaintiff's #461. International Club Development approval. Through today nothing has been filed specifically attempting to change the HOA name.

The Defendants argue that Plantation AD's amendment not only changed the PUD name but required the property owners to deal with a different HOA.

This is a real problem because as of the date of Amendment #1, May 10, 2000, substantial property had already been sold by Plantation subject to the original covenants and thus the already sold property and MIGPA had mutual rights and obligations.

January 19, 1999 – Golf Course property sold. Deed – PI #544.

February 3, 1999 – Pebble Creek property sold, which is where Plaintiff's property is located. Deed- PI #545.

This is NOT to say that the Developer could not amend the Covenants in other respects which do not affect equitable rights and obligations – such as use restrictions. The Covenants explicitly gave the Developer the right to make changes which do not detract equitable rights without the consent of owners. See Covenant, Amendment, Pl #547,

Section 8.5 Amendment Pl 547 Pg 25 Deed Book 2117 @ 1379:

(a) Amendments by Developer. For a period of fifteen (15) years ... Developer may amend this Declaration in any particular ... without the approval of any Owner ...

(i) in the event that such amendment materially ... alters or changes any Owner's right to the use and enjoyment of such Owner's Unit ... such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby; ...

Defense Counsel did not controvert Plaintiff's assertion at trial that any Amendment to the Covenants made by the Developer which impaired the use of an Owner's Property or which imposed a new obligation or restriction required written consent by the majority of the owners, per the Covenants. Plaintiff has presented case law concluding that every homeowner thus affected must consent, not just a majority, because a particular impairment to the free use of property could not be foreseen or predicted. Case law presented has the effect of stating that the Developer could unilaterally only make a change to the covenants which had a general procedural effect, or which relaxed a restriction, but that this method of unilateral amendment without consent or even notification is ineffective as to new obligations or restrictions.

APPLYING THE DEFENDANT'S SUGGESTED NAME TRANSPOSITION ALGORITHM EXCLUDES DEFENDANT IHOA AS "THE ASSOCIATION"

Covenants and Contracts are to be strictly construed. If a difference of opinion arises as to the meaning of a covenant or contract the answer to which can be ascertained by reading the document, than the issue is a matter of law and no parole evidence is admitted.

Here the meaning can be easily ascertained by applying the transposition rule suggested by the Defendant IHOA which results in excluding the IHOA as "The Association". The transposition rule is that changing "Murrells Inlet Golf Plantation" to "International Club" results in the name of "The Association" that is newly designated in Amendment 1. Plaintiff asserts that no Association name change was intended and if it was, the resultant Association is the International Club Association which existed as a bona fide South Carolina Non-Profit Corporation and which was merged into MIGPA.

First – the Developer clearly stated his meaning in Amendment 1 through the contemporaneous clarifying language in Amendments 2 through 5 – he intended only to

change the name of the PUD. It was a marketing issue.

In 1998 and 1999 the Golf Course went by the name "Traditions Golf Course" See Page 4 of February 8, 1999 Sunbelt – Golf Course Use and Marketing Agreement; Pl #546. By 2000 the Golf Course was now using the name "The International Club".

The FIRST QUESTION IS:

Given the clarifications of Amendments #2 through #5, did the Developer mean to change the name of the PUD AND ALSO the name of the HOA to "The International Club".

The SECOND QUESTIONS IS:

Could the Developer legally do so, since

(1) Amendment #1 came after the sale of the golf course and the Pebble Creek properties which subjected them to an association with MIGPA, and

(2) MIGPA had equitable riparian rights in the ponds and the right to operate and get income from amenity facilities.

The THIRD QUESTION IS:

If the developer could make such a change, did it satisfy the recording requirements of Section 33-31-404 Names Change Filing Requirements and Section 30-9-40 Indexing

The FOURTH QUESTION IS:

If such an HOA name change was intended, could legally be done, and was legally done, which of the four contenders is the HOA:

- * MIGPA (Murrells Inlet Golf Plantation Association
- * ICA (International Club Association)
- * IHOA (International Homeowners Association)
- * IC (International Club) ?

Let's apply the transposition rule which the Defendant uses to make their case. The defendants claim that literally applying the change of Amendment 1 gives the IHOA the rights and obligations of the HOA. Plaintiff argues that it is either MIGPA or ICA.

The Formula, from Amendment #1, is:

Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club".

Let's test that theory: See Plaintiff's Exhibit 567, Name Change Worksheet

Start with	Murrells Inlet Golf Plantation	Association, Inc
Transposition Rule	International Club	Association, Inc
You Get:	International Club	Association, Inc

You Don't Get International Club Home Owners Association, Inc
You Don't Get International Club LLC

To get to IHOA, the rule would have to have been, which it was not:

Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club Home Owners".

But that is NOT the transposition rule stated in Amendment #1.

OR

You would have to start out as
Murrells Inlet Golf Plantation Golf Plantation Home Owners
Association, Inc

But the name defined in the Original covenants does not have the phrase
"Home Owners" in it.

The Court is asked to enter a finding of fact and conclusion of law that the transposition rule if applied would name the International Club Association, Inc, as "The Association" – if Amendment #1 meant to change the name of The Association.

EFFECT OF MERGER OF ICA INTO MIGPA

IMPORTANT DATES:

11/20/2008	International Club LLC Incorporated	Exhibit
9/30/2010	Murrells Inlet Golf Plantation Inc Incorporated	568
	Int'l Club Assoc. Fictitious Name Horry County	
10/5/2010	Bk 3484 @ 1188	569
12/1/2010	International Club Association Inc Incorporated	570
3/7/2010	Articles of Merger: ICA into MIGPA	571

THUS:

IF the Developer never meant to change the name of the HOA, the intended HOA – MIGPA - exists and it is not the Defendant.

IF the Developer intended to and successfully changed the name of the HOA using the algorithm set out in Amendment #1, the intended HOA is the International Club Association, ICA, and by virtue of it's merger with MIGPA, MIGPA is the rightful HOA.

IF AND ONLY IF the Developer intended to change the name to IHOA, and it could

and was legally done, and the explanation of the later amendments is disregarded, and the application of the transposition rule is disregarded, then the Defendant IHOA is the resident HOA.

At least one element in the chain of procedure is "broken". Plaintiff argues that he has shown it is more likely than not that each element in the chain of procedure is "broken".

The Court is thus asked to enter an Order stating that as a finding of fact and conclusion of law, the Murrells Inlet Golf Plantation Association Inc, MIGPA, is "The Association" with rights and obligations under the Covenants and that the Defendant International Club Home Owners Association is not The Association.

The Court is further asked to enter an injunction prohibiting the Defendant IHOA from attempting to enforce the Covenants in any way. The Court is further asked to order that this shall not be taken as a prohibition in any way against the Defendant IHOA continuing to operate the Amenity Center, which the Court should find is owned by the IHOA, as a voluntary membership enterprise. Plaintiff asks that the Order explicitly state that this in no way interferes with the ownership the Defendant IHOA has in any property it owns by virtue of any deed with the IHOA as Grantee. The Court is further asked to Order that this decision likewise does not interfere with any existing contractual relationship which the Defendant IHOA has with any third party.

The Court is likewise asked to Order that the Bylaws of MIGPA be and are those adopted by the Incorporator of MIGPA which are recorded with the Recorder of Deeds of Horry County on October 5, 2010 at Deed Book 3484 Page 1056.

The Court is further asked to Order:

As a matter of law, if the IHOA IS the HOA per the covenants, than Plaintiff and the other homeowners can not be forced to join or remain a member and can not be held responsible for the debts to the corporation taken while he was involuntarily a member.

That when Plaintiff filed suit in Jarmuth v IHOA, 2010-CP-26-11320, he effectively gave notice that he had no desire to be a member of the IHOA.

That Plaintiff at that time demanded the return of all monies collected from Plaintiff for the period reaching back so far as the law will permit. That as a matter of law Plaintiff is entitled to a judgment against the IHOA in the amount recorded in the ledgers of the Defendant IHOA as having been collected from Plaintiff for any purpose through three years reaching back from the date he filed suit on April 7, 2009..

That Plaintiff is discharged from any debts alleged owed by him to the Defendant IHOA.

That as a matter of law, any provision of the Covenants which requires a homeowner in the International Club PUD to join "The Association" is void.

That as a matter of law, any member of "The Association" can resign at will, being responsible only for the cost of goods or services that he requested and received from "The Association".

That as a matter of law, no homeowner in the International Club PUD is responsible for any debt of the Defendant IHOA.

That as a matter of law, no homeowner in the International Club PUD is bound by any contract entered into by the Defendant IHOA.

That Per Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 , only restrictions explicitly found in the Covenants and not HOA regulations or rules limit the "free use of property" and that expansion thereon requires an amendment of the Covenants.

- * That MIGPA is not bound by any agreements or contracts entered into by IHOA.**
- * That MIGPA owns riparian rights to ponds in the PUD per Covenants 4.17**
- * That MIGPA not the IHOA owns the rights or interests in any easements within the PUD created by the Covenants.**

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

- DIVISION 3 -

**WHAT AREAS ARE IN THE PLANNED UNIT DEVELOPMENT AND
WHAT AREAS ARE SUBJECT TO THE COVENANTS?**

At trial it was undisputed that "The Subdivision" was first defined as the Murrells Inlet Golf Plantation filed by the Murrells Inlet Golf Plantation LLC, the predecessor to Plantation AD, said Plat filed with and approved by the Horry County Planning Commission on February 1, 1997, Pl #450. The original approximately 24" by 30" printout from the Recorder of Deeds was exhibited to the Court and to the Parties at trial, as being easier to read than the reduced size Plat placed into evidence.

By agreement of the applicant and the planning commission, the extreme limits of the PUD included what is now known as "The Enclaves" and "The Fairways" which are found at the top of the Plat and which are east of the PUD. These two areas are not now subjected to the dominion of the IHOA. They do not pay assessments to the IHOA.

At trial Plaintiff asked the court to take notice of the area to the bottom left of the PUD but outside the PUD line marked owned by Jessie McDowell. This is the areas later developed by DR Horton, a successor builder, now called "The Meadows" which has been subjected to the Covenants and to the dominion of the IHOA.

The "Meadows" at the time the PUD was agreed upon was owned by Murrells Inlet Golf Plantation but was explicitly not incorporated into the PUD.

The agreement between the developer and the planning commission took into account Horry County development requirements set forth in Horry County Ordinance 18-0004 Section 2, Site Plan Design Standards Pl # 254. These standards are used to determine the amount of open space, amenities, number and size of roads and exits, and the densities which the builder can apply to any particular area of the approved planned unit

development.

Plaintiff testified, unrefuted, that this constitutes an agreement between the builder and the county which can not be modified without the resubmission of plans (for the modification) to the county and approval prior to execution. This was conceded by the Defendant's expert witness, King.

Plaintiff pointed out, and it was unrefuted, that Plats attached to deeds, such as the Plat associated with the Covenants (Plat Book 160 Page 79 Pl # 454 and Plat Book 158 Page 159) are not submitted to the Horry County Planning Commission and do not carry with them any authority to deviate from the approved plan.

On May 14, 1999, Pl # 451 the successor to the Murrells Inlet Golf Plantation LLC, Plantation AD (R Scott Pyle, president the Declarant of the Covenants) submitted a revised development application for the same area to the Planning Commission. A dashed line marks the outer extent of the approved PUD, the line marked "PUD LIMITS". The property within those limits was unchanged from that previously submitted. On that day, which was after the Covenants were filed, the PUD was now called "LANTANA PUD", so named by the same individual who declared the Covenants. This was the only name the PUD was known as to the Planning Commission until 2003. Besides the name, the revised Plat gave additional details for development of areas within the PUD but outside Pebble Creek. It now depicted the details of the Golf course which at the time was owned by Plantation AD. It also showed that the Amenities for the entire PUD would be a common clubhouse of 8.8 acres. The documents filed with the Planning Commission showed that this clubhouse was SEPARATE from the Golf Course, which was listed comprising 197.7 acres. This is accord with the known agreement between Plantation AD and Sunbelt whereby Plantation AD would provide common large amenities for the entire PUD – which contract Plantation breached by no performance at all.

On January 15, 1999 Plantation AD filed a Plat of property it owned with the Recorder of Deeds at Book 160 Page 79. Pl #454. Despite a FOIA request to the Horry County Planning Commission, there is no record that through this date Plantation AD had sought a variance in the approvals from the Planning Commission. The January 15, 1999 Plat is the one cited in the Covenants and referred to in Exhibit A and one of the two cited in Exhibit B to the Covenants (the other being Plat Book 158 Page 155). Per that Plat the area now known as "The Meadows" was included in the International Club PUD – by act of DR Horton without submitting it to or obtaining approval from the Planning Commission. "The Meadows" was within an area now marked as "Reserved for Future Development, Parcel 2, which was stated as containing 50.18 acres.

The Court is asked to note that the January 15, 1999 Plat Book 160 Page 79. Pl #454. was not subjected to scrutiny by the Planning Commission and could contain anything Plantation sought to state on it. The May 14, 1999 Lantana Plat, Pl # 451, was filed with and subjected to scrutiny by the Planning Commission prior to it's approval on May 14, 1999.

It is unrefuted to this day that the records of the Horry County Planning Commission does not reflect The Meadows as being within the PUD. This was admitted by Freiboth at his deposition. Defense witness King stated that the PUD had nothing to do with areas subjected to the Covenants and subjected to the HOA. King could not explain how the PUD could be expanded to include the Meadows without making an accommodation for the additional traffic and without providing for additional open space and amenities, among other considerations. The statement of Mr. King reflects the habit of ignoring the Planning Commission after some sort of approval has been achieved.

On June 19, 2003 PI # 461 builder DR Horton, the successor to Plantation AD, provided the Planning Commission with a document titled "International Club PUD". This is the first document in the files of the Planning Commission with that name for the PUD at issue. The Plat, however, did not contain even the barest of the data elements needed to secure a Planning Commission modification of the prior agreement and approval for the PUD reached with Horton's predecessor, Plantation AD. The June 19th document was never approved as such a modification. There are no such markings on it.

The June 19, 2003 plat now showed that "The Meadows" area was within the PUD – all without the approval of the Planning Commission. A separate Plat for approval of development work by Horton was provided to and approved by the Planning Commission at this time, but per GIS records and the lack of any official record to the contrary, The Meadows was approved as a "stand alone" community.

In Plantation AD's Plat Book 160 at 79 which defines what is stated in the Covenants as being subject to the covenants, it includes the area which is now called "The Enclaves" and "The Meadows" at the top of the plat. These areas are ALSO within the PUD limits as approved by the Planning Commission.

In the June 19, 2003 Horton document The Enclaves and The Fairways area have disappeared from the PUD. However, after the Lantana PUD Plat, no further application for modification of the PUD was ever filed with the Planning Commission.

The actual Declaration in the Covenants subjected all of Exhibit A and Exhibit B to the Covenants. Exhibit B not only added the rest of the property described in Plat Book 169 at Page 79, it also described property at Plat Book 158 Page 155. The "5.42 and 9.79 acres" includes what is now known as "The Grand Vistas" condominium development – being the portion containing 9.79 acres, and the "Front Entrance" – containing 5.42 acres.

The Grand Vistas depends 100 percent on the use of International Club Drive for entrance and egress. Plaintiff notes that the scheme for The Grand Vistas violates Horry County Planning standards because the number of units in The Grand Vistas requires two separate entrances and exits and it contains only one – onto International Club Drive. Although for many years the IHOA year end bulletins and minutes of the IHOA board of directors referred to The Grand Vistas, the Horton controlled board never collected assessments from it. After the Rosemary Toth board took over, The Grand Vistas ceased being referred to in IHOA minutes or announcements. It's residents do not pay

assessments to the IHOA yet the benefit from the maintenance of International Club Drive. The Grand Vistas in Exhibit B was explicitly subjected to the Covenants. The other property is the "Front Entrance" – 5.42 acres. Both The Grand Vistas and The Front Entrance are outside the PUD. That much is uncontroverted.

Here is the language from the top of Page 2 of the original covenants which explicitly subjects all of the property in both Exhibit A and Exhibit B to the Covenants (including The Grand Vistas, The Enclaves, and The Fairways):

DECLARATION:

NOW, THEREFORE, the Developer hereby declares that all of the Property described in Exhibit "A" and the Additional Property described in Exhibit "B" or so much of it as Developer may, in Developer's sole discretion, see fit to develop or dedicate, and as, by subsequent amendment hereto, may be subjected to this Declaration, shall be held, mortgaged, transferred, sold, conveyed, leased, occupied and used subordinate and subject to the following easements, restrictions, covenants, charges, liens and conditions

Ambiguity must be resolved in favor of the free use of covenants. The above text is the text of the original covenants which subjects ANY land to the covenants, assuming the Declarant owned the land at the time (he no longer owned Pebble Creek).

Plaintiff believes that the phrase, "all of the Property described in Exhibit A" is NOT ambiguous. The Court will have to decide whether the text relating to Exhibit B is ambiguous, and the issue arises from the inclusion of the phrase "or so much..."

To assist the Court, Plaintiff has identified the Parcels in Exhibit A to their current names:

Parcel 1 –	Pebble Creek subdivision of the PUD which should be excluded from the Covenants on the basis of lack of horizontal privity.
Parcel G-1	The Golf Course
Clubhouse	Now the Golf Course Clubhouse
Parcel 4	The currently undeveloped future "Ballycastle" Multi-family area.

Exhibit B contains all the rest of the property in Plat Book 160 at 79, and the property at Plat Book 158 at Page 155. The former Plat contains The Enclaves, The Fairways, what is now The Highlands, The Villas (condo), The Glens (multi-family), The Cambridge (condo), and The Links. All of those, except The Enclaves and The Fairways, are assessment paying members of the IHOA and within the PUD. The former Plat also contains The Meadows which is outside the PUD. The latter Plat contains The Grand Vistas (condo) which is outside the PUD and does not pay assessments. The latter Plat also contains the Front Entrance which is outside the PUD.

If the phrase "or so much" does not introduce ambiguity, then all of the

aforementioned are also subject to the covenants, subject to the issue of whether the inclusion of areas not in the PUD was a gambit to avoid rejection by the Planning Commission.

Subsequent amendments to the Covenants added all the aforementioned areas of Exhibit B – except for The Fairways, The Enclaves, The Grand Vistas, and The Front Entrance.

The Restatement Third of Servitudes imposes a requirement beyond having horizontal privity when Covenants are declared and that is the issue of Notice.

The original Covenants were never indexed to the Lantana PUD or to the International Club PUD – only to the Murrells Inlet Golf Plantation PUD. The concept of notice arises BEFORE the deed is signed and has nothing to do with whether the deed cites to the covenants by book page. The issue is could the prospective buyer know the restrictions on the property he is considering buying and the cases tell us that these buyers are not on notice unless and until proper indexing has occurred.

Prospective buyers had only the PUD plats available to them which were of record in the Office of the Planning Commission in the names of Murrells Inlet Golf Plantation and later of Lantana until June 19, 2003 when DR Horton presented his “International Club PUD Land Use Plat” to the Planning Commission.

This followed the sale on April 26, 2003 PI #556 by Plantation of his remaining land to Horton.

Extent of PUD

The Court at this time is asked to declare, as a matter of fact and of law, that –

- (1) Pebble Creek is within the PUD.
- (2) The Meadows is not within the PUD.
- (3) The Golf Course and Club house are within the PUD.
- (4) The Enclaves and The Fairways are within the PUD.
- (5) The Grand Vistas and Front Entrance are not within the PUD.
- (6) The other communities shown on Plat Book 160 at 79 are within the PUD, that being the Highlands, the Links, The Glens, the future Ballycastle, and The Cambridge.

Plaintiff earlier at trial made the case that Pebble Creek is not subject to the Covenants because of lack of horizontal privity. It is clearly within the PUD.

Extent of Covenants Applicability to Land

For the reasons stated, Pebble Creek is not subject to the Covenants.

There is no ambiguity in the Declaration to dispute that The Golf Course and The

Club House and the future Ballycastle is subject to the Covenants. The Court is asked to so declare as a finding of fact and conclusion of law. Defendants did not controvert this, raising only the question (previously dealt with at trial and in this Brief) of whether the Golf Course is a member of the HOA.

In later amendments to the covenants DR Horton, the successor to Plantation Ad, explicitly subjected The Meadows to the Covenants. This is undisputed. Plaintiff, however, argues that future buyers of The Meadows had no notice because the Covenants were indexed to the Murrells Inlet Golf Plantation, not the International Club, and the Plats identifying that exclude The Meadows. The Plats referenced in the Covenants are not indexed to any PUD, but were created in conjunction with deeds which said deeds transferred property by deed book and page reference without separate reference to PUD names. In addition, it has been shown and is undisputed that the Meadows was never added to the PUD. For these reasons Plaintiff asks the Court to declare that, as a finding of fact and conclusion of law, The Meadows is not subject to the Covenants.

It is undisputed that in later amendments DR Horton explicitly subjected the land which became The Links, The Highlands, The Villas, The Cambridge, and The Glens to the Covenants. The same issue of notice remains problematic for this extension. This extension of land subjected to the covenants remedies any ambiguity that might exist from the Declaration's reference to Exhibit B, but it does not cure the notice issue.

The effect of notice problems to subjecting The Links, The Highlands, The Villas, The Cambridge, and The Glens to the Covenants was NOT argued at trial and thus is not before the Court for a declaration.

Elements to Be Considered in Forming a Conclusion

An area can be within a PUD and not be subject to a particular set of covenants. A multi-family area can be subjected to overall covenants and it's own covenants: For example: The Villas and The Glens multi-family areas.

To declare covenants:

The Declarant must have an actual equitable interest in a piece of land at the time he makes his declaration – Horizontal Privity;

The Covenants must be properly recorded and indexed so as to be capable of giving notice before they become effective.

In Arcadian Shores Homeowners v Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 the Court held that

(1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;

The requirement for equitable ownership when covenants are declared is stated in the Restatement of Servitudes.

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

- DIVISION 4 -

**THAT HOMEOWNERS IN
THE ASSOCIATION CAN NOT BE
FORCED TO PAY HIGHWAY 17 ASSESSMENTS
THROUGH ASSESSMENTS IMPOSED BY
"THE ASSOCIATION"**

What was set before the Court in Plaintiff's Complaint and was argued in Court was the issue of the IHOA collecting money as IHOA assessments which the IHOA in turn paid to "The Highway 17 Connector Road Maintenance District Association, Inc". This latter entity will be called "Highway 17" for purposes of this Brief.

Plaintiff has asserted that there is no right on the part of The Association through the Covenants to Collect this Highway 17 money and there is no obligation on the part of homeowners through the PUD covenants to pay this money to The Association.

At trial it was undisputed that Highway 17 is not a Road Maintenance District or other entity created by any government action. This was undisputed. It was also undisputed that where Horry County intended to create a special purpose entity it did so by act of the County Council and that entities created in this manner receive their money through the County Assessor's collection of taxes from property owners. Examples stated were the Murrells Inlet Fire Department and the Waste Management Services of Horry County. Another example cited was the special tax district recently created by Horry County whose domain is the Hidden Woods subdivision, which tax district was created to maintain and repair roads in the Hidden Woods community.

At trial it was undisputed that despite its name, Highway 17 is nothing more than another Non-Profit Corporation chartered with the Secretary of State under the same non-profit corporation act as IHOA.

At trial it was undisputed that collection of assessment by the IHOA on behalf of Highway 17 began with when Defendant Rosemary Toth became President and board member of IHOA. It was also undisputed that said Toth is a member of the board of directors of Highway 17.

It was likewise undisputed that Highway 17 has never sent a single document to any homeowner in the PUD, to include notice of annual meetings of Highway 17, announcements of elections, proxies, or assessment bills.

It was also undisputed that Plaintiff had obtained the Bylaws of Highway 17, budget and other documents from Highway 17 which they had provided Plaintiff in explanation of how they computed the amounts Highway 17 demanded from the IHOA.

It was undisputed that Highway 17 does not own any property.

It was undisputed that the PUD does not, and never has, had a shared property line with any property that was ever owned by Highway 17.

It was undisputed that at the time the Highway 17 Covenants were signed, the developer and owner of the PUD property, Plantation AD, did not own any property adjacent to Highway 17 property and that Plantation AD never held an equitable interest in Highway 17 property.

It was undisputed that the property which was used to create the Highway 17 Connector Road, which is the area which Highway 17 supposedly is collecting assessments to maintain, was owned by Kaminsky at the time the Highway 17 covenants were declared, and that Kaminsky was the developer of Prince Creek.

It was undisputed that the Highway 17 connector property became what is now known as "Tournament Boulevard".

It was undisputed that shortly after the covenants were declared, all of the Highway 17 property was dedicated to and accepted by the Horry County Council in an official act.

It was undisputed that there is no regulation at all of Tournament Boulevard by Highway 17 and that Horry County not only maintains Tournament Boulevard, but that it has also repaved and reconfigured the road, inserting turn lanes and in the process tearing out all the landscaping Highway 17 did; and imposing speed limits and painting lane markers on the replacement roadway.

It was undisputed that there is no vertical privity in any prior or current owner of PUD property going back to anyone who had horizontal privity in Highway 17 at the time the Highway 17 covenants were declared.

It was also undisputed that certain inequities exist, in that the Prince Creek golf

course property is exempt from assessment by Highway 17, but the International Club Golf Course is not.

It was undisputed that no PUD homeowner has ever given the IHOA a proxy or delegation authorizing the IHOA to vote in Highway 17 for the homeowner, or authorizing the IHOA to collect Highway 17 assessments from said homeowner(s).

It was undisputed that no Highway 17 property has ever been or currently is, International Club "Common Areas" as defined by the PUD's covenants.

It was also undisputed that the Highway 17 money is not used to maintain or improve PUD Common Areas.

It was also undisputed that the method that Highway 17 uses to compute assessments is to divide the Highway 17 budget by the number of acres it believes is subject to assessment and to bill each HOA on the basis of how many acres a particular HOA controls. Plaintiff asserted that the Highway 17 figures are very wrong.

At Plaintiff's # 115, introduced "in bulk" into evidence by Plaintiff and not objected to by Defense Counsel, is a "wiring chart" of "who pays for what" provided Plaintiff by Highway 17. It shows:

* Rosemary Toth (in 2009) was seen as the agent for PUD homeowners and the duly appointed agent for all the properties wired below the "International Club".

* The International Club (IHOA) was billed for and was paying Highway 17 assessments computed acreage for Pebble Creek, The Enclaves (which is not paying IHOA assessments), The Links, The Meadows, The Highlands, The Glens, The Fairways (which is not paying IHOA assessments), the Charleston Villas (Plaintiff has no idea who they are but the too are not paying IHOA assessments), and The Villas. Per this document The Cambridge, which is paying IHOA assessments, was not included in the computation of IHOA acreage.

At Pl # 135 is a Horry County GIS photo of the intersection of the Front Entrance, International Club Drive, and Tournament Boulevard. In the photo, neither Highway 17 nor Horry County has installed anything distinctive to this intersection. It is a total replacement of what Kaminsky (Prince Creek's developer) built and is strictly functional. Elsewhere on Tournament Drive Horry County has also redone the road. Tournament Drive is the main path from Prince Creek to Highway 17 and it bears heavy traffic at various times of day.

The Tournament Drive road dedication documents are at Pl # 409 and occurred on June 5, 2001. The Highway 17 Covenants were filed on December 29, 1998. Sunbelt bought Pebble Creek from Plantation AD January 29, 1999.

Witnesses testified and it was undisputed at trial that for sometime after Pebble

Creek houses were being sold, the sole entrance / exit to Pebble Creek was from McDowell Shortcut Road, and that the "front entrance" to Tournament Drive did not exist. Thus to a time beyond the Dedication to Horry County, Highway 17 provided no functionality to PUD homeowners. The areas of the PUD other than Pebble Creek were not developed until well into 2003 after DR Horton bought the rest of the PUD property.

The Highway 17 Covenants were entered into evidence as Pl # 541 and were filed December 29, 1998. The Highway 17 Charter with the South Carolina Secretary of State was entered as Pl # 550 and Highway 17 was chartered July 26, 1999.

Plaintiff's representation that Highway 17's covenants state that it's members are the owners of property on which it assesses (not their HOA's). It says that such owners will have votes related to the amount of their dues.

Highway 17's covenants purport to impose an obligation on HOA's (for property that Highway 17, by it's own fiat, asserts is subject to Highway 17 assessment) to collect Highway 17 assessments from homeowners on behalf of Highway 17. This assertion is made even though all of the HOA's it demands assessments from were created after Highway 17 and it was not disputed at trial that the IHOA had never signed such an agreement and that there was nothing in the IHOA minutes to reflect such. At her deposition Toth admitted that the first demand that Highway 17 made on the IHOA for assessments was when Toth took office – and that she willingly agreed to pay. To reiterate, there is no record of a vote of the IHOA Board approving such a decision. The payments are reflected in IHOA ledgers thereafter.

At depositions no witness recalled ever being told that the IHOA was paying Highway 17 assessments until Plaintiff raised the issue, and all agreed, as does Plaintiff, that no delegation to the IHOA was ever made.

At trial Plaintiff pointed out that the Highway 17 Covenants do not constitute an obligation or limitation on what homeowners in the PUD can or can not do with their property and Plaintiff asserted, undisputed, that this is not a proper covenant running with the land, and that it is nothing more than an obligation to pay money for something done outside of one's property and is at most a personal services contract. However, Plaintiff points out that it fails the Statute of Frauds because it is for more than two years, is not directly between the parties to the contract, and has no definite terms upon which to predict the cost and the services.

Plaintiff asserted that he does not attempt to interfere in any way with Highway 17 operations, although said association is clearly in violation of The Act having since 1999 only board members and officers appointed by the Prince Creek Developer and having held no elections nor annual meetings announced or conducted per The Act.

If Highway 17 believes that homeowners owe it money, Highway 17 is free to bill homeowners individually and to see what happens.

Plaintiff asserts that Highway 17 is free to do what it wants to do with whatever money it can get from sources other than himself and the IHOA, but asked the court, as a matter of fact and law, to Declare that

(1) Highway 17 Assessments are not within the parameters of what IHOA assessments or The Association assessments may be collected for under the Covenants;

(2) The Association under the Covenants may not, and is forbidden to, collect Highway 17 assessments from homeowners subjected to The Covenants for the PUD without their written, revocable consent.

-- Supporting Law --

CASE LAW

Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,;368 S.C. 342; 628 S.E.2d 902

Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

Hardy v. Aiken 631 SE 2d 539, 369 SC 160 - SC: Supreme Court, 2006

Arcadian Shores Homeowners v Cromer, 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 –

Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).

Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex.App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ;

Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

Concept

A promise to do or not do something on my property is a covenant which runs with the land. A right to do something on someone else's land is an easement, as it the obligation to allow someone else to do something on my land. These are the dominant and servient sides of an easement.

If I promise to do something on someone else's property that is a personal services contract. If written into a deed it is still a personal services contract and does not survive the sale of my property. For example, to get a deal when I buy a lot I might promise to buy my groceries from the seller, or to join his chapter of the VFW, attend his church, buy my

shoes from him, or to mow his lawn. If I sell my house that obligation does not transfer. It does not survive the transfer. These do not touch and run with the land because it does not control something I do on my land.

The People and Property Subject to the Covenants

The Highway 17 Covenant on it's page 3, Deed Book page 609, says that "an owner shall mean and refer to the record owner (including the Declarants) as shown by the real estate records ... situated within the "Property" .

That Covenant on it's page 4, Deed Book page 610, says that "Property" shall mean and refer to all the Property which is subject to this Declaration. It says that the Plantation Tract is at Exhibit F.

The actual property subject to the Covenants, called "The Connector" is where the PUD homeowners have a putative duty to do something, is described on Book page 608 page 2 as stated at the Highway 17 Exhibit C.

The Highway 17 Covenants do not impose an obligation on anyone to perform anything except on the Connector where they supposedly have an obligation to perform maintenance on someone else's property.

On Page 7 Article 5 Section 1 of their covenants it is asserted that non-owners of The Connector property have an obligation to pay for the purposes described in Section 2.

The purposes are stated in Section 2, Page 8, Book Page 614, that being "the improvement, maintenance, enhancement, enlargement, and operation of ... the Connector.

The Connector Property, Exhibit C, Deed Book page 651, page 45 of the Covenant, excludes the actual road from the property, but it includes the rest of the right of way for what is now known at some of Tournament Drive.

On June 5, 2001 the entire Connector, including roadway and shoulders, was conveyed to Horry County and accepted by Horry County Council Resolution R076-01, Pl # 409. As such the entire area which to be benefited by the Covenants do not belong to any of the original parties to the Covenants. The dedication was made without any reference to the Highway 17 Covenants and thus they are not preserved.

The Dedication documents describes the dedication as being Tournament Boulevard, and the owners of The Connector as being "Kaminski, owner and developer of Prince Creek", ETS, and Bill Hatoway. Plantation AD is not listed as an owner. All owners have to be listed to assure that everyone with an interest in the property has surrendered it to the County.

Because there is at least a clear Change of Circumstances, the Court is empowered

to void the entire Highway 17 Covenants. At the present day So at this point in time there is at the least a Change in Circumstances. None of the Declarants or parties to the Highway 17 Covenant and no successor save the County has an equitable interest in the property. There is no horizontal privity to enforce the Highway 17 Covenants.

Exhibit F to the Highway 17 Covenants is the property belonging to Plantation AD which is related to the Covenants and it is described as the "Murrells Inlet Golf Plantation" property. This property is not contiguous with The Connector and shares no common point. It is separated from The Connector by the southern end of Tournament Drive which was not and is not a part of the PUD. There is no horizontal privity between the Plantation property and the Connector.

The southern end of International Club Drive is on Plat Book 160 at 79, Pl #454, which plat also describes 9.79 acres which is Cypress Keyes. Cypress Keyes is not contiguous with the Murrells Inlet Golf Plantation Cypress Keyes is contiguous with The Connector.

The Plantation property did not have horizontal privity to The Connector. The owners in the PUD do not have vertical privity to an original owner with horizontal privity to The Connector.

The obligation to do something on someone else's property or for someone else is a personal services contract, not a covenant, and does not survive the transfer of property on either side. After the Highway 17 Declaration of Covenants, there have been at least two transfers of Plaintiff's property: From Plantation AD to Sunbelt, from Sunbelt to Cheryl Essex, and from Essex to Plaintiff.

On page 11 of the Highway 17 Covenants, Deed Book page 617, it exempts from any obligation under the Highway 17 Covenants any property, Section 11 (c) any property owned by a non-profit organization – which includes the HOA. Thus the HOA being exempt has no vertical or horizontal privity with Highway 17 through property it owns. The IHOA is however being assessed for the acreage the IHOA owns.

It also exempts wetlands. The retention ponds are areas which periodically become wet and which although not directly connected with the rivers or oceans are still defined as wetlands on the PUD plats and by SC DHEC and it's county counterparts. The IHOA is however being assessed for wetlands acreage.

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

- DIVISION 5 -

WHO OWNS THE ROADS IN THE PUD AND ARE THEY SUBJECT TO THE COVENANTS ?

What was set before the Court in Plaintiff's Complaint and was argued in Court was the question of the IHOA enforcement of Covenants on the Roads in the PUD.

Plaintiff argued at trial that

- (1) The roads in the PUD are all owned by Horry County ⁴ ;
- (2) Horry County took title to those roads;
- (3) Title or Dedication was not encumbered by the Covenants;
- (4) Continuous use by the Public endows PUD homeowners with at least the same rights enjoyed by the public at large;
- (5) IHOA "rules" if otherwise valid are pre-empted by state law.
- (6) The IHOA has no vertical privity to the roads and thus has no right to enforce covenants on the use of roads, even if valid.

UNDISPUTED FACTS

At trial Plaintiff introduced as evidence all the Plats in his evidence book. None of these were controverted by Defense Counsel. Plaintiff also presented for the Court's inspection the original 25" x 30" (approximately) plats which were provided him by the Horry County Planning Commission or by the Horry County Recorder of Deeds.

Working from the plats, Plaintiff pointed out that the Declarant was aware of

⁴ Except for Madrid Drive in The Glens, which the builder of The Glens deeded to the IHOA.

distinctions between Easement, Dedication, and Private, because those labels appeared at various places on various plats. For example, golf cart crossings were marked "easements", roads were marked "dedicated to Horry County" and the front entrance was marked "private".

A CD was submitted to the Court as evidence which was authenticated by Mr. Louis Astorino at his deposition. At 6 minutes and 10 seconds it perpetuates an admission against interest by Defendant Rosemary Toth, who was present in the courtroom, that the PUD roads are "owned" by Horry County. No evidence or testimony was offered to refute her admission. However, the contention of Defense witnesses was that Horry County enjoyed an easement which was absolutely limited by all of the provisions relating to roads in the covenants.

At trial it was conceded by Defense and uncontroverted when asserted by Plaintiff that the IHOA took no action against anyone who it suspected was not a PUD homeowner – to include not even placing a note on a window – who did any of several things which resulted in a violation letter and fine if done by a homeowner.

It was not disputed that Horry County maintains the roads, to include abating flooding, striping the road lanes, erecting traffic control signs, enforcing speed limits, and even controlling conduct on the road shoulders by requiring encroachment permits for anything done on the shoulders. It was not disputed that the IHOA has several times applied for encroachment permits to do various things within the roadway; and copies of IHOA applications signed by Toth herself as IHOA President were placed into evidence. Pictures of Horry County doing flood abatement and posting traffic control signs were placed into evidence.

Plaintiff submitted into evidence pictures and documents which showed that homeowner property ended as much as over twenty feet from the curb, and that the typical roadway extended an average of over twelve (12) feet towards homes from the curb. Plaintiff placed into evidence copies of encroachment permits he received from Horry County for various plantings within the right of way. Plaintiff also placed into evidence pictures of various trees (Fletcher, across the street from him) which were in the right of way and which had not received either an encroachment permit from the County nor had the IHOA done anything to address this apparent violation of Covenant restrictions on use of roads.

The Glens Planning Commission approval Plat was entered into evidence, Plat Book 197 at 171 Pl # 466 and the original oversize plat was offered to the Court and the parties for inspection (hard to read the reduced size copies). Madrid Drive was marked "private". Pickering Drive was NOT marked "dedicated" but was marked "existing public". This was approved on May 25, 2004. That portion of International Club Drive (from the intersection with Pickering Drive in front of the Golf Course Clubhouse to the point next to The Grand Vistas where International Club Drive became owned by DR Horton) which was dedicated to Horry County was now marked "Existing Public". Of all the plats relating to the PUD filed with the Planning Commission this one was unique because,

referring to Madrid Drive, the only road in The Glens, "The Roads and Drainage within the Subdivision [The Glens] are intended to be Private and maintained by the [Glens] HOA."

The representation of DR Horton to the Planning Commission was that Madrid Drive would be deeded to The Glens (sub) HOA and maintained by that sub-HOA. Instead he deeded Madrid Drive to the IHOA, a "gift" for which there is no evidence that the IHOA ever accepted same by signing any document (including the deed) or by Act of the Board of Directors prior to the tail end of this lawsuit in 2012.

At trial it was pointed out that The Murrells Inlet Golf Plantation and Lantana Plats specified the exact road right of way and pavement widths (approved by Planning Commission) The first of those two places, Pl # 450, had the notation "All roads and rights of way shall be designed and built by the developer and inspected by Horry County Engineering for the purposes of dedication to Horry County Government. The only exception shall be driveways to multi family projects or service / maintenance facilities." The Lantana PUD, which was qualified as the "Revised Master Plan",

The most illustrative one is at Plat Book 181 Page 89 Pl #460. This contains a dedication signed by Plantation Golf, Plantation AD, and Sunbelt, the three landowners. The Dedications were actually signed December 29, 2001. It reads:

"The undersigned hereby acknowledges that I am (we are) the owner() of the property shown and described hereon and that I (we) adopt this (plan of development / plat) with my our) free consent and that I (we) hereby dedicate all items as specifically shown or indicated on said plat."

The notes of the Plat refer to the properties owned by Sunbelt, The Golf Course, and Plantation AD. This is the Plat with roads marked "public" or "private and the golf cart crossings marked "easements". As of this date no roads were marked "dedicated". Specific pavement widths and right of way widths are shown. This is the definitive plat for roads in the PUD, subject to the Dedication documents of the County Council which are consistent with this Plat.

At Plaintiff's Exhibit # 60 is the US Postal Service approval for Plaintiff to install a locking mailbox, the particular locking mailbox that Plaintiff requested Postal approval for – September 8, 2010. Plaintiff asserted that the Postal Service has pre-empted IHOA authority to approve mail boxes – especially when located on a public street which the HOA NEVER owned and which Plaintiff NEVER owned (a person without horizontal privity on some plot of land can neither enforce nor be subjected to an obligation or restriction relating to that land).

ARGUMENT

Who owns those roads?

What are the rights and obligations of

- * Horry County
- * Homeowners
- * The HOA

regarding the roads in the PUD which have been "dedicated" to the public, accepted and maintained by the County and which the owners have sworn are "public" on plats of record?

What authority and limitations exist regarding the HOA's authority to –

- * Regulate speed limits on roads inside the PUD?
- * Tow vehicles parked legally on these non-HOA owned roads first marked as "public" and later explicitly dedicated to the Horry County?

Plaintiff reiterates that at no time has a filed document relating to Plats and Approvals used the word "easement" when referring to the roads in the PUD.

Doctrine of Eminent Domain

Blacks Legal Dictionary. 1st Edition, Page 426 Pl #87 and 88 describes "Eminent Domain" as "The Right of the people or government to take private property for public use."

Article 14 Sections 2 of the South Carolina Constitution (Eminent Domain) states that "title to all lands and other property" may "vest in the State" by "grant [or]m gift" as well as by "purchase ... or otherwise". The manner in which the state acquires property is irrelevant as to the title.

Section 3 – Ultimate Property in Lands -- of the South Carolina Constitution makes it clear that because "the people of the State ... possess the ultimate property in and to all lands" no individual can diminish the state's title to land by conditioning the state's title without the state's explicit consent.

Case Law

Case law is conclusive that unless the state explicitly agrees in writing, the taking of property for public use is without any conditions or restrictions.

"The default rule in eminent domain is that a taking in fee simple establishes a new title and extinguishes all existing possessory and ownership interests not specifically exempted"

"where the government takes fee simple title, it takes all interests, specified

as well as unspecified and if the government intends to take less than fee simple title, the excluded interests shall be specifically mentioned." United States v. 194.08 Acres of Land, 135 F.3d 1025, 1029 (5th Cir. La. 1998)

"When the government acquires fee simple interests in land ... the government simultaneously extinguishes the servitudes burdening the property because continuance of the burdens of a servitude would interfere with the purposes for which the property is acquired. ... courts are of the view that ... land that is subject to an enforceable covenant, such acquisition extinguishes all existing possessory and ownership interests not specifically exempted and the ... authority acquires the land free from the burden of the covenant --- Newberry v. Andalusia, 257 Ala. 49 (Ala. 1952), Dothan Area Chamber of Commerce, Inc. v. Shealy, 561 So. 2d 515 (Ala. 1990).

"The government's rights as the condemnor are distinct from those of an ordinary purchaser of property ... securing better title against the entire world than may be obtained by voluntary conveyance" United States v. Carmack, 329 U.S. 230 (U.S. 1946).

SC Department of Transportation, Respondent, v Horry County, Burroughs & Chapin, et al Appeal from Horry County; Opinion No. 26911; January 18, 2011, SC Supreme Court
The grant of an easement for a highway conveys title to the roadway. Horry County's conveyance to title back to Burroughs & Chapin was defective because it remained with SC DOT.

Implying that unless otherwise stated in the document, the granting of a road easement to the state brings title with it.

Van Blarcum v. City of North Myrtle Beach, 523 S.E.2d 486 (S.C. Ct. App. 1999) found that when Myrtle Beach accepted a dedication it gained "title to two five-foot rights-of-way that extend to the Atlantic Ocean along the "east" and "west" boundaries of the two lots on which the motel sits,"

The payment of taxes on disputed property is evidence contrary to the intent to dedicate property to the public. Anderson v. Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977).

It is noted that neither the Developer, any Builder, nor the IHOA have ever paid taxes on any road within the PUD. Indigo Creek, the PUD "next door" has a gate on one entrance and the short road behind it is taxed. If taxes are not assessed on a road, this is supportive that the county has more than a mere easement -- that it owns the road

" The assessment of taxes is a factor to consider along with other evidence. " Van Blarcum, 337 S.C. at 452, 523 S.E.2d at 489

DEDICATION

Blacks Legal Dictionary, 1st Edition, Page 343 defines "Dedication" as "an appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. 23 Wis. 416; 33 N.J. Law, 13. A deliberate appropriation of land by it's owner for any general and public uses, reserving to himself no other rights than such as are perfectly compatible with the full exercise and enjoyment of the public uses to which he has devoted his property. 22 Wend. 472."

In February 24, 1997 the Horry County Planning Commission approved the plan of development for the Murrells Inlet Golf Plantation with certain conditions. One of those conditions was set out in a note on Page G-2: Pl # 450

"RIGHTS OF WAY MAINTENANCE. All roads and rights of way shall be designed and built by the Developer and inspected by Horry CO Engineering for the Purpose of DEDICATION to HORRY COUNTY GOVERNMENT. The ONLY EXECEPTION shall be driveways to Multi-Family projects or service / maintenance facilities."

On October 15, 2002, well before Horton came on the scene, the Pebble Creek developer Sunbelt began the process of dedicating roads in the PUD to Horry County. The documents for every dedication have had no reservation or exclusion relating to any covenants. The County Council Resolutions, such as this one, R-155-02, Pl #413, are for complete dedication and have no exception for any covenants. The HOA is not a grantor on any of the dedications.

These Road dedication documents were never made available to Plaintiff by the HOA, either before filing suit or in discovery after. They were obtained by FOIA, Pl #400.

Tournament Drive is effectively part of the main entrance to Prince Creek.

During the relevant period Tournament Drive when Highway 17 and PUD covenants were being declared and filed, Tournament Drive (the Highway 17 Connector) did not touch or come close to land within the PUD. At the time the Developers / Builders Plantation and Sunbelt did not own any land on which Tournament Drive was built – they never did – nor adjanent to that property. Neither Sunbelt for Plantation AD were grantors in the Tournament Drive dedication documents Pl # 409, June 5, 2001.

When Pebble Creek was developed and Plaintiff's lot was sold on September 27, 2001 (Pl #566) there was no egress to Tournament Drive. The reference to the front entrance in deeds was that Sunbelt and successor homeowners would have an "easement" over the front entrance, which became owned as private property by DR Horton and which was marked "private" on Planning Commission plats.

The dedications of all the roads in the PUD, plus Tournament Drive, are at Pl #401

through 414. The dedications relate to the owners as the grantors and never any HOA as grantor.

The dedications were accompanied by Certificates of Non –Litigation which refer to the “fee simple” dedication to Horry County. Fee simple is a term of art referring to transfer of ownership.

One of the road dedication documents that Horry County requires is a “Certificate of Non-Litigation”. It includes the statement “that (nothing) will affect the fee simple dedication of the below named project.”

No later than February 15, 2011, PI # 404, R-14-11, Horry County took title to the PUD Roads. Sample: PI # 405, February 21, 2006

"FEBRUARY 21, 2006 Horry County Council Resolution R-16-06 A resolution to accept DEDICATION of the Roads and Drainage ... into the County Road System. ... The developers ... request the roads and drainage be DEDICATED to Horry County. ... fully executed DEDICATION documents ... it is the intent of Horry County Council to accept the roads and drainage ... into the County system. ... Now therefore: Horry County Council resolves To accept the roads and drainage ...

Section 28-2-90 of the SC Code, The South Carolina Eminent Domain Procedures Act specifies that the state can take eminent domain title to property without a formal proceeding "(1) at any time upon receipt of written consent of the record owner or owners"

The title that vests in the state is "fee simple".

Per Section 8-2-450 of the Act, this authority extends all the way down to the municipality level.

In Ford et al v Dickerson et al; 222 W. Va. 61; 662 S.E.2d 503; No. 33349, Filed: February 27, 2008 the West Virginia Supreme Court held stated that

"The words or terms “road,” “public road,” or “highway” shall be deemed to include, but shall not be limited to, the right-of- way, roadbed ... necessary for the maintenance of travel, ... and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, ...

Courts have held that title to roads can vest in a government without the formal exercise of eminent domain, specifically –

(2) by continuous and adverse user by the public ... accompanied by some official recognition thereof as a public road by the county...

(3) by the owner's dedication of the land to the public use, ... - Ryan v. Monongalia County Court, 86 W.Va. 40, 102 S.E. 731 (1920).; State ex rel. Riddle v. Department of Highways, 154 W.Va. 722, 725, 179 S.E.2d 10, 13 (1971) and Ford et al v Dickerson et al; op cit..

The HOA was never the owner of the roads. Sunbelt or DR Horton, the owner prior to dedication, dedicated the roads to the County "fee simple", without a single written word attempting to limit the extent of the title. No taxes were ever paid on the roads. The HOA does not hold the capacity as a Servient or Dominant easement holder and has no association with any easement rights and no authority through title to exercise any control over the roads.

Horry County has performed maintenance on these roads, for example when there was flooding on the streets September 22, 2011 – see photos Pl #20, #29, #30, and # 35. #37 Horry County has also painted the road lines on International Club Drive.

PRIVITY

The HOA never owned any roads in the PUD, The HOA never owned any home lots in the PUD.

No homeowner ever owned any of the roads or the right of way of any of the PUD streets.

The Developers no longer own any of the roads in the PUD and does not own any home lots "subject to the covenants".

The parties to the Covenants are the Developer, the homeowners, and the HOA, possibly exercising rights derived from the homeowners.

None of these has "Privity" ownership in the Roads such as to give them the right to enforce Covenants applying to the land between the homeowner property lines – the roads.

Black's First Edition, Page 942, Pl # 89 & 90, states that "the term "privity" means mutual or successive relationship to the same rights of property. ... Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on." – in this case, the use of property neither owns.

The County owns the roads – additional argument below. If the covenants were effective against the County, they could only control what the owner of the road does with the land – they are not effective against one who has never had an ownership interest in the roads and neither homeowners nor the HOA have standing to try to enforce covenants on the use of the road where neither own or ever owned the roads.

Deed restrictions are private contracts affecting land.

In Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902 the Court noted that "Restrictive covenants differ from contracts in that they 'run with the land,' and that the only provisions which are enforceable are those "which 'touch and concern' land, and therefore, run with the land" citing Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

The fact that no party to the Covenants owns the roads must invalidate – because of lack of privity -- those covenant provisions and purported rules controlling the use the roads:

INVALID COVENANT SECTIONS BECAUSE OF NO PRIVITY

Section 6.2 Purpose of Assessments – Obligation to Maintain Roads and right to collect Assessments for that purpose;

Section 7.16 Tree Removal – in the road right of way;

Section 7.21 Sign Control – in the road right of way;

Section 7.25 Parking – on the roads (a police issue);

Section 7.26 Junk Vehicles – on the roads (a police issue);

Section 7.27 Motor-cycles on the streets (a police issue);

Section 7.28 Mailboxes, because they stand on county property and are governed by county encroachment ordinance and US Postal Service rules;

Section 7.33 Landscaping, to the extent that it is in outside of homeowner property and in the road right of way;

INVALID HOA ARCHITECTURAL REVIEW BOARD RULES BECAUSE OF NO PRIVITY

K. Landscaping – to the extent that it purports to apply to lawns between homeowner property lines and curbs.

R. Mailboxes – are in the area owned by the County.

Section V Application Review Fees and Deposits – none.

"These deposits cover any damages to International Club common areas from contractors, vendors, etc during construction. ... e.g., trucks with more than two axles, track – driven equipment, front end loaders ..."

The potential damage is to county owned roads for which the county has repair responsibility. There is no liability by any person using or abusing the roads to the HOA. There is no privity here.

IHOA's Asserted Authority

The HOA's February 27, 2008 Landscape Contract PI # 345 with Sunbelt Landscape Services provided that the HOA would spend over \$ 6,000 to maintain the Tournament Drive / International Club Drive area of International Club Drive then owned at the time by DR Horton and owned since April 2010 by the HOA – which area is outside the PUD.

That contract spent almost \$ 9,000 in 2008 to maintain International Club Drive in areas owned by DR Horton or dedicated to Horry County.

The contract provided approximately \$ 27,000 more to maintain shoulders and areas beyond of non – HOA owned roads elsewhere in the PUD – including Golf Course owned property.

Of the contract's \$ 56,000, only \$ 12,000 was used to maintain HOA owned property – the Amenity Center complex grounds. PI #345.

On or about June 25, 2008 the HOA's Building and Grounds Committee (Pete Pizzi and Mike Butryn) made an official presentation to the HOA at a Board of Directors' meeting . PI # 330.

The Board was informed by the Building and Grounds Committee, PI #331, that the HOA was spending 22 % (\$ 14,000) of it's grounds maintenance budget to maintain property owned by DR Horton, 38 % (\$ 25,000) to maintain Golf Course property, 31 % (\$ 20,000) to maintain roads dedicated to the county or otherwise not owned by the HOA, and 2 % (\$ 1,300) to maintain land owned by homeowners. Only 7 % (\$4,600) was being spent to maintain HOA owned “common” property.

On May 12, 2009 the HOA Board held a meeting at which the Board admitted that it is maintaining the "County Right of Way". PI # 355.

It is noted that no where in the PUD is there a single sign alerting the public to any restrictions on parking on roads. This HOA owned Amenity Center parking lots now contains such a warning sign erected this year, over three years after the issue was raised by Plaintiff. There is nothing to tell the public that the streets are in the PUD.

On July 15, 2011 the HOA Board of Directors alerted SOME of the homeowners via a "Friday Facts" e-mail – to those it chooses to send this to, which does not include the Plaintiff – that the HOA intends to tow cars (whether owned by homeowners or the public) without notice or warning and to hold said cars for ransom at some un-stated non-PUD location.

The HOA claimed authority under Covenant sections 7.25 (Parking, which was deleted by Covenant Amendment #1 May 10 2000) and section 7.26. The Board stated that "When the roads ere dedicated for public use and county maintenance, the full property

title did not transfer to the county, just some property rights and we can not have a gated community. ... Road right of way remain subject to covenants .. The county does not "own the roads".

The HOA declared that it may tow a car – without knowing who owns a car – if the car is "parked on the street for more than 4 hours ... This is consistent with state law ... no warning may be placed on the vehicle or delivered ... "

Section 7.26 of the Covenants reads:

"Section 7.26. Junk or Disabled Vehicles. No stripped, partially wrecked, unlicensed or invalidly licensed, disabled or junk motor vehicle, or part thereof, shall be permitted to be parked or kept in the Subdivision. The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.26,

There is no obligation to report one's license plate numbers to the HOA and the HOA has no way of distinguishing owner vehicles from those of the public who choose to park on the roads dedicated to the PUBLIC at large. If the HOA has no right to tow a public vehicle from a spot it likewise has no authority to tow a homeowner vehicle – as Privy would grant such right upon all vehicles on the property. As a matter of law homeowners have the same rights as those of the general public to park on the streets dedicated to ALL of the PUBLIC. Homeowners are part of the public.

The actual state law does not give a private person any right of action as to a suspected violation Pl #250:

SC Code 56-5-2510. Stopping, standing or parking outside of business or residential district. (A) No person shall stop, park, or leave standing a vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park, or leave the vehicle off the roadway. An unobstructed width of the highway opposite a standing vehicle must be left for the free passage of other vehicles

The PUD is a "residential district – PUD". See the road dedication documents. The PUD is zoned residential by the County and is thus a "residential district" – which definition was affirmed in South Carolina Court of Appeals case on writ of Certiorari, Restaurant Row et al v Horry County, No. 24944 May 17, 1999. Thus the statute – which is the ONLY parking limitation statute – does not apply. Horry County has no parking ordinance applicable to unincorporated areas.

Horry County does, however, have a Towing Ordinance, Sec 12.5-123, which governs "Non-Consensual Towing from PRIVATE property". Among other things there have to be signage, which is lacking in the HOA (section a(2)a), and the HOA has to be able to control who may enter the street, which it does not (section a(1)). Further, per part a, the decision to involuntarily tow without notice is limited to a police officer – thus the

HOA's declaration is an intent to commit a crime (grand theft – auto).

Horry County's Land Development Ordinance controls. From the "get go" it is clear that the PUD's streets were to be "dedicated to Horry County" unless designated as a platted private road with a fee – simple deed to a tax – paying HOA. The HOA never owned the streets and no one has ever paid taxes on the streets – including from the moment they were built. Chapter 18, Article 4, Section 2-1.. See Pl # 53 and 254.

The same section states that the area dedicated to the county is NOT the pavement, but the area "measured from lot line to lot line" including shoulders, graded areas, and the utility easement areas. Clearly the County acquired at the least SERVIENT ownership of and easements – the HOA does not own easements either. Per paragraph "B" "the roadway shall be no less than 60 feet in width". The paved area in the HOA is often approximately 25 feet wide. There is a peculiarity here because someone in the Horry County Planning Office allowed many of the streets in Pebble Creek to be 50 feet wide. Plat Book 181 @ 89, Pl # 460.

The county area beyond the curbs is unevenly distributed left and right of the paved road. An example is Bill Fletcher's house – across from Plaintiff's on Pickering Drive, Pl # 38 and #39 – 21 feet which means 4 feet of Plaintiff's grass belongs to Horry County.

21 feet of Plaintiff's neighbor Fletcher's grass belongs to Horry County.

If Fletcher doesn't own it, who does?

No one pays taxes on the shoulders.

Upon pain of "fines" levied by Beckie Abel, an employee of the HOA's management company KA Diehl – a defendant here – homeowners maintain the area from their property line to the curb. Except if you are the Golf Course, or a present or former Board Member living across from the Amenity Center, or are Developer, in which case the HOA maintains the area from the property line to the curb. See Buildings & Grounds presentation earlier.. Pl #330 331

Pl 47 49 Homeowner Curb sides maintained. At right is typical street-side edging and landscaping found in the PUD – several houses away from Plaintiff's on Pickering Drive. The HOA demands prior ARB approval and control over everything between the property line and the curb. At the offices of Defendants's counsel, Plaintiff recently examined hundreds of ARB applications and found dozens of these cases. Pl # 40, 42

Horry County has asserted it's authority per Ordinance Appendix B Zoning Section 1301 Encroachment: "WITHIN PUBLIC RIGHTS OF WAY". The phrase "rights of way" includes "dedicated" streets however one might choose to argue it. The HOA's asserted authority is PRE-EMPTED by Horry County's encroachment law. Clearly the HOA has no authority to permit encroachment where the county might prohibit it,

PL 252 "1301.2. - Encroachments within public rights-of-way. ...

encroachments within any public right-of-way shall be limited.

Encroachments, including but not limited to, untagged vehicles, untagged or

tagged vehicles for sale, landscaping, and structures ...shall not be permitted within the public right-of-way unless an encroachment permit has been issued by the applicable regulatory agency (Horry County or South Carolina Department of Transportation). Unlawful encroachments may be removed from the right-of-way by the county without further notice to the owner. The owner of the encroachment shall be liable for all costs of removal. "

Plaintiff applied for and was issued Encroachment Permit #4691 PI #629 by the County on July 9, 2008, which covers all landscaping and objects between Plaintiff's property line and the curb so long as the following conditions are met:

"All plants in the Right of Way must be maintained below 3' in height and all items in the Right of Way must be break away. Any item(s) not meeting these criteria will be removed at the owner's expense".

Other homeowners, such as Fletcher across the street from Plaintiff, #38 39, and down the street #40 #42, did not and were selectively "left alone" by the HOA. Fletcher was on the Transition Committee and an ARB Board member – he denied Plaintiff the swing set request, and #40 is John Bianchi, a former board member.

On September 26, 2008 PI #62 63 "The Villas", a condo development within the PUD, received approval from Horry County Planning to install temporary speed limit and curve signs on International Club Drive in the portion dedicated to the County. Per the HC Planning Commission (and the permit, as in the case of Plaintiff's encroachment permit) it was not necessary to obtain prior agreement of Defendant HOA – clearly showing who exercises dominion over these "dedicated roads". PI #63

On October 2, 2008 Defendant Rosemary Toth, as President of the HOA, applied for an encroachment permit from the Horry County Planning Commission so as to plant landscaping on International Club Drive. By this act she and the IHOA recognized that the county had more than an easement on the road. A servient easement holder – the road owner – does not need permission from the dominant easement owner – the non-owner user – to do something to the road.

It was signed by Defendant Rosemary Toth in her capacity as IHOA President:

Defendants Toth and IHOA sought to plant trees in the area between the curb and the property line

September 18, 2011 and for a few days more, the PUD was hit by storms. The streets flooded into yards. The HOA recognized that it was Horry County not the HOA with responsibility to deal with the flooding – who were called by the IHOA to clear the storm sewers which had been installed under Pickering Drive by the Developer. If the County merely possessed an easement allowing the public to pass, the county would be the benefiting easement holder and the HOA would be responsible to fix the road (Servient –

Dominant Easement doctrine). The HOA recognized that the County is more than an easement holder – it holds the responsibilities of the owner of the streets in the PUD to maintain the streets.

On September 20, 2011 Diehl, for the IHOA, let homeowners know that the “Horry County Storm Water Department” was taking care of the road flooding problem.

ORDER REQUESTED

Plaintiff has shown with the preponderance of the evidence that it is more likely than not that for many reasons as a matter of fact and law, the PUD Covenants do not control what may be done with the streets and that the IHOA has no dominion over them.

Plaintiff asks the Court to Order that it has made findings of fact and conclusions of law that:

(1) The PUD Covenants do not control what may not or must be done within the roadways in the PUD, with the exception of Madrid Drive; the Covenants do not apply to the “front entrance because that road has never been subjected to the covenants and is outside the PUD.

(2) The IHOA has no authority to regulate or control the road ways in the PUD.

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

(4) The roadways in the PUD extend from private property line to private property line and valid obligations and restrictions on the use of property begin and end within private lots.

(5) The obligation to maintain the roadways lies with Horry County which owns the road ways with the exception of Madrid Drive and that portion of International Club Drive not yet dedicated to the County.

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

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

- DIVISION 6 -

**WERE THE ACTS OF THE IHOA BOARD BEFORE
SEPTEMBER 2007 ULTRA VIRES AND
ARE THERE OTHER ULTRA VIRES ACTS
OF THE BOARD SINCE THEN ?**

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that because the IHOA Board was illegally constituted until September 2007 when at least some semblance of an election by homeowners was held, no board member has authority to act and thus all of the acts of the board were "ultra vires"

It was also argued that many of the subsequent acts of the IHOA board members singly or collectively clearly required either (1) a vote of the members; (2) approval by the board as documented in the minutes; or (3) were not within the scope of authority of the board stated in the Bylaws or (4) were directly contrary to mandates in Covenants, Bylaws, or The Act.

Although the Defendant IHOA was incorporated on March L 2001 as a Non Profit Corporation with Members entitled to vote, no election for members of the Board was held until September 29, 2007 and the term of office of that Board did not properly commence until March of 2008.

APPLICABLE LAW AND RELATED COVENANT AND BYLAWS PROVISIONS **

[** Plaintiff asserts that there are no legally effective Bylaws for the IHOA - thus making moot exceptions in law which consider alternatives under Bylaws.]

The Defendant IHOA was incorporated on March 1, 2001. Pl # 552 per Secretary of State documents.

SC Code 33-31-701. Annual and regular meetings. PI #223:

(a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP PI #548

3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

The First Annual Meeting of The Association AND the Members Was Required to be Held on March 10, 2001- the Second Saturday of March, 2001. PI #116

Here's what was supposed to happen BEFORE March 10, 2001:

Two directors were to be appointed by the Developer, Plantation AD. until THE MARCH 10 2001 Annual Meeting.

SC Code 33-31-804. Election, designation, and appointment of directors. PI #230

(a) If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected .. at each annual meeting thereafter, unless the articles or bylaws provide some other ... method of election, or provide that some of the directors are appointed by some other person or designated.

Bylaws Part 4 Board of Directors Section 1 Number. PI # 248

Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer.

AT THE MARCH 10, 2001 ANNUAL MEETING: (which never took place) three directors were to be appointed, for terms of 1, 2 and 3 years. Thereafter, all directors were required to be elected, beginning with one director in 2002, one director in 2003, and one director in 2004. Bylaws Part 4 Board of Directors Section 1 Number PI #248

“Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer. Thereafter, the affairs of the Association shall be managed by a Board of not less than three (3) directors, ...”

Bylaws Part 4 Section 2 Term of Office. Pl #248

"At the first annual meeting the Developer shall select approximately one-third (1/3) of the directors for terms of one year each, approximately one third (1/3) of the directors for terms of two years each and approximately one-third (1/3) of the directors for terms of three (3) years each; "

This scheme results in one Board Member whose office ended March 2002 (one year); one Board Member whose office ended March 2003 (two years); and one Board Member whose office ended March 2004 (three years).

Clearly after the second Saturday in March, 2003, two of the Board Members, a majority, were to be elected by the homeowners.

This didn't happen.

Plaintiff asserts that with regard to a non-profit corporation with members SOME of the directors may be "appointed by some other person or designated" - but not all. SC Code 33-31-804 - invalidating the "designate all" provision of the bylaws. " some of the directors are appointed by some other person"

No election was held until September 19, 2007

The so called "First Annual Members Meetings" was held on July 30, 2004 - which was neither in March, nor the anniversary of the Board's appointment on September 3, 2003. Pl# 305.

No election was held.

BEGINNING IN 2001 THERE WERE HOMEOWNERS ELIGIBLE TO VOTE

On September 27, 2001 Sunbelt, the builder of the Pebble Creek area of the PUD, sold the house -- that Plaintiff now owns - to Cheryl Tucker Essex in Deed Book 2412 at Page 46. This was only one of many such sales to homeowners of completed houses made at that time. Pl #566. Plaintiff's predecessor purchased home September 27, 2001. From Plaintiff's Deed:

"This being the identical property conveyed to the Grantor by Deed of Sunbelt Homes of Myrtle Beach, Inc, recorded September 27, 2001 in Deed Book 2412 at page 0046, Office of the Register of Deeds for Horry County."

On April 29, 2003 Plantation AD, the Developer, sold the remaining PUD property to DR Horton who sold hundreds of houses -- most of which years before the 2007 election. Pl #556

Approximately 222 houses were sold in Pebble Creek, where Plaintiff lives, years before the 2007 election.

The 2nd ANNUAL MEETING OF MEMBERS WAS TO BE HELD ON MARCH 9, 2002.

It wasn't.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP PI #548
3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

Per the calendar for 2002 this was to be March 9, 2002. Calendar PI # 117

THE DEVELOPER ILLEGALLY RAN THE BOARD THROUGH AT LEAST SEPTEMBER 19, 2007

Examples:

From the Minutes of Board September 10, 2002. PI #300. all board members were appointed by the Developer.

From the Minutes of Board September 3, 2003. PI #301. On that day the Board minutes tells us that Charles Flynn, the owner of Sunbelt had been magically appointed to the Board without an election or meeting, as was Developer employees Rick Ryan and Ron Peoples and Russ Carson. Also on the board without election was DR Horton's employee Doug Brown.

Per the minutes no existing board member resigned thus no vacancy had been created. DR Horton simply appointed the new board. Upon information and belief Doug Brown, Horton's employee, simply announced the new Board composition.

No Notice of the Meeting to Replace the Directors was given to Owner Members of the HOA: By statute, notice to homeowners of this meeting and it's purpose was required.

SC Code 33-31-705. Notice of meeting. PI #225

(a) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner. ..

From the minutes of the "First Annual Members Meetings" held July 30, 2004 PI # 305: Members were not permitted to vote. The minutes for July 30, 2004 reflect that the Developer lectured homeowners to be meek and not question the Developer Board. He also lied to the homeowners, such as when a homeowner asked about spending money on International Club Drive - which was owned by DR Horton but for which the HOA was spending money maintaining. The HOA so called president, Doug Brown, Horton's employee, lied and said the road was owned by the HOA:

“Several Members questioned the main entrance road condition. Chairman Brown stated that at this time, this roadway areas is owned and maintained by the Association”

He was truthful that the Horton owned road was “maintained by the Association” but not about it’s ownership.

At trial Plaintiff made the unchallenged assertion that in 2011 the federal government fined DR Horton over \$75 million dollars for homeowner fraud in North Carolina, and that other actions are underway in other states against Horton for fraud.

No election was held at the “Second Annual Meeting” on August 19, 2005, still disregarding the provision for the Annual Meeting of Members to be held on the Second Saturday in March.

The "Third Annual Members Meeting" was held on August 16, 2006. No election was held. Pl # 315

On August 8 2007 a Notice of Election to be held September 19, 2007 was mailed. This is un-numbered in Plaintiff’s list of exhibits but was submitted into evidence. It’s authenticity and admissibility was not challenged by Defense Counsel.

The Court is asked to look closely at the second paragraph of that Notice, which reads that the new, 2007 Board will be “appointed by the Developer to act as a Board of Directors”. This explains the statement made to Plaintiff, a statement against interest of a member of the board, of outgoing Developer Board Member – Horton Employee Pat Walsh that Walsh had appointed the new board. This was when Plaintiff asked to see the tally of votes on September 19, 2007 and was refused – with Walsh making that statement.. Pl # 320

The first election was held on September 19, 2007. This was neither the anniversary of the appointment of the September 3, 2003 Board Reorganization nor was it the second Saturday of March. The Court is asked to note that the date of an election is not the date a term of office begins, and the Bylaws provide for one year terms. No director resigned to make way for the 2007 directors.

Plaintiff asks the Court to hold that IHOA Board terms of office begin on the second Saturday of March, per the Bylaws

On November 12, 2007 the board sent a letter to the homeowners. In the second paragraph, it told the homeowners that tne new board had been “appointed”, although this was “based on the number of votes”. This is consistent with the August 8 announcement.

This letter was also not within Plaintiff’s list of exhibits and was submitted in impeachment of the assertions by Toth in her deposition that she had been elected by the homeowners. It was submitted in evidence.

Plaintiff's original suit in 2009 asked that all Board Members then in office who had been "elected / appointed" in 2007 be removed, as well as any who had been "appointed" by the board to fill the rest of the term of a board member "elected / appointed" in 2007 who had resigned. Prior to trial Plaintiff waived as "moot" this demand because there was no relief that the Court could grant, all such terms of office having expired in September, 2010. Likewise the demand that the Court look into election irregularities, moot for the same reason.

What is not moot is the legal effectiveness of the decisions, contracts, and other acts of the 2007 Board through the period September 2009, when two out of three of the 2007 board members or their appointed replacements would no longer be in office.

Plaintiff asserts that it is more likely than not, given the documents of the IHOA itself both before and after the 2007 election, that the 2007 Board had been appointed by Pat Walsh, the Horton employee, who stated in an admission against interest that he saw the 2007 election as nothing more than a suggested beauty contest (not his words).

Plaintiff waives asking the Court to enter an order on the question of whether the 2007 Board was appointed or not and the ultra – vires effect of such appointment in lieu of election. The Court thus does not have to deal with what Plaintiff has earlier "waived" relating to the 2007 election.

IMPORTANT CONSEQUENCE:

If the Board was illegally constituted until at least September 17, 2007 all acts and particularly contracts of prior boards were ultra vires. The practical effect of this is only felt on long term contracts, specifically the October 20, 2003 cable tv contract Pl # 302, and the November 20, 2003 "Golf Course Agreement" Pl # 558.

The damage was done by the respective developers, Sunbelt and primarily DR Horton, who Plaintiff believes are beyond the statute of limitations and in any event are not parties to this suit; likewise the individual Builder appointed members of the Board.

At trial Plaintiff did not argue the amount of damages that the putative boards effected by virtue of their illegal assumption of office. Plaintiff is also of the belief that the ultra – vires acts of the illegal boards are not recoverable from the IHOA's insurer since they are not "errors or omissions" of officers.

Plaintiff has shown by a preponderance of the evidence and the law that it is more likely than not that no member of the Board of Directors was properly in office prior to September, 2007.

Plaintiff Asks the Court to Enter an Order holding that each and every act of such prior boards was "ultra – vires" and of no legal effect.

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

- DIVISION 7 -

**THAT THE SECTIONS OF THE COVENANTS
MARKED "WAIVED" WERE ACTUALLY DELETED
AND ARE LEGALLY INEFFECTIVE**

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that Amendment # 1 to the Covenants effectively deleted many homeowner restrictions on use and obligations stated in the original covenants. The issue came about because the Board of Directors elected in September, 2007 led by Defendant Rosemary Toth refused to accept that any covenant provision had ever been altered, and insisted on enforcing the unaltered original covenants, except for their asserting that provisions of later amendments which subjected additional areas of the PUD covenants – and added dues paying members – were valid.

Plaintiff has suffered direct damages through the efforts of boards since 2009 to enforce those "waived" covenants. Certain of the changes also impose new burdens on the free use of property – by imposing what amounts to a property transfer tax on sale and resale of lots paid by the home owner at original purchase and by the homeowner seller at resale, when the original provision was to impose that as a one time charge at the original sale – paid by the builder as seller. This also had the effect of transferring a burden from the builder to the buyer at original purchase.

That original payment was called a Capital Contribution in the covenants. Based upon a Builder's Agreement obtained prior to when Plaintiff filed his complaint, it appeared that each Builder was required to pay, into the IHOA accounts, a capital contribution of \$ 1,000. There being over 700 units, the expected reserve was in the range of \$ 700,000.

Pebble Creek Equitable Ownership in the Amenity Center

- A Note -

The same Builder's Agreement indicated that Sunbelt had a binding commitment with his home buyers to provide amenities which would be exclusive to Pebble Creek homeowners. This was verified through information compounded and assembled in discovery over three years. The same Builders Agreement indicated that Plantation AD had a contract with all builders to build for all single family homeowners a very large common complex at G-2 where the golf course club house now stands, but that this was among the many contracts that Plantation defaulted on through 2003 (Plantation and its President R Scott Pyle were the defendants in numerous civil suits over contract breaches). Based on the agreement it appeared that Pebble Creek home owners owned a \$ 220,000 stake in the Amenity Center since the agreement stated that Sunbelt would provide Horton that much money to satisfy Sunbelt's obligations to its own home buyers. Papers provided Plaintiff by DR Horton in 2012, by order of this Court, indicate that Sunbelt did indeed give Horton approximately \$ 220,000. In 2009 Plaintiff subpoenaed the related documents from Sunbelt who admitted their existence but claimed they were "proprietary" or "so numerous" that producing them would be a burden. In 2012 when this Court finally got around to a hearing to enforce the 2009 subpoena, Sunbelt asserted that it had destroyed the documents during the interval. Plaintiff notes that this constitutes Spoilation of Evidence and may rise to the level of Contempt of Court. However, since no document survives which states the "conditions" under which the Sunbelt funds were provided to Horton to build the Amenity Center, no equitable claim can be made to support this contention in the Complaint. However, the Horton documents did relate that approximately \$ 220,000 was given by Sunbelt to Horton to provide amenities for 220 Pebble Creek homeowners, towards the construction of what is now the IHOA Amenity Center, and that Horton, with approximately 500 additional home buyers, contributed approximately \$ 110,000 towards the construction.

This statement is made to explain why Plaintiff at trial did not seek to prove equitable ownership by Pebble Creek homeowners in the Amenity Center and is not asking the Court for related relief.

-- Waived Covenants --

ISSUE: DID THE AMENDMENTS WHICH "WAIVED" PROVISIONS OF THE COVENANTS EQUATE TO DELETING THOSE RESTRICTIONS?

To answer this question the covenants and amendments were presented and the Court was asked to declare the effect of those amendments and what the resulting rights and obligations of the homeowners and association are – as well as the legal validity of certain changes.

On February 8, 1999 Plantation AD, the owner of all the property in the future PUD, filed Covenants concerning the property. Pl # 547.

On January 29, 1999, ten days earlier, Plantation sold to Sunbelt (a builder) the lots

which were resold as "Pebble Creek" where Plaintiff lives. PI # 545.

On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. PI #551.

The document "waived" many of the pre-existing covenant restrictions. The HOA has taken the position that these "waivers" applied solely and exclusively

to the Developer, Plantation AD,
to Sunbelt, a developer and
to International Club Villas, another developer (that day see Amendment #1).

At trial William Freiboth, current IHOA President, made the surprising assertion that none of the restrictions and obligations in the Covenants (other than the mandate to pay assessments) apply to "The Villas". Plaintiff proffers that his search of IHOA documents has not revealed a single covenant violation levied against The Villas nor a single instance where The Villas applied for permission to do something. Until the resolution in favor of The Villas of a lawssuite filed in 2010 (prior to this lawsuit) against the IHOA, The isolation of The Villas was so complete that they received no notices from the IHOA at all, not even invitations to elections.

To this day Defendants have attempted to enforce every single "waived" covenant restriction, to include levying fines and other sanctions for violating "waived" sections of the Covenants.

Amendment #1 changed the name of the PUD and "waived" numerous Covenant sections.

On April 25, 2003 Plantation AD sold it's remaining lots in the PUD to DR Horton. PI # 556. Filed April 29, 2003.

On April 25 2003, Plantation AD and Horton executed Amendment 2 to the Covenants, Filed April 29, 2003. This designated Horton as the successor Developer and assigned Plantation's rights to Horton. PI #555. No prior or subsequent notice was given to existing homeowners of this amendment.

On March 26, 2004 Horton executed Amendment 3 to the Covenants and filed it March 29, 2004. This Amendment deleted, modified, or added numerous covenant provisions. PI #559. No prior or subsequent notice was given to existing homeowners of this amendment.

On December 23, 2004 Horton and Seacoast Associates, another developer, executed Amendment 4 to the Covenants, PI #561, filed December 28, 2004. No prior or subsequent notice was given to existing homeowners of this amendment.

This fourth Amendment made major changes to the assessment provisions (changes 3, 4 and 5) and explicitly banned all multi-family occupants from the Amenity Center

(change 3).. At the time Plaintiff raised this issue, Maureen Sullivan, a homeowner from The Glens who was on the HOA Board, asserted that her unit was a “townhome”, thus a “single family unit”, and eligible for use of the Amenity Center. In sympathy, Plaintiff notes in the exhibits that Defense Counsel brought to trial that there were many self-serving documents generated by the seller, DR Horton, which asserted that Horton’s customers in The Glens could use the Amenity Center. Sullivan testified at trial that it was a salesman who told her this, that she relied on same, and that this was critical to her decision to buy a unit in The Glens. However, the use of the Amenity Center, per the Covenants, turns on whether The Glens was designated “multi-family” to the Planning Commission, which it was, and not on what DR Horton called the units. Horton could have called these units palaces but they were still attached townhouses with it’s own common property owned by a sub-association with it’s own covenants.

During various elections Rosemary Toth and other board members campaigned to keep homeowners from The Villas off the HOA Board ⁵ under the theory of "how can they decide how to use Amenity Center Money If They Can't Use the Amenity Center". Maureen Sullivan, a Board Member, owned a house in The Glens which is an area which is defined by the Horry County Planning Commission as a “Multi-Family” townhouse development which per the covenants is in the same category as The Villas.

On or about May 17, 2011 this Court signed a consent judgment in case 2009-CP-26-3211 in which the Villas sued the HOA for, among other things, depriving homeowners in The Villas of a vote in IHOA elections and depriving them of representation on the IHOA Board. In the consent decision the IHOA agreed to appoint a Villas homeowner as a non-elective member of the Defendant’s HOA Board. As of today there is no Villas IHOA Board Member.

On June 4, 2008, Horton and yet another developer, ADA Ocean Boulevard, signed Amendment 5 to the Covenants, filed June 20, 2008. This granted ADA “Developer Rights” exempting ADA, like all other developers from the beginning, from any building restrictions. Pl #563. Amendment #5 repeated word for word many of the changes of Amendment #4. No prior or subsequent notice was given to existing homeowners of this amendment.

Through the beginning of this lawsuit in 2009 the IHOA website represented that the Covenants consisted only of the basic covenants and Amendment #1. Upon inquiry at the office of co-defendant KA Diehl, requesting covenant documents, these were the only covenant documents known to exist. Amendments # 2 through 5 were found by Plaintiff’s search at the recorder of deeds prior to filing this lawsuit.

No Declarant had asked nor been granted consent by any homeowner to impose a covenant change which increased the burden on existing homeowners – particularly the change in capital contributions which shifted payment of this from the builder to the

⁵ Various Villas homeonwers independently found out about the 2007 and later elections and filed the requisite papers to appear on the ballot.

homeowner and made it a recurring expense.

In paragraphs 5 and 7 page 1 of Amendment #3 Pl #559 the Declarant acknowledged that any such change required the consent of existing homeowners. He didn't have it.

Amendment #1 was declared prior to the sale of any house to any individual homeowner. When Amendment #2 was declared in April, 2003, there already were many homeowners – for example Plaintiff's house was conveyed on September 27, 2001, almost two years before Amendment #2. Plantation sold Pebble Creek to Sunbelt prior to the Covenants itself being declared.

MEANING OF THE PHRASE "WAIVER"

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows: Pl #97 and 98--

"WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*

In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.

A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

HOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy et al v Aiken et al, SC

Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument.

**COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER OR BUILDERS –
NO DEVELOPER OR BUILDER WAIVER NEEDED**

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2 of the Covenants – PI 547:

Section 2.2 reads:

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.

The last paragraph of Section 7.2 read:

"Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

Amendment #5 PI #563 Para 7 named Kinsale a Designated Builder – for Ballycastle.

Amendment #1 PI #551 Para 7 named The Villas developer a designated builder.

Amendment #2 PI #555 Page 2, named Horton as the developer.

Amendment #3 PI #559 Pages 2 and 3, paragraph 5 named Sunbelt as a designated builder.

These named builders were the only builders in the PUD. As such, per the last paragraph of Section 7.2 of the covenants, the covenant restrictions did not apply to said developers at all and no waiver was needed for any of these builders.

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.25, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.25 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the

argument is grounded in substantial law – which is not the situation here.

“WAIVED” PROVISIONS

Amendment #1 to the Covenants, Pl #551. May 11, 2000

At the time there were no individual homes sold in the HOA so notice is not an issue.

Page 1. paragraph 4 of the Amendment reads:

Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restrictions on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel.

The Court is asked to declare that this deletion does not create an additional burden on property and is thus deleted, and to further Order That the HOA shall not attempt to enforce Section 3.7.

Amendment #1 contained the following “waivers”:

9. The Declarant hereby waives all easement rights reserved in Article IV, Sections 4.10, Section 4.11, Section 4.12, Section 4.16 and Section 4.17 of the Declaration.

11. The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration.

12. The Developer hereby waives its rights to enter into and for maintain the Golf Course Easement Area as set forth in Article VII, Section 7.37 (c) of the Declaration.

The Court is asked to consider Black’s interpretation of the word “Waived” and equate that to “deleted”. From the previous argument, it can be seen that developers and builders had absolute exclusion from the provisions of the covenants in creating their homes for sale.

No “waivers” / deletion created an additional burden on property. Since there were no homeowners there was no need to obtain 100% assent – the Declarant was the homeowner – at least for the non-pebble creek area.

Examining them one by 1:

Sections 4.10, Easements for Utilities. Waiver terminated the right of the “Developer, the Association and their respective successors and assigns .. the power to grant and accept easements to and from any private or public authority, agency, public service district, public or private utility or other

person upon, over, under and across ... To the extent possible, all utility lines and facilities serving the Subdivision and located therein shall be located underground. " The PUD was to stay like it was.

It is noted that this waiver explicitly removes from the developer or the association the power to grant easements. Plaintiff interprets this to mean that the IHOA Board has no authority to grant easements, which is germane to the IHOA Board granting Central Electric an Easement in 2010 for overhead utilities.⁶

The Court is asked to declare that the granting by the Board of an easement is an ultra-vires act.

The waived Section 4.11 of the covenants had read:

Section 4.11. Easements for Walks, Trails and Signs.

There is hereby reserved for the benefit of Developer, the Association and their respective successors and assigns the alienable, transferable and perpetual right and easement upon, over and across:

- (i) all portions of the Multi-Family Areas in which Units are not constructed or erected; and
- (ii) all other lands which may remain unimproved for the installation, maintenance and use of sidewalks, jogging trails, bicycle paths, signs of all kinds, lakes, lagoons, swales, ditches, other water courses, drainage ways, and related improvements.

-- May 10 2000 Amendment 1

The Court is asked to declare that waiving this section equated to deleting it.

The next section waived in Amendment #1:

Section 4.12. Easements for Association deleted in Amendment 1.

There is hereby reserved a general right and easement for the benefit of the Association, ..., to enter upon any Unit, or Multi-Family Area or any portion thereof in the performance of their respective duties. ... this easement is to be exercised only during normal business hours and ... only upon advance notice to and with permission of the Owner... Any such entry and performance shall not be deemed a trespass.

In effect this waived section had granted the Association permission to enter property to determine whether there was an ARB violation – or whether work had been done without ARB approval. It was akin to a search without a search warrant or a search authorized without probable cause. Deletion of this section was wise.

⁶ A pre-existing restriction in the original covenants absolutely forbids overhead utilities.

It is noted that Amendment #1 also deleted the requirement to seek ARB approval for anything, thus there was no need to "inspect", reinforcing the interpretation that it was the intent of the developer in Amendment #1 to delete the requirement to seek ARB pre-approval.

This deletion does not impair a homeowner's enjoyment or use of his lot because it eliminates adverse trespassers.

THE COURT is asked to declare that this waiver deleted Section 4.12.

The COURT is asked to declare that any entry into private property by the Association or its KA Diehl representatives to inspect for ARB violations without the consent of the homeowner is a trespass.

The next section waived in Amendment #1:

Section 4.16. Environmental Easement was also "waived".

There is hereby reserved for the benefit of the Developer, the Association an alienable, transferable and perpetual right and easement on ... unimproved portions of the Common Areas, Units and Multi-Family Areas for the purposes of taking any action necessary to effect compliance with environmental rules, regulations and procedures instituted by the Board of Directors or by any governmental entity, such easement to include without limitation the right to implement erosion control procedures and practices, the right to drain standing water and the right to dispense pesticides.

This deletion enhanced the free use of property.

It is clear that this provision was a "helper" section to the enforcement of the requirement to seek pre-approval from the ARB – and the deletion of the helper section buttresses the argument that it was intended to delete a requirement to seek pre-approval from the ARB.

The Court is asked to declare this "waiver" is a deletion.

The next section waived in Amendment #1:

Section 4.17 Pond Water.

This section granted the Association a perpetual equitable interest in the riparian rights in the PUD – ownership of the water in the ponds. It read:

There is hereby reserved for the benefit of Developer, the Association [a] perpetual right and easement: (i) to pump water from lagoons, ponds ... (ii) to drill, install, locate, maintain and use wells, pumping stations, ... (iii) to

spray or locate any treated sewage effluent

The Court has already been asked to deal with this amendment.

The next section waived in Amendment #1:

Sections 7.2 Architectural Review Board, ARB.

The deletion of this section is the most important provision of Amendment #1.

Plaintiff has already explained that “waiver” equates to “delete” AND That no developer or builder was ever required to nor ever actually sought approval of any plans from any ARB.

Not to be overlooked is that deleted section 7.2 was the source of authority for the development, promulgation, and enforcement of architectural rules. The deleted section read in part:

The Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers here-under.

So deleting this section not only deletes the requirement to seek approval, it deletes the authority of the ARB to make and enforce rules.

This does not gut the enforcement of the surviving covenant provisions.

Under the Covenants any homeowner as well as the Association itself can demand that a homeowner, or the golf course, that violates the covenants remedy that – and can enforce a failure to remediate with suit in court. Ultimately, this is the same enforcement mechanism that the Covenants prescribes without deleting 7.2.

So deleting the ARB does not deprive any homeowner of any protection, rights, or obligations that the amended covenant sets out. The amendment merely eliminates a dysfunctional requirement susceptible of corrupt use because of a lack of checks and balances.

Whether or not the Covenants applied to Pebble Creek – and hence subsequent Amendments, the Covenants certainly apply to the Horton sections of the PUD.

In analyzing the deletion it is irrelevant whether the deletion was wise or unwise, functional or dysfunctional. The analysis need look only to several things:

- 1) Did an existing homeowner have notice before or after -
There were no existing homeowners on May 10, 2000 who were entitled to notice.

- 2) Did the elimination of the ARB add burdens to the free use of property?
No --- It actually facilitated the freer use of property.
- 3) Did this deprive some homeowner of any right or did it impose any new obligation?
No.
- 4) Did Plantation AD have the authority to make this deletion and did he properly do so?

Yes – and it should be noted that the only entity whose rights were diminished was the Developer himself, since the Developer ran the ARB for years, the developer was restricting his own powers of control over homes after sale. Without an ARB, no homeowner needed to ask the developer for permission to perform modifications after purchasing a home, which approval could be arbitrarily with-held. It should be noted that there are no known instances where any developer refused to allow any homeowner to make any modification requested directly from the developer prior to the 2007 transition to homeowner control of the PUD.

In making this decision the court should be guided by *Arcadian Shores HOA v Cromer*, 644 SE 2d 778, 373 SC 292, where the Court held that any “regulation” stating a restriction not explicitly stated in the covenants was in fact an attempt to enlarge the covenants and required the procedurally correct amendment of the covenants. The Court further held that any so called “rules” required proper signing, acknowledging, and indexing with the recorder of deeds to place everyone on effective notice of these rules – which procedure is never followed for so called ARB rules.

The Court is asked to declare that

1. Section 7.2 has been deleted and is unenforceable;
2. Any attempt to enforce 7.2 is frivolous and without authority.
3. There is no source of authority to establish, amend and enforce architectural guidelines, rules and regulations,
4. AND TO ENJOIN THE ENFORCEMENT OF SECTION 7.2.

The next section waived in Amendment #1:

Amendment #1 also “waived” Section 7.4. Fences.

This deleted section is found beginning on Page 17 of the Covenants, PL #547.

In examining this section it should be noted that this has absolutely nothing to do with gardens, flower beds, landscaping edging, trees, or palm tree beds, which the Defendant has attempted to use it to control,

Plaintiff introduced into evidence photographs showing that there are literally dozens of fences of wide architectural variation, height, location, and materials throughout the PUD – far more than the 28 that the Defendant admitted through answers to

interrogatories.

In Arcadian Shores v Cromer the Court of Appeals held relating to fences in an HOA which Arcadian Shores sought to control --

“However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts.”

“Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures.” Upheld that the Association thus waived its right to review / approve.

Besides the failure to have a consistent scheme, there is a fatal defect in the wording which the Developer may have recognized when he decided to delete this section. That flaw is that forever more, even when the Developer lacks horizontal privity in the development, the ARB is not allowed to act without the Developer agreeing in every instance. The text reads:

No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board and set back from Unit lines at such distance as the Developer and the Architectural Review Board in their sole discretion may require, or except those erected by the Developer in Common Areas. Said fences and patio fences shall be allowed only after obtaining prior written approval of the Developer and Architectural Review Board. Said fences shall be made of materials approved in advance by the Developer and Architectural Review Board ...

Additionally, the section purported to allow the ARB to act selectively and capriciously, without having to relate a decision to a covenant provision or to give an explanation. Further, there was no procedure stated to appeal such a decision, thus making it susceptible to manipulation by hostile neighbors for personal purposes.

Deleting this section enhanced the free use of property. It did not impose a single additional burden on homeowners.

The next section waived in Amendment #1:

Section 7.25. Relating to parking was deleted.

Parking; Certain Vehicles Prohibited From Units.

This section was problematic to start with because the Horry County Planning Commission approval of the Development, and all subsequent approvals, uniformly stated that all roads would be built to Horry County standards, would be public, and would be dedicated to Horry County.

The Requirement for Dedication was in addition to the requirement that all roads be Public.

In unincorporated areas all parking restrictions are pre-empted by state law which in effect says that if you don't block traffic and passing sight lines, all duly registered vehicles can park where they want to, in the South Carolina spirit of hands off government – a message lost to the incumbent HOA Board and it's predecessors.

Horry County has promulgated ordinances for the towing of vehicles from private property, making it illegal for private individuals to arbitrarily tow or harass private cars. There are strict provisions as to towing from public streets – it may be done only by police or fire officials.

The streets were never owned by any home owner association and clearly there was no horizontal privity from the start. Individual homeowners always have had at least an easement of necessity to park any number of their vehicles on the public streets in the PUD so long as those cars are legally registered and don't obstruct traffic.

There is yet another impediment to any attempt by an HOA to regulate parking on public streets in the PUD: individuals who don't live in the PUD have an absolute right to park on streets within the PUD, and the HOA would have no legal mechanism to restrict such vehicles. An attempt to restrict identical cars identically parked, one owned by a homeowner and another by an outsider, clearly would reflect a capricious and arbitrary and selective enforcement mechanism.

The deletion of the section was a wise choice. It does not impose an additional burden on the free use of property.

It is also supported by Hardy v Aiken, 631 SE 2d 539. 369 SC 160 Supreme Court 2006 where it was held that ARB rules which purported to impose parking controls not explicitly contained in covenants – or to supplement same – were illegal and void, supporting the lower court's decision upholding the free use of property.

The "waived" section read in part:

... Owner agrees not to park any automobile or other vehicles (including golf carts) or those of such Owner's guests on the streets ... Parking shall only be allowed on designated paved parking areas, ... No travel trailers or mobile homes, campers or other habitable motor vehicles ... shall be used, kept, stored or parked overnight, ... The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.25, and shall charge the cost thereof to the Owner of the Unit involved, and shall have a lien for such cost against such Unit, enforceable in the same manner as an Assessment as provided herein.

It is noted that it is common in the PUD for travel trailers , boats, and other such

vehicles to be parked for days in driveways or on the streets of the PUD. This was the testimony at trial of Plaintiff's witnesses and in Mr. Astorino's original deposition. It was also Plaintiff's testimony. This was not controverted when Freiboth, Abel, and Sullivan took the stand.

The Court is asked to declare Section 7.4 deleted and unenforceable, and to enjoin any attempt to enforce same.

The next section waived in Amendment #1:

Section 7.31. Prohibition of Open Outdoor Storage was likewise waived. It read

No materials of any kind shall be stored on a Unit other than in an approved enclosed structure, which shall be attached to the principal dwelling.

Firewood and bicycles may be stored outside in side or rear yards only, provided they are not visible from any Common Area, easement, street or Recreational Amenity area.

The deletion of this section enhances the free use of property and does not impose any additional burden on any homeowner.

In evaluating this deletion it is not the Court's role to decide the effect this may have on property. This Amendment was properly noticed, witnessed, recorded and indexed. Every homeowner was on notice that this provision was deleted – as was the deletion of all other sections accomplished in Amendment 1. Thus when homeowners bought their units they could not rely on Section 7.31, nor the section on fences, nor the section on ARB.

It also did not add an additional burden on the free use of property.

The Court is asked to declare this section voided and enjoin any attempt at enforcement.

The next section waived in Amendment #1:

Section 7.37 (c) within Section 7.37 Special Restrictions Affecting Golf Fairway Residential Areas. This subsection (c) deleted by Amendment #1 pertained to the "Golf Course Maintenance Easement" which was deleted by this amendment.

It should be noted that at the time of Amendment #1 the same individual who controlled the developer, Plantation AD, also controlled the golf course, Plantation Golf. AD.

The deleted subparagraph read:

There is reserved to the Developer a "Golf Course Maintenance Easement Area" on each Lot ... adjacent to any golf course ... This reserved easement shall permit the Developer ... to go onto any Golf Course ... Area for the

purpose of landscaping or maintaining said area. ... The Developer reserves the right to waive the easement herein reserved in whole or in part in its sole discretion.

The Court is asked to note that in the context of this section, the clear meaning of waive is delete, where he said he might waive the easement in whole or in part.

Deleting this enhanced the free use of homeowner property because it eliminated the possibility that someone might arbitrary tear out a homeowner's landscaping – a possibility that would obstruct sales of golf course side lots.

The Court is asked to note that even with this deletion there remains a prohibition on obstructing the view of golf course side lots onto the golf course. This is enforceable at law by homeowners themselves, the actual injured parties anyway.

=====

PROVISIONS IN AND CHANGES TO THE COVENANTS
THE COURT IS ASKED TO INTERPRET BY DECLARATION

ORIGINAL COVENANTS PL #547

Who owns the rights to the water in the Ponds within the PUD, irrespective of who owns the underlying land, and what use may the owner of the riparian rights make of the water?

Plaintiff argues that the covenants as originally stated gives the riparian rights to all water in all ponds within the PUD to the Association named in the original covenants – The Murrells Inlet Golf Plantation Association.

The relevant section reads:

Section 4.17. Wells and Effluent. There is hereby reserved for the benefit of Developer, the Association and their respective agents, employees, successors and assigns an alienable, transferable and perpetual right and easement: (i) to pump water from lagoons, ponds and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes;

(ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities and systems within the Common Areas, including within any portion of the Recreational Amenities; or

(iii) to spray or locate any treated sewage effluent within the Common Areas, including within any portion of the Recreational Amenities or upon any

unimproved portions of any Unit, or Multi-Family Area.

Plaintiff asserted at trial that when the Covenants were written, it endowed the named association, MIGPA, with the equitable riparian rights to the water in all the ponds in the PUD.

The Court is asked to Declare that Riparian Rights in the water in the ponds and in the streams in the PUD belonged to MIGPA from the moment the Covenants were declared.

Plaintiff asserted at trial that the developer could not, without the consent of MIGPA, deprive MIGPA of those equitable riparian rights without its consent.

The Court is asked to declare that no Amendment to Covenants could affect a property right, particularly the riparian rights, without the written consent of the property holder, in this instance it being MIGPA.

Plaintiff asserted at trial that the Developer had no capacity as a matter of law relating to covenants to delete a provision endowing MIGPA with equitable riparian rights.

The Court is asked to declare that Section 4.17. Wells and Effluent survived any attempt by the Developer to delete it by amendment and remains in force.

Plaintiff asserted in court, citing Hardy v Aiken, 631 SE 2d 539,369 SC 160 – 2006 that general provisions for amending covenants can not be used to alter, create, or eliminate specific provisions of covenants related to specific rights or obligations. Or more exactly, that a vote of the members in the majority stated in The Act was required.

Plaintiff asks the Court to Declare that the only way The Association may eliminate, alter or impose provisions of covenants relating to specific equitable rights or uses of property is through the vote of the members as provided in The Act.

How has the notion of Common Areas been affected by Amendment?

The Developer never designated any actual property as Common Areas.

Paragraph #3 of Amendment #1 stated that

3. There is no "Common Area" as such term is defined in the Declaration located in or on the Multifamily Parcel.

Plaintiff interprets this as an attempt by the Developer to prevent a future IHOA Board from transferring the burden of maintaining property belonging to a multi-family sub association to the IHOA in general by accepting ownership of sub-association property and declaring it to be IHOA common areas since it would not be owned by the IHOA.

This has actually happened and Plaintiff believes that this is "illegal" under the

covenants, Amendment #1. DR Horton deeded the parking lot for the Glens to the IHOA, without the IHOA's consent in the minutes, and the IHOA now is maintaining this limited use parking lot aka Madrid Drive at the expense of all homeowners.

At trial William Freiboth testified that in 2012 the current IHOA board discovered what Horton had done. Clearly the IHOA board had no knowledge about this – it wasn't in their minutes. The Horry County Planning Commission plat for the Glens, Pl # 466 specifically required the HOA of The Glens to maintain that "private road" / common area. Freiboth also testified that the current board just recently gave The Glens sub-HOA \$ 10,000 to "reimburse The Glens for maintaining " it's own parking lot, and committed to having all homeowners maintain Madrid Drive / aka The Glens parking lot into the future.

The Court is asked to declare that this action directly violates the provision of the amended covenants, per Amendment #1, which prohibits IHOA common areas "in the multi-family parcel". Madrid Drive, as a common area, is "in the multi-family parcel"

The Court is also asked to Order that if the current IHOA board is unsuccessful in retrieving the \$ 10,000, that the current board be held personally, individually, and collectively responsible to repay the IHOA for the \$ 10,000.

When all was said and done Freiboth and the current board tried to capitalize on the original covenant's definition of common areas. Common Areas were defined in Section 1.6 of the Original Covenants, pg 2 as

Section 1.6. Common Areas shall mean and refer to all *real and personal property owned by the Association* for the common use and enjoyment of the Owners or *designated by the Developer as Common Areas,*

Plaintiff asks that the Court explicitly declare that roads and shoulders are not Common Areas to settle the issue that the roadways are not among the property for which The Association can collect money, through assessments, to maintain.

If one looks at Plat Book 181 Page 89, Pl #460 one sees that all roads in the PUD are marked "public" and are specified to be dedicated for public use on every Planning Commission plat relating to the PUD.

CAPITAL CONTRIBUTIONS IN THE AMENDED COVENANTS:

In accounting terms, Capital expenses is money spent on equipment with a life of more than one year. This is easily seen through IRS rules regarding deductions for business expenses.

The original Covenants refer to Capital Contributions as follows::

Section 3.5 Capital Contribution. The association shall collect a capital

contribution equal to 1/6th of the aggregate annual assessment for each Unit as set forth in Article VI. Each Unit's share of said capital contribution shall be collected and transferred to the Association at the time of the closing of the initial sale of each Unit by the Developer. All sums paid as a capital contribution are in addition to and not in lieu of regular assessments for common expenses.

The Court is asked to declare void this section because of it's ambiguity.

An additional reason for the Court to void this section is because it is not uniform in it's computation and application:

If this is tied to the monthly assessments imposed on homeowners, it becomes speculative and very arbitrary because of the following:

(a) Some homeowners pay less than others in a monthly assessment, for example at one time \$ 70 for single family homeowners and \$ 20 for condo homeowners, and of the \$ 70, much of that is for cable TV and garbage which is not a charge paid to the HOA by condo owners. Thus single family homeowners will have their capital contributions controlled not by the need for capital replacement but by the unrelated charges imposed by the cable and garbage companies.

(b) The assessment increases from year to year, thus a homeowner selling in year one will pay less than a homeowner paying in a following year – supposedly for the same capital replacement cost thus the later homeowners pay a larger share of replacement capital money.

The Court is asked to declare that any scheme which collects uneven rates from the same category of homeowner is void.

CAPITAL CONTRIBUTION AMENDMENT PROVISIONS OBJECTED TO:

Amendment #3, March 29 2004 PI #559:

3. Section 3.5 shall be deleted in its entirety and the following shall be substituted in *its place and stead*:
Section 3.5 Capital Contribution. The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner of a Unit upon the transfer of such Unit either from the Developer or from another Owner. All sums paid as Capital Contributions are in addition to and not in lieu of regular assessments for common expenses.

4. Section 6.7 shall be deleted in its entirety and the following shall be substituted in its place:
Section 6.7 Capital Contribution. The Association shall collect a Capital

Contribution from each Owner of a Unit as provided in Section 3.5 hereof.

The Court is asked to declare that this amendment is void for the following reasons:

(1) Unequal burden on a particular house unit for the reasons stated. Note that there is a difference between a burden on property and a burden on a particular owner.

(2) Requiring a subsequent purchaser to pay a sum of money to the HOA imposes an additional burden on the sale because it increases the cost of the housing unit.

(3) The HOA does not own and has never owned a particular housing unit. It has been held that a covenant may not require a buyer or seller to pay sums to a third party upon the sale of property; All federal mortgage institutions such as FHMA, Fannie Mae, VA, have bans on paying such sums in connection with mortgages issued by or for those agencies, which means that this payment scheme makes it impossible for a buyer to finance a house in the PUD if the requirement is honestly disclosed to the federal agency. In addition, this is not a proper covenant touching and running with the land..

(4) These changes were made without the approval of or prior or subsequent notice to existing homeowners.

(5) It violates the Hardy v Aiken⁷ decision in that this change required 100% approval and could not be made in any other fashion. Further, there is a specific amendment provision in section 6.4 which specifically applies to added capital contributions other than the one at original sale.

Additional Ambiguous Burden

Horton imposed an additional burden, on condo buyers but not single family home buyers, in paragraph 5, covenant burden added, Amendment #4 to the Covenants, Pl 561, December 2004 which should be voided because of it's ambiguity and internal wording conflicts:

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

This is clearly NOT the capital contribution charge because it is for "Maintenance".

Related Problems:

In 2004 DR Horton owned the International Club Drive front entrance off

⁷ Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006

Tournament Drive AND all the roads in the PUD. The International Club Drive front entrance isn't even in the PUD. No roads or entrances were or are "common areas". The County always owned and owns the Pebble Creek entrance – off of McDowell Shortcut Road.

The Court is asked to declare the change numbered "5" in Amendment #4, paragraph 5, void.

In addition --

(1) This is internally ambiguous and doesn't make sense: At the initial sale the developer sells to a second party. The developer never will "convey from the developer to a third party purchaser". This event will literally never occur.

(2) Doesn't apply to single family homeowners – so not uniform in its application.

(3) No prior or subsequent notice to existing condo homeowners.

(4) Violates the Hardy v Aiken decision in that there are specific assessment provisions and the general amendment by developer scheme was used to make Amendment #4..

(5) Condo homeowners now have a fixed, very large additional burden charge. This is in addition to the first month's two months of assessments charge so this makes it more expensive to resell the house.

(6) This is a personal services contract not a proper covenant that runs with the land, and lacks horizontal privity on the part of either party or anyone with an interest in the sale of the real estate.

(7) It is imposed on existing homeowners without their consent or notice.

INTERPRETATION OF UNAMENDED COVENANT PROVISIONS

INTERPRETATION OF COMMON AREA DEFINITION.

Definition:

Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which common elements are owned by either the Owners of Units in such Multi-Family Area as tenants-in-common or by the Multi-Family Association composed of such Owners, pursuant to a Horizontal Property Regime or other multi-family legal structure within the Subdivision upon which there shall have been or will be constructed either attached or detached townhouses,

condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.

When Developers applied to the Horry County Planning Commission for subdivision approval, the plats were required to designate whether an area was for single family or multi-family use, the densities, the number of units, and other restrictions such as set backs and percent lot coverage.

We see this in the Planning Commission documents PI #449, in the Murrells Inlet Golf Plantation approval in 1997, PI # 450, in the Lantana 1999 approval, PI # 451, in the 2000 approval of The Villas, PI #459, and in the 2004 approval of The Glens, PI #466.

Both the Villas, the Cambridge townhouses, and The Glens own common area through their sub-homeowner associations, the Multi-family associations, which certainly are at worst an "or other multi-family legal structure". The Cambridge recorded the deed to it's common area from Horton on June 12, 2007. Likewise The Glens common area from Horton on December 4, 2007.

The Planning Commission specifically approved The Glens as "Town Houses" not "Town Homes". See Glens approval plat PI # 466.

The covenants do not refer to nor depend on any sales literature put out by any builder calling an area a "townhome". They simply state an area is either single family home or multi family, with consequential rights and obligations, which determination was perpetuated in Planning Commission documents and related Plats.

The Court is asked to declare that any area of the PUD designated as a multi-family area in a planning commission Plat and which owns common areas through an association other than the one designated in the PUD overall Covenants is a "multi-family" area within the meaning of the Covenants.

Per Arcadian Shores v Cromer, an alternative interpretation is not permitted. The Covenants could have been written to exclude "town homes" from the "mutli-family" definition but did not. When Horton bought out Plantation in 2003, and subsequently made numerous amendments, it had the opportunity to try to alter the covenants in this regard but did not.

Horton's usage when it sold The Glens units, for example, to sometime Board Member Maureen Sullivan on October 4, 2005, does not control.

-- CONFLICT BETWEEN NON-PROFIT CORPORATION ACT AND
COVENANTS OVER CAPACITY OF COVENANTS TO CONTROL AN
ASSOCIATION --

At trial the Defense witness King asserted that it was the "habit" or "practice" of developers in Horry County to write controls over hypothetical, then non-existent non-profit corporations (future home owner associations) into their covenants. Reading the deposition testimony of Toth, Freiboth, and Pyle (the developer / President of Plantation AD) and listening to the trial testimony of King, Sullivan, and Abel it is clear that it is common to assume that documents associated with deeds to land can have anything to do with corporations.

Within South Carolina there is no HOA statute. The legislature has deliberately chosen to leave control over HOA's remain under the Non-Profit Corporation Act, 33-31 of the Code.

The Code expressly states in many places that the governance of a non-profit corporation is explicitly to be derived from The Act, from the Articles of Incorporation, and from the Association's Bylaws. Any other document which attempts to control the operation of a non-profit corporation is pre-empted by law, common law and practice to the contrary.

On February 8, 1999 R Scott Pyle, President of Plantation AD, signed the covenants with purported Bylaws for "The Association" as an Exhibit. PI # 547

On July 26, 1999 the HOA was incorporated with the Secretary of State. PI #552.. The Declarant / incorporator was Ken Grover.

SC Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

Nothing in the Covenants, including the Exhibit purporting to be the HOA's Bylaws, can be considered the Bylaws because they were adopted by someone who was not the incorporator nor, since the HOA did not exist, was Pyle a member of the HOA's board of directors.

Section 3.4 of the Covenants purports to control the Voting rights in the Association.

Covenants provisions must touch and run with the land and control the use of the property. Voting in a non-profit corporation does not touch and run with the land nor does it affect the use of the private property. Since this covenant topic is not part of the Association's Bylaws, but part of a document never adopted by the Association nor it's incorporator, this area of the covenants should be declared null and void since it has nothing to do with land. The default provisions of The Act will apply to The Association, thus this does not leave the IHOA in limbo.

The Covenants reads as follow in this regard:

Section 3.4. Voting Rights. The Association shall have two classes of voting membership:

***Class A.** Class A members shall be all Owners excepting the Developer. Class A members shall be entitled to one vote for each Unit in which they hold the interest required for membership by Section 3.3 above. When more than one person holds such interest or interests in any Unit, the vote attributable to such Unit shall be exercised as such persons mutually determine, but in no event shall more than one vote be cast with respect to any such Unit. The owner of the Golf Course shall have the voting rights of fifty (50) Class A members.*

***Class B.** The sole Class B member shall be the Developer. The Class B member shall be entitled to ten (10) votes for each Unit in which it holds either the interest required for membership under Section 3.3 above or (as to the Additional Property) the right to submit Units to this Declaration. The Class B membership shall cease and become converted to Class A membership upon the occurrence of the first of either of the following two events:*

The statute goes further:

SUBARTICLE B. . TYPES OF MEMBERSHIPS - MEMBERS' RIGHTS AND OBLIGATIONS SECTION 33-31-610. Differences in rights and obligations of members.

All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

Clearly the covenants (which are neither the articles nor bylaws) can NOT establish classes of membership.

The Court is asked to declare that nothing in the Covenants shall control the operation of any homeowners association, specifically to include voting rights and privileges in such a homeowner association..

MEMBERSHIP ISSUE.

The Covenants requires that every homeowner be a member of the named association. This would be a legally valid requirement if the PUD was in a state with a homeowners association act – but the subdivision is in South Carolina. All HOA's in South Carolina are expressly incorporated subject to a specific membership statute -- See Pl # 552 == that being 33-31-202 of the South Carolina Non-Profit Corporation Act. This is pre-emptive of private agreements to the contrary, in areas where it does not provide for provisions to the contrary, such as the section of when the annual meeting shall take place.

The Covenants:

Section 3.3. Membership. Every person or entity who is an Owner of any

Unit shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of the Unit.

There is no provision in the covenants for resignation. This is not stated as “may be a member” as a scope of eligibility, such as a neighborhood association.

This is pre-empted by law:

ARTICLE 6. MEMBERS AND MEMBERSHIPS

SUBARTICLE A. . ADMISSION OF MEMBERS

SECTION 33-31-601. Admission. (a) The articles or bylaws may establish criteria or procedures for the admission of members.

(b) No person may be admitted as a member without his consent.

SUBARTICLE C. . RESIGNATION AND TERMINATION

SECTION 33-31-620. Resignation. (a) A member may resign at any time.

33-31-601 of the Code states that the articles or bylaws, not some external covenant, controls criteria for membership.

The Court is asked to declare that Section 3.5 of the Covenants is void as a matter of law.

BYLAWS OF THE ASSOCIATION DECLARED IN THE COVENANTS

Turning to Exhibit C of the Covenants, “Bylaws of the Association”, Pl #548 --

This purports to be the Bylaws of the Murrells Inlet Golf Plantation Association.

It was recorded at Deed Book 2117 at 1400.

It is NOT indexed to the Murrells Inlet Golf Plantation Association.

It is part of a document indexed to the Murrells Inlet Golf Plantation – the PUD, exactly as early amendments to the covenants were indexed.

It is NOT indexed to the Defendant International Club Homeowners Association or to ANY homeowners association.

It is not separately signed or verified by anyone.

It is part of a document which violates the statute in that it is not declared by the incorporator or board of directors.

Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

These Bylaws were never adopted by the membership or board of any HOA.

The Court is asked to Declare that the Bylaws which are at Exhibit C to the Covenants, as found in Deed Book 2117 Pages 1384 through 1400, are null and void as to their effectiveness as the Bylaws of any Association.

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

- DIVISION 8 -

THAT THE GLENS IS A MULTI-FAMILY AREA

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the Glens is a multi-family sub-development and as such is bound by the limitations of the two other multi-family areas, those being The Villas and The Cambridge, and eventually The Ballycastle if and when it is built.

The particular practical question is whether homeowners in The Glens are allowed to use the Amenity Center. The homeowners in The Cambridge are not allowed to use the Amenity Center. The builder of The Cambridge and The Glens was DR Horton. A different builder constructed and sold The Villas condominiums. That builder came through with his promise to build a cabana and pool for the Villas purchasers. Horton promised the same for The Cambridge homeowners but never delivered, which is still a source of contention between Cambridge homeowners and DR Horton but which is outside of this litigation.

DR Horton was not the author of The Covenants. Horton, however, inherited the authority of Plantation AD – the title of Developer -- as part of the purchase of the remaining lots from Plantation AD in 2003. Horton could have, but did not, amend the Covenants to alter the requirements for use of the Amenity Center. As recently as 2010 Horton attempted to get the homeowners to allow Cambridge multi-family owners into the Amenity Center so as to resolve the dispute between Horton and the Cambridge. The overwhelming opposition of single family homeowners stifled that attempt.

As Maureen Sullivan, a defense witness who is a member of the board of The Glens' sub-association and former board member of IHOA testified at trial, the lure of the Amenity Center meant for single family homeowners was the critical inducement in getting her and others to buy at The Glens – from Horton.

For purposes of reference the Court is asked to note Pl # 557, the May 16, 2003 agreement between Sunbelt and Horton. That agreement perpetuates that the original concept for homes was that single family homes would all be 1900 square feet or larger (page 4). The Murrells Inlet Golf Plantation Plat approved by the Planning Commission and modified and reapproved as the Lantana Plat reflect homes with lots of one-third of an acre or larger. The 2003 submission by Horton on June 19, 2003 Pl #461 reflected small houses on one – quarter acre lots, or smaller. Pebble Creek homes are as large as 3000 square feet, typical Horton homes are as small as 1200 square feet, or even smaller. Horton changed the look of the PUD.

MULTI FAMILY PER COVENANTS

The Covenants talk about “Areas” as the key to distinctions between ownership rights, not the construction of units within those areas. Thus an argument that The Glens is a “townhome” not a “townhouse” is bogus and inapplicable.

The Covenants defines what it means by a “multi – family area”. PL # 547 Covenants

Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which common elements are owned by either the Owners of Units in such Multi-Family Area as tenants-in-common or by the Multi-Family Association composed of such Owners, pursuant to a Horizontal Property Regime or other multi-family legal structure within the Subdivision upon which there shall have been or will be constructed either attached or detached townhouses, condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.

At Plaintiff's # 007 is a photo placed into evidence at trial of what one of The Glens units looks like. It is a typical townhouse. “A picture is worth a thousand words”. Upon information and belief, it is Maureen Sullivan's unit. At Pl # 011 is another picture of a row of The Glens townhouse units and at Pl # 016 is another set of such units. More such units are at Pl # 109 and # 110..

The Horry County GIS images of the two common areas held in common by all owners of units in The Glens are at Pl # 107 and 108 with their TNS numbers. It can be seen that these common areas are to the rear of either row of The Glens townhouses. Plaintiff's witnesses Mike Butryn and Pete Pizzi testified that IHOA maintains at least one of these areas at the expense of all homeowners.

The full Planning Commission approval Plat for The Glens is Pl # 466 approved May 26, 2003, Plat Book 197 at 171. “Blow ups” of notes from this Plat are at Pl # 128 through 130.

Both the Murrells Inlet Golf Planatation and Lantana PUD's refer to the area on which The Glens was built as "mutli-family", "MF", and has substantially different restrictions for construction there than for the areas designated as "Single Family", "SF".

Section 1.18 refers to Multi – Family associations or subordinate regimes. These are defined in the Covenants as follows:

Section 1.19. Mufti-Family Association or Subordinate Regime shall mean and refer to a corporation or an unincorporated association the shareholders or members of which are all Owners of Units within a **Multi-Family Area** or within any subordinate property development within the Subdivision, whether submitted to a horizontal property regime or made subject to further or additional restrictions and/or covenants of ownership, use and control.

It was undisputed that The Glens has it's own additional set of covenantnts with restrictions which provide for joint ownership of the two common areas and for membership in a subordinate regime, The Glens Homeowners Association.

Another phrase used in distinguishing single from multi-family areas

Section 1.20. Multi-Family Declaration shall mean and refer to any instrument or document, and any amendmets thereto, which is recorded in the office of the Register of Deeds for Horry County with respect to any Multi-Family Area and which creates a townhouse, patio home, cluster home, cooperative regime, or condominium or horizontal property regime for such Multi-Family Area or imposes covenants, conditions, easements and restrictions with respect to such Multi-Family Area.

In the Murrells Inlet Golf Plantation PUD approval The Glens is the area at Phase II. It was is approved as "MF" Use with 14 Units per Acre.

In the Lantana modification The Glens is in area hase G-1 with 9.6 Acres. Phase G-1 is makred as a Multi-Family Phase approved for 192 units.

The May, 2004 DR Horton approval from Horry County Planning is for a "Glens Townhouse" development. In submitting and receiving approval for that the Developer, DR Horton, and The Planning Commission, were both in agreement with what is in The Glens. In the approval document, Plat Book 197 at 171, the notes read"

10. The project name and phase is: The Glens Phase I at International Club. The Type of Development is TOWNHOUSES RESIDENTIAL.

12. The Glens Ph I has 47 TOWNHOUSE Units and an area of 9.74 acres. This Phase has a density of 5.76 Units / Acre.

The original Covenants did not leave homeowners in multi-family areas without amenities. It contemplated that the developer would provide separate facilities – exactly what happened in The Villas and what was promised The Cambridge.

That “separate facilities” concept is found in the Covenants at Section 6.5:

"Section 6.5. Rate of Assessment. Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) and may be collected on a monthly, quarterly or annual basis, except that the Developer shall have the right, at its sole discretion, to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association. The assessments paid by all Units located in such multi-family associations will not include the costs of maintenance of the recreational amenities

This concept of separation was stated in a later amendment made by DR Horton: Amendment #4 of the Covenants, enacted on December 28, 2004 by the Developer DR Horton

" Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of certain recreational amenities located on Common Areas within the International Club Subdivision and the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities."

All of these documents were submitted uncontested into evidence at trial.

Plaintiff has shown, by the preponderance of the evidence, that The Glens is in a multi-family area and is not entitled to use the Amenities set aside for homes in the Single Family area.

The Court is asked to state findings of fact and conclusions of law that The Glens is located in a multi-family area and is not permitted, under the covenants, to use the Amenity Center set aside for homeowners in the single family areas.

Plaintiff has not plead nor requested any retrospective adjustment and the impact is all prospective.

This issue was amply stated in Plaintiff's complaint. An officer of The Glens HOA was present at trial and had an opportunity to state her case in rebuttal. That case in rebutal came down to buyers in The Glens depending on what DR Horton sales persons stated.

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

- DIVISION 9 -

**THAT THE HTC / "MASTER HOA" CABLE CONTRACT
DOES NOT BIND HOMEOWNERS**

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the contract between the "International Club Master HOA" and the Horry Telephone Cooperative" ("HTC") is not binding on homeowners and the Court was asked to declare that no homeowner had any obligation under the HTC / Master Association contract. The Court was NOT asked to void the contract.

At trial Defense Counsel took the testimony of Denise Ambuhl who represented that she is the HTC official knowledgeable about and responsible for the "Business" sector of HTC's operations, including contracts for various services between HTC and homeowner associations in Horry County.

At trial Ambuhl testified that the mission of HTC is was originally to provide telephone services in areas of Horry County where commercial sources did not offer it because it was not profitable to do so, and that later HTC's mission was expanded to include other services which could be offered to HTC's customers using HTC's telephone infrastructure – such as cable tv and internet services.

For purposes of this Brief and in testimony at court, the phrase "Master Association" was used / will be used to refer to the "other" party to the HTC contract which on it's face is the "International Club Master Association". The Defendant will / was continue to be referred to as "IHOA".

The testimony which was adduced by Defense Counsel was that the HTC contract as it exists is typical of many which HTC has in place and that because this practice (in general) has never been challenged this instance of it is acceptable. To put it in the same

“vein” as the King testimony, “habit” trumps common law, case law, ordinance and statute. This is clearly not so.

Under cross examination Ambuhl testified that –

- (1) HTC’s overall business is very profitable;**
- (2) HTC issues “excess capital contribution refunds” each year in the order of magnitude of millions of dollars;**
- (3) Each HTC customer with telephone service receives such an “excess capital contribution refund” each year;**
- (4) HTC separately bills IHOA for cable service in the “neighborhoods” within the PUD;**
- (5) HTC’s bills for the separate neighborhoods commonly reflect different “per house” monthly charges for different neighborhoods;**
- (6) Ambuhl has no actual knowledge of the circumstances of the signing of the Master Association / HTC contract;**
- (7) No competitor cable tv source is permitted to use the infrastructure within the PUD used to deliver cable services;**
- (8) HTC did not install the original cable tv infrastructure in Pebble Creek;**
- (9) HTC did not install nor does it own the “premises” equipment in single family houses in Pebble Creek;**
- (10) The IHOA is a subscriber of telephone service from HTC and thus the IHOA would have received excess capital contribution refunds each year;**
- (11) In the HTC / Master Association contract, the Master Association is free to charge whatever it wants to homeowners, up to the amount that homeowners would pay if they subscribed to cable services from HTC outside of the HTC / Master Association Contract;**
- (12) Homeowners who receive cable services under the HTC / Master Association contract (originated by HTC) are not HTC customers;**
- (13) The HTC customer under the HTC / Master Association contract is HTC’s counterpart on the HTC / Master Association contract;**
- (14) HTC does not mandate the Master Association to impose any rate increase at all each year;**
- (15) HTC increases its rates in some, but not all years, under the HTC / Master Association contract at the beginning of the first billing period beginning in April;**
- (16) The rate increase that the IHOA imposes each year on January 1st is not mandated by any HTC rate increase and can be any amount that the Master Association chooses and is part of the Master Association’s receipts – it is not a pass through to HTC;**
- (17) For IHOA homeowners to receive digital tv through the HTC / Master Association contract, homeowners must rent a “set top box” at a cost of \$ 10.00 per room per month, or for the six tv’s possible in each Pebble Creek home, an additional cost of \$ 60.00 per month;**
- (18) For IHOA cable to have the functionality of a “digital video recorder” through the HTC / Master Association contract they must pay an additional monthly charge of \$ 5.00 per month;**
- (19) That HTC is aware that the “Dish TV” company is offering high definition**

(all channel) television programming for six room with the equivalent of six set top boxes and Digital Video Recorder service for \$ 19.99, which would cost approximately \$ 95.00 through the HTC / Master Association contract;

(20) That HTC as a provider of cable tv services to end consumers was required to, and did, obtain a cable tv franchise from Horry County;

(21) Homeowners who receive only the cable tv service provided through the HTC / Master Association contract are not HTC customers;

(22) The "Customer" under the HTC / Master Association contract is the other subscribing party to that contract (Ambuhl testified that she considers it to be the IHOA).

At trial Plaintiff argued that the arrangement was akin to a "franchise", not too different from a reseller of cell phone services (called capacity in the business) because the reseller, the "Master Association", bought product in bulk and was free (within limits) to resell it in a specified territory at rates and under such terms as The Master Association chose.

At trial it was not controverted that the Master Association sells cable tv services to consumers (homeowenrs) and does not hold a cable tv franchise from Horry County;

At trial, through additional testimony, it was not controverted that homeonwers in "The Villas" condominium area (which area pays assessments to the IHOA) are not asked to nor do they buy their cable tv service through the IHOA. It was likewise conceded that the same situation exists for homeowenrs in "The Cambridge" condominium area and for the golf course, all of which have separate arrangements to receive their cable tv services.

At trial the testimony of Plaintiff was not controverted that to install cable tv service to homeonwer units the installer would have to disconnect and disable any existing alternative source of tv service (e.g., satellite dish, over – the – air antenna) and that HTC does not in fact install parallel "premises" equipment.

At trial the testimony of Plaintiff was not controverted that the covenants and federal law entitle homeowners to install satellite dishes and over – the – air antennas on any area of their housing unit that they control (by ownership or rental) without any interference by an ARB or otherwise.

It was not controverted that the assessments for the Condo homeowners reflects just a "front door" charge for the contact with KA Diehl, a charge to maintain the roads owned by Horry County which roads were never owned by the HOA, a charge for reserves to repair Horry County roads, and money for IHOA corporate insurance and miscellaneous operating expenses.

At trial the testimony of Plaintiff (supported by the ledgers of IHOA) was not controverted that each month KA Diehl charges the IHOA accounts that are at times more than the amounts paid to HTC. No explanation was given by IHOA witnesses (Freiboth / Toth / Case at deposition; Freiboth at trial) for Plaintiff's unrefuted observation that the destinations of these excesses could not be found in the IHOA's books and these excesses

were not shown as "profit" on the IHOA annual statement.

The HTC / Master Association contract was introduced into evidence. It is dated October 30, 2003 PI # 302 and is between the non-existent "Master HOA" and HTC. More on that later.

Plaintiff's uncontroverted testimony that no "Master HOA" exists in the records of the South Carolina Secretary of State in the records of the Horry County Recorder of Deeds in any capacity.

At trial Plaintiff argued that the Enforcement by IHOA of the contract requires homeowners to pay money to IHOA for a personal service or personal product, not something which directly "touches or runs with the land". Plaintiff testified that this arrangement is little different from a provision in a covenant, perhaps inserted as an inducement for a property seller to reduce the price of land, that says that homeowners must buy their groceries from a particular supermarket owned by the property seller. These cable tv groceries happen to be sold by the Defendant IHOA.

Such a contractual commitment could be part of a contract for sale of land as an inducement for a seller to sell at a particular price, but it is a personal service contract, not a valid covenant. There is considerable case law that such a provision in a covenant is unenforceable.

It has been blithely assumed in Horry County by developers and HTC that they can force homeowners to buy cable tv services from HTC. There is no case law enforcing this strategy.

The HTC / Master HOA contract has no severability clause. Thus if the Court finds that any provision is invalid for any reason, the entire contract is void.

Plaintiff asserted that the contract or contractual relationship which Plaintiff is not seeking to disturb is the attempt by the IHOA to use the covenants as a contract between homeowners and the association.

The testimony of Toth and Freiboth at depositions and of Freiboth at trial is that they consider the HTC / Master Association contract as binding on homeowners. They point to the exhibits in the HTC / Master Association contract when asked to explain what the IHOA does with regards to cable services.

At trial Plaintiff introduced as impeachment evidence the following uncontroverted documents which were authenticated by defense witness Ambuhl:

- (1) The IHOA "welcome" letter dated May 1, 2007 stating that the IHOA is HTC Member # 0254899 further identifying it to IHOA's TID.⁸
- (2) The HTC document titled "Connect on October 21, 2008" which Ambuhl admitted was HTC's Annual Member Meeting Announcement which contained the "President's Letter" from HTC's CEO / CFO O'Neal Miller.
- (3) A letter from O'Neal Miller to Plaintiff dated February 27, 2009.
- (4) The Dish TV \$ 19.99 offer.

Ambuhl agreed that the statement in O'Neal Miller's letter that Plaintiff is not HTC's cable customer through the Contract applies to all IHOA homeowners.

The "welcome" letter states that regarding excess capital contribution "refunds"

"These funds are assigned as capital credit allocations and are disbursed based upon each member's proportional share of member-related revenue".

Plaintiff asserted that "revenues" are what a member pays in a bill, and profit is the difference between revenue and expenses. Plaintiff asserted that there is no provision in the HTC bylaws to divide revenues into "line of business" categories. Although at the start of her cross examination Ambuhl stated she was familiar with HTC's bylaws, upon questioning on this matter she changed her testimony to say that she was unfamiliar with what the HTC Bylaws said regarding computation and refund of excess capital contributions.

The letter also goes on to say that "When these credits are paid, they are issued to the member name on the capital credit account".

The last page of O'Neal Miller's "President's Letter" stated that later in 2008 HTC would distribute "Over \$ 5 million ... [to] 105,000 member [s]".

Plaintiff was not challenged when he testified at trial that he had copied every document relating to HTC in early 2009 (from the inception of the HTC contract in 2003) prior to filing this complaint and had not found entries reflecting the receipt, by the IHOA, of anything from HTC which could be related to such a distribution.

⁸ Per Privacy Order of the South Carolina Supreme Court, the IHOA TID which is on the document is not repeated here.

Case Law Relating to Collection of Money Fees.:

There is no case law to support the notion that homeowners can be forced to pay money to their HOA's for cable tv service because of a provision in their covenants.

Plaintiff noted at trial that rental contract may include a provision, as part of the arms – length contract signed between lessor and lessee, for the tenant to accept and pay for particular specified cable tv services. Such an arrangement has always been seen as a “personal services contract”.

There is, however, case law that covenants MAY NOT force homeowners to pay sums of money under such circumstances, albeit not in South Carolina where this has never been challenged before.

South Carolina has adopted the doctrine that where a case presents a “novel” situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)

At trial Plaintiff focused on the requirement to pay money for something:

MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007), <

In MidSouth,

the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the Declarant, regardless of whether or not they used the amenities. MidSouth, 33,. The homeowners had no equitable rights in the amenities. *Id.* at 35.

A Trial Plaintiff followed this line of judicial reasoning where it talks about money.

The court in MidSouth cited the precedent set by the court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). Relying on Raintree, the court in MidSouth voided the homeowner obligation, finding in MidSouth that the supposed homeowner obligation to pay money for goods or services did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that a covenant requiring membership in a country club and payment of dues did not run with the land.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land citing Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801)

"Courts have generally held that covenants to pay money do not touch and concern the land". Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)) cited in Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978).

This should be the law of the case for cable tv payments to the IHOA for cable tv services that homeowners may not choose to use, and by extension to single family home owner involuntary membership in the "PAEC" (Amenity Center).

Plaintiff does not contest the right of the resident IHOA, which ever one that might be, to offer bulk services with a discount which homeowners might voluntarily choose . Plaintiff contests the IHOA's posture and practice that home owners have an enforceable (by the IHOA) obligation under the covenants to accept and pay for same

Provisions Relating to Cable Service In The Covenants

The precedent and practice relating to parallel utilities such as water, sewer and power is that the acceptance and use of utilities mentioned in the Covenants is optional

The covenants do not have any provision actually mandating homeowners to accept cable tv services from the IHOA. The covenants merely permit the IHOA to offer it. Covenants, Pl # 547.

Section 2.1. Plan of Development of the Subdivision. Developer shall have the right, but not the obligation, ... including but not necessarily limited to the following: ... (iii) installation and maintenance of any water, sewer, storm and surface water drainage systems and other utility systems and facilities, to include, but not limited to, T.V. cable and its various attendant services and telephone service to include teletype or computer, telex, news service, or computer, or any such like instrument used in the transmittal, reception, or retrieval of messages, facts, or information;

This clearly provides the option to the developer to install infrastructure as may be required by the Horry County planning commission. It does not impose a burden on

homeowners to use any of this. In Pebble Creek the developer either installed or arranged for the installation of sewer and water services from GSWSA and electric services from Horry Electric. The precedent is that home owners are not forced to accept either, and make their own arrangements with GSWSA and Horry Electric for these utility services.

Section 2.4. Utilities and Related Facilities. Developer, ... may retain ownership of the telephone, master television antennas and/or cable system facilities serving the Subdivision. ... Telephone, master television antennas and/or cable system services shall be provided to the Subdivision pursuant to the terms of agreements between the Association and Developer, its affiliates, successors or assigns.

These phrases in the Covenants states a right for the developer to optionally retain an equitable ownership of certain infrastructure. It is speculative to conclude that the developer intended to offer it to cable tv providers, who have the option of running their own lines by eminent domain.

Plaintiff has presented case law that "all doubts must be resolved in favor of the free use of property".

The phrase "shall be provided" imposes an obligation on the Developer to install the requisite infrastructure which works to the advantage of the developer because it made his property more sale-able. To interpret this any other way would require an interpretation that "The Association" can lawfully, through the Covenants, contract for goods and services for homeowners in perpetuity, which is not a proper covenant running with the land and would violate the Statute of Frauds.

The only covenant provision which actually relates cable or television services to homeowners is --

Section 7.24. Communication System. There shall not be permitted or maintained any type of radio or communications system antenna (other than normal receive-only radio antennae) or satellite dish larger than 24" in diameter

Clearly homeowners are permitted to select how they want to obtain their television service. This does not further state that homeowners shall purchase cable services from the Association. This is the logical text that should be used if it was the intention. Intent is not good enough when interpreting covenants.

The covenant provisions must be read in light of Arcadian Shores HOA v Cromer, 644 SE 2d 778, 371 SC 292 which provided that

"nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed

been foreseen by them at the time when the restriction was written.”

In 1999 commercial cable television providers and satellite television providers existed. Cable television franchises all use the phrase, “cable television service shall be provided” in a particular specified area. The provision of franchised cable television does not require the homeowners in the area of the franchise to accept or pay for it. The language of the covenants is exactly the same.

While the covenants provide that the IHOA can offer cable services there is no unambiguous requirement for homeowners to accept it.

Defense witnesses have never been able to cite a single provision entitling the IHOA to include cable tv services, or, for that matter, garbage services, in assessments – which is what the Defendant has done.

The area which controls what the HOA can include in assessments is Article 6 page 14 through 16 which says nothing about homeowners being charged for cable television or garbage collection. The only things that the IHOA can collect for, per the covenants, is maintenance of the common area. To be enforceable, if involuntary charges were contemplated, per Arcadian Shores, they would have to be explicitly mentioned.

They are not.

Returning to the October 30, 2003 HTC / Master Association contract, PI # 302, the second paragraph of the first page of that contract clearly implies that it applies to the entire property described in that paragraph, that it applies to both single family and multi-family units, and that it will be applied in a “roll out basis” to housing units as they are sold. It was admitted at trial that no multi-family unit is subjected to the contract by the IHOA, which is selective and capricious enforcement of a purported covenant provision, which constitutes “waiver and estoppel”.

There is a provision on page 2 of the contract, top paragraph, which can only be read that the receipt of services by home owners is optional. The text reads:

“HOA is responsible for fees based on 100% of the total units activated”.

At trial Plaintiff asserted his technical knowledge regarding infrastructure and premises equipment, however, that expertise is not required to interpret the above quote.

Activation necessarily entails not only an electronic “turn on” somewhere “up stream” from a home (“premises”) but also the physical connection of the cable service to the distribution box on the side of a single family house, well within the real property. As Plaintiff explained, without challenge, a 6-way distribution plate is situated on the side of every single family house (and a counterpart somewhere for condominium units) and a physical connection must be made to each of the 6 jacks from a “splitter” and a physical connection made, with the permission of the homeowner, between the cable feed coaxial

cable (at trial Plaintiff called this "8g) and the splitter. Since entry onto the "courtelage"⁹ of a homeowner lot without the consent of the home owner is a trespass, this physical change is clearly at the option of the home owner.

There are other problems related to the cable tv contract, PI # 302.

As Plaintiff observed at trial, the contract has no severance clause.

Despite the important and dependent assertion by Doug Brown, who signed for "The International Club Master HOA" ("ICMA") the ICMA is not "the sole owner or sole representative" of any homeowner, which is the dependent representation which ICMA makes to HTC in the contract.

The contract says that the property to which this applies is the "International Club Master HOA". There is no PROPERTY with that name. The defendant is the International Club Homeowners Association and the PUD is the International Club Planned Unit Development or Lantana PUD or Murrells Inlet Golf Plantation PUD.

On Page 4, Section 6, there is the phrase "Promotional Material". There is no need for promotional material for acceptance of a service which is mandatory.

"Owner shall submit for company's review and approval prior to use all proposed advertising and promotional materials for the premises or its dwelling units which refer to the Company's service."

There is a privacy issue here, because the contract provides the ICMA shall provide, at HTC's request, the names, service addresses, telephone numbers, and other account information about homeowners. This information was never provided to the association with any IHOA request to sign nor disclosure of privacy rights allowing the association to release this information to anyone.

Access. The bottom of page 2 provides HTC an easement to enter into private property, for certain purposes which easement the association does not itself hold.

At trial Plaintiff asserted and Denise Ambuhl admitted that any entity which provides cable services to an end user requires a cable franchise from the County. Since the IHOA is the provider to homeowners of cable services, billing and collecting for same, irrespective of how the IHOA obtained it, the IHOA must obtain a franchise to provide cable services over property it does not own. The only franchise providers in Horry County are Time-Warner and HTC. The association, by demanding money for the resale

⁹ "Courtelage" has been used in case law to describe the area private area belonging to a property owner in which he has an expectation of privacy and over which he desires to assert control. It need not be enclosed by a fence or wall. It has been held that to enter a courtelage for a search requires a search warrant and any search in a "courtelage" without a properly obtained search warrant is an illegal entry.

of cable tv services, is an illegal cable service provider.

As is the case for the provision of goods or services by unlicensed vendors, customers may not compel a charge (by a vendor) for services provided without a license where a license (or franchise) is required.

It has likewise generally been held that an individual or company can not be charged for goods or services they have not requested, even if they use the goods or services.

For example, Christmas return address labels you receive from a charity. Or the following scam: paper delivered by company which was not ordered, used by the company, and a bill following soon after – often at inflated prices. Many businesses check the receiving dock logs against the bill but forget to check their orders.

In this instance, cable tv services are unrequested goods or services.

In Horry County the county council has determined that waste management, in unincorporated areas of Horry County shall be obtained from the county through it's tax imposed for the operation of recycling / waste collection points. Plaintiff testified at trial that he uses the Horry County facility "just around the corner" on McDowell Shortcut Road, which he pays to use through taxes on Plaintiff's property -- and that Plaintiff DOES NOT USE the Waste Management services provided by the IHOA. This none-use was unrefuted. While plaintiff has possession of the garbage receptacle provided by Waste Management, he does not "fill it or put it out".

There is no legitimate economic reason or special benefit to homeowners accruing from participating in the cable tv program. Higher quality (HiDef) programming over a wider range of program sources with more utility (Digital Video Recording) can be obtained at lower cost from Dish-TV.

The representation by the IHOA witnesses that the charges are a pass thru is a fraud and swindle as defined in 18 USC 1341, frauds and swindles. Pl # 266.

The requirement by the IHOA that homeowners purchase cable tv services from them, including charging for the services whether desired or not, whether requested or not, is an act in restraint of trade per SC 39-3-10 Pl # 263, Agreements affecting Competition.

An assertion by the IHOA that homeowners must buy cable services and waste management services from IHOA also violates SC 39-03-140 Pl # 265, agreements to limit competition.

Additional supportive cases:

Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905), Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902
Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.
Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, re-filed May 17, 2007; 2007 S.C. App. LEXIS 98
Clear Lake City Water Authority
Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).
Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex. App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ; Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

At trial the Plaintiff entered into evidence and asked the Court to refer to and consider -- various Federal Communications Commission rules and regulations, and a related court decision by the United States Court of Appeals for the District of Columbia Circuit, Plaintiffs # 258 and # 259, which held that "Exclusivity Arrangements" are null and void and that any contract with such a provision is void in it's entirety. At trial Ambuhl testified that any homeowner is free to choose his source of tv programming, and that the bulk services contract offered by HTC is only one of the choices that a homeowner could make.

RELIEF REQUESTED

Plaintiff asserts that through the preponderance of evidence Plaintiff has presented sufficient fact and invoked appropriate legal authority to support the following ORDER:

THAT

1. No home owner has any obligations under the contract for provision of cable tv services entered into between HTC and the ICMA.
2. The IHOA has no standing or rights to enforce the contract in it's own name.
3. The IHOA lacks a required cable tv franchise from Horry County and is enjoined from offering cable tv services to end users until and unless it obtains a proper cable tv franchise from Horry County permitting it to do so.
4. Home owners in the International Club PUD are free to choose without any interference from the IHOA the source and method of delivery of television programming.
5. Plaintiff is individually entitled to a refund from the IHOA of any money the IHOA had collected from Plaintiff related to the provision of television services reaching back to April 7, 2006, three years prior to the date this complaint was filed.

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	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
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	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 10 -

**THAT THE COVENANTS CAN NOT FORCE
HOME OWNERS TO JOIN AND PAY ASSESSMENTS
FOR "THE AMENITY CENTER"
AND
THAT THE IHOA CAN NOT COLLECT MONEY TO
SUPPORT THE AMENITY CENTER AS
INVOLUNTARY ASSESSMENTS**

Plaintiff at trial argued that there is no enforceable provision under the Covenants to compel single family home owners to pay assessments for the Amenity Center.

This proposition in it's fullest form is that:

- (1) There is no enforceable covenant obligation for single family home owners to join the Amenity Center;
- (2) There is no enforceable covenant obligation for single family home owners to pay assessments for the support of the Amenity Center;
- (3) There is no enforceable covenant right for the Defendant IHOA to demand and collect such assessments from single family home owners;
- (4) An agreement to join and / or pay for the Amenity Center is a personal service contract and not a proper covenant under the Restatement of Servitudes.

In Plaintiff's Complaint it was argued that the Pebble Creek builder had a binding obligation to provide certain amenities for the exclusive use of Pebble Creek home owners

and that Amenities as delivered did not satisfy that obligation. The Complaint also argued that Pebble Creek home owners have an equitable interest in The Amenity Center, which would supercede the provision in the Covenants that home owners have no equitable rights in the Common Area. In discovery, as was mentioned at trial, evidentiary problems arose because of the destruction of evidence by the builders after they had been subpoenaed. Another confusing issue in the area of advocacy is that the documents related to the "Builders Agreement" which led to DR Horton building the Amenity Center were likewise destroyed after being subpoenaed. Not among the records of the IHOA prior to trial when said records were examined by Plaintiff in the office of KA Diehl, prior to suit, was the deed for the Amenity Center land which Plaintiff later independently found at the Horry County Recorder of Deeds and provided defendants (in discovery) early in 2009. Because the IHOA can be asserted to be a "third party purchaser" of the Amenity Center lot and because the documents to support an equitable claim by Pebble Creek home owners were kept from Plaintiff, those areas are not being put to the Court for decision.

Because of evidentiary issues, Plaintiff is not challenging the equitable title of the IHOA to the Amenity Center complex, to include the two parking lots. The IHOA is free no matter what to continue to operate that Complex, to (non-compulsively) solicit membership and collect use or (user's choice) membership fees, and to enter into contracts binding the IHOA for the maintenance of that property.

The simple question which is before the court relates to the inclusion of Amenity Center "dues" in the involuntary assessments levied on single family home owners, and the presumption (of the IHOA) that such home owners MUST join the Amenity Center facility.

For Pebble Creek home owners, this question is further simplified if the Covenants do not apply to Pebble Creek by virtue of having been declared ten days after Pebble Creek was sold to Sunbelt by Plantation AD, the declarant of the covenants. Plaintiff asserts that this is true.

The Requirement to Join the Amenity Center Should Be Set Aside Because it is a Personal Services Contract and does not sufficiently Touch and Concern the Land

It has blithely been assumed by developers in Horry County that they can force homeowners to enroll in Amenity Centers run by their HOA's. In Georgetown County, and to our north in North Carolina, the practice has generally been that the offering was a country - club type scenario and that enrollment was voluntary; enrollment offered a lesser price to participate than offered to non-resident members of the clubs.

There is no case law to support the notion that homeowners can be forced to join amenity centers in their developments but there is case law to the contrary, albeit not in South Carolina where this has never been challenged before. South Carolina has adopted the doctrine that where a case presents a "novel" situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp., 483 SE 2d 757, 764 (SC Ct App 1997)

The case most directly on point is MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007),

In MidSouth,

“the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the declarant, regardless of whether or not they used the amenities.” MidSouth, 33,. “The homeowners had no equitable rights in the amenities.” *Id.* at 35.

The court in MidSouth relied heavily upon the precedent set by the same court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). In MidSouth the Court voided the homeowner obligation, finding in MidSouth that it did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that the covenant did not run with the land.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801) Courts have generally held that covenants to pay money do not touch and concern the land. Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)). . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree.

-- Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978) at 908-09.

In MidSouth the Court concluded that “the *recreational amenities are not appurtenant to [the land] and therefore the covenant to pay amenity fees does not touch and concern [the land].*” MidSouth at 36, 652 S.E.2d at 388.

This should be the law of the case for both the Amenity Center and Highway 17 dues.

o -Damages- o

IF the Court finds for any reason that Plaintiff was not contractually obliged to join the Amenity Center but money was involuntarily collected from him, the questions of damages arises: how much does the IHOA owe Plaintiff.

Plaintiff has computed this for the period 2007 through 2012, ignoring the prior sums.

At trial Plaintiff cited to the specific documents (ledgers, announcements, budgets, etc) of the IHOA itself as the source of the amounts. Those sources were stated for the record, one by one, at trial. This enumeration was not challenged by Defense Counsel.

Through August of 2012, from January of 2007, the amounts are computed as follows:

	Total Assessment	Amentity Center	Per Year
2006	\$70	\$18	\$216
2007	\$70	\$18	\$216
2008	\$70	\$18	\$216
2009	\$88	\$18	\$216
2010	\$88	\$18	\$216
2011	\$88	\$18	\$216
2012	\$91	\$18	\$144
	\$6,507		\$1,440

Note: \$ 5,940 is the total assessment paid by Plaintiff from 2007 through

The Amenity Center assessments are taken from the following IHOA documents:

2006 From the November 2006 Year End document, \$ 18 per month for 2006. Pl # 317.

2007 From the November 2006 Year End document, \$ 18 per month for 2007. Pl # 317.

2008 From the December 2, 2007 IHOA letter, no change in assessments for 2008 Pl # 342.

2009 There was no change in the amount for the amenity center.

2010 From the November 6, 2009 Budget Pl # 364 and the November 20, 2009 Newsletter, Pl # 366.

2011 From the November 16, 2010 Budget Letter, Pl # 387 the amenity center charge is unchanged, although overall assessments rose.

2012 From the October 28, 2011 Budget for 2012, Pl # 388, overall assessments rise but the amenity center charge remains at \$ 18.00. Assessments and other charges are carried for nine months through September, 2012.

At trial Plaintiff asked the Court to take judicial notice that Plaintiff has previously moved the court to deposit assessments with the Clerk of Court but the Court at a hearing ruled that because the expense to the court was significantly more then the amounts in question, Plaintiff should – and did – continue paying the assessments under protest.

Defense Counsel did not controvert that every Plaintiff assessment check since early 2009 has been marked “paid under protest” as were any checks for payment of putative fines. Pl # 373..

Since 2006 per the schedule above, Plaintiff has paid \$ 1,440 in Amenity Center charges and \$ 6,780 in overall assessments.

RELIEF

The Court is asked to declare and Order that on the basis of findings of fact and conclusions of law --

- (1)** The Amenity Center located in the International Club PUD at the general vicinity of the intersection of Pickering and International Club drives is owned by the IHOA.
- (2)** No home owner in the International Club PUD is subject to any obligation under the covenants to join the Amenity Center owned by the IHOA, nor any obligation under the covenants to pay money for the support or maintenance of any Amenities. Such a requirement is a personal services contract which must be freely entered in by a homeowner and is not a proper covenant which touches and runs with the land. As a finding of Fact and Conclusion of Law the Court finds that there is no enforceable personal services contract for such a duty or obligation exists.
- (3)** The IHOA is free to operate the aforementioned Amenity Center under a “voluntary membership” basis, or under a “fee for use” basis.
- (4)** This decision does not set aside any restrictions on eligibility for use of the Amenity Center contained in the Covenants for the International Club PUD.
- (5)** The Defendant IHOA has no rights under the Covenants to force any homeowner to pay assessments or dues for membership in, support or maintenance of the Amenity Center, or to involuntarily become a member of the Amenity Center. The Defendant IHOA is enjoined from any act which is contrary to this decision.

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

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Defendants	)	
	)	

- DIVISION 11 -

INJUNCTIVE RELIEF TO ASSURE THAT HOME OWNERS HAVE CONTINUED AND UNCHALLENGED ACCESS TO THE AMENITY CENTER PARKING

Plaintiff at trial and in his Complaint, asserted that Defendant Rosemary Toth, in her capacity as President of the IHOA and Board Member, had ordered the removal of signage for Parking Lots associated with the Amenity Center,¹⁰ had asserted that these two lots both belonged to the Golf Course, and asserted that the use of those lots by home owners was at the discretion and fore bearance of the Golf Course. The Complaint asserted that Toth was alienating IHOA property and that was contrary to the law and the covenants.

Plaintiff at trial and in his Complaint asserted that Toth had made these lots availabe in particular for the Joe Bernat Golf Acadmeny, whose playing area was across the street from the parking lot which is off Pickering Drive (the other one opening onto the Golf Course entrance road, a private road over which the IHOA holds an easement). The Bernat Academy had no parking lot and as Plaintiff assserted, also lacked business and sales tax permits in South Carolina and Horry County. A photo of the Bernat sign on Pickering Drive across from the parking lot was introduced as Pl # 86.

A photo of the Pool Parking Lot sign that existed on March 22, 2009 that Toth ordered removed is at Pl #68. It was accidentally introduced a second time at Pl # 134. Plaintiff stipulated at trial that the current IHOA Board has in 2012 erected a new set of signs which meets the Horry County towing ordinance – as Plaintiff had demanded be done in his Complaint and in other documents.

¹⁰ The signs had been erected by a former board of directors. This is perpetuated in the Minutes of that decision.

At trial both Plaintiff and Defense Counsel agreed that the two parking lots are the equitable and unalienable property of the IHOA. A deed to the Amenity Center land and the (first) parking lot on Pickering Drive was entered into evidence, Pl # 554, Deed Book 2511 at 967, August 22, 2002. A deed to the second parking lot opening off of the Golf Course private entrance road was entered into evidence, PL #560, Deed Book 2771 at 1490, August 4, 2004.

An extract of the March 24, 2009 Minutes of the Board (in evidence at Pl # 355 was read into the record at trial. At #6 was the

"Issue Statement: Golf course employees are occasionally parking in the pool parking lot and homeowners are occasionally parking in golf course parking lots"

which Plaintiff observed was the Pickering Drive lot. The analysis and action the board took – Plaintiff suggests it was Defendant Toth's statement and decision -- is also in the minutes and there lies the problem. The minutes relate:

"Amenity Center parking actually resides on golf course property. .. The Board will direct K.A. Diehl to remove all "no parking" signs within the pool parking lot. The Board encourages home owners to use discretion (in time and numbers) when parking in Golf Course lots."

Plaintiff also submitted as evidence Horry County GIS photos of the overall complex and the individual lots, together with Plats. Because of the consensus between the two sides, those need not be explored. The photos as Pl # 121, 122, and 123 are informative, because the Bernat academy area to the left of the complex, a field, can be seen to have no parking.

Clearly the Defendant IHOA mitigated the issue of doubts of ownership over the lots and as to the control which the Golf Course could exercise over the lots. There remains, however, the real possibility that a future IHOA officer could repeat the scenario.

Plaintiff thus requests that the Court Order the following relief as a finding of fact and conclusion of law::

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

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

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

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- DIVISION 12 -

INJUNCTIVE RELIEF PROHIBITING KA DIEHL FROM ENGAGING IN UNLAWFUL BUSINESS PRACTICES AND ACTS IN RESTRAINT OF TRADE

Plaintiff at trial, and explicitly in his Complaint, alleged that Defendant KA Diehl was engaging in unlawful business practices in restraint of trade; that the Defendant IHOA Board was not acting in good faith in permitting this; that this breached the fiduciary duties both Diehl and the Board had towards the IHOA; that the IHOA had been or would be harmed by this; and that the privacy rights of Plaintiff and the homeowners had been or could be breached by these practices.

The nexus of this revolves around

- (1) The KA Diehl Contractor Program, including
 - (a) Charges payable to Diehl imposed by Diehl on prospective Contractors before they will be allowed to compete for contracts for goods or services offered by IHOA;
 - (b) Requirement for prospective contractors to join Community Association Institures, a homeowenr management trade association;
 - (c) Provisions enabling prospective contractors to know who they will be bidding against;
 - (d) Provisions providing businesses that enroll in this program to have access to the names, addresses and other information relating to homeowners without the informed consent of said homeowners;
 - (e) Using communications avenues (such as web sites, newsletters, and emails) paid for by the IHOA to channel advertising from such business participants towards

homeowners, without giving such homeowners an "opt out" method;

- (2) IHOA / KA Diehl contract provisions and Diehl practices regarding discounts and rebates from vendors;
- (3) IHOA / KA Diehl contract provisions relating to non-competition by homeowners who are or were members of the IHOA Board or Committees;
- (4) KA Diehl representations that they were "property managers"
- (5) KA Diehl and the IHOA violating the SC Non Profit Corporation Act by outright refusal to permit inspection and copying of records or refusing to provide the voter list.

At trial Plaintiff besides entering all his exhibits into evidence, he specifically cited to the following documents:

1. Diehl "storefront" signs, Pl #101 and #102 which stated that Diehl is a "Property Manager";
2. Plaintiff July 24, 2008 Request for Voter List; #333;
3. IHOA / Diehl 2008 Contract; # 343;
4. Diehl Contractor Program documents; #348;
5. Plaintiff April 28, 2009 Request to Diehl for voter list; #358;
6. Plaintiff September 3, 2009 Request to Diehl for Voter List; #361;
7. IHOA / Diehl 2009 Contract; # 367;
8. IHOA / Diehl 2010 Contract; # 383;
9. Diehl Vendor Agreement; #397;
10. Diehl Vendor Program "Summary" page; # 398;
11. Diehl's Vendor Certification web page; #399;
12. Community Association Institutes (CAI) "Get A New Member Incentive Program" providing for kickbacks or rewards for signing up new members; #702;

Plaintiff also cited to the following statutes, laws or regulations, whose contents were offered either as evidence or in the alternative, the Court was asked to take judicial notice of said regulatory provisions:

1. SC 16-13-230, Breach of Trust with fraudulent intent # 206;
2. SC 16-13-240, Obtaining signature or property by false pretenses; # 207;
3. SC 33-31-830 General Standards of Conduct; # 235;
4. SC 33-31-842 Standards of Conduct for Officers; # 239;
5. SC 33-31-720 Member List for Voting; # 226;
6. SC 33-31-1602 Inspection of HOA Records; # 245.
7. SC 39-03-10 Agreements Affecting Competition; # 263;
8. SC 39-03-30 Injured Person May Recover Damages; # 264;
9. SC 39-3-140 Agreements to Limit Competition; # 265;
10. SC 40-57-20 License Requirement for Property Management; # 246;
11. SC 40-57-30 Definitions; # 247;
12. SC 40-57-220 Penalties for action without license; # 248;
13. SC 40-57-230 Civil actions; # 249;
14. 18 USC 1341 Frauds and Swindles; # 266;
15. IRS Announcement 2002-18 (34) Cash Rebates; # 267.

DETAILS

1. Under IHOA contracts with KA Diehl, Board members are not permitted to sell goods or services to the HOA until at least three years after leaving office – and this includes competing with Diehl for the HOA management contract!

From the 2009 Contract Page 1 Pl # 367

1.3 The Association acknowledges that during their relationship with the MANAGER each Board Member will acquire knowledge of organizational methods and other information concerning the unique and distinctive elements comprising the MANAGER's business and agrees to maintain this knowledge in a confidential manner. The Board agrees to refrain from hiring, directly or indirectly, any board member(s) who is or was on the board of the ASSOCIATION during the term of this agreement and for two years following the termination of this agreement without first obtaining written consent of MANAGER.

At trial Plaintiff noted the following objectionable aspects, none of which were controverted by Defense Counsel:

- * Board Members in their individual capacities are not parties to any Diehl Contract. Plaintiff's witness Butryn testified he never signed such an agreement.

- * Board Members never signed any "non-compete" agreement. Plaintiff's witness Butryn stated that he was never even informed about this provision.

- * "Proprietary Information" about the HOA is the property of the HOA – not Diehl. Plaintiff's witness Butryn testified extensively that KA Diehl operations have nothing unique about them, and that the flow of knowledge and expertise was from the Buildings and Grounds Committee to KA Diehl, not the other way around. In particular Diehl adopted the contract check lists and specifications that Butryn and another witness, former Buildings and Grounds Committee member Pete Pizzi developed and that Diehl later incorporated into contracts they provided to the IHOA for said services.

- * There is nothing "proprietary" or "special" about how Diehl is organized and operates.

Defense witness Abel testified that she and other Diehl employees hold no licenses at all from any state recognized licensing authorities and that the training they speak of comes almost exclusively from the CAI trade group and not from any educational institution licensed or certified by any state or other licensing institution.

Butryn testified that KA Diehl was unable to provide any suggestions at all regarding PUD maintenance or repair issues.

- * This also prevents a Board member from being employed by a contractor. Since the IHOA / Diehl contracts have provisions for automatic renewal, the non-compete term could

be for many years.

Plaintiff at trial asserted that this is illegal. This conclusion is, of course, for the Court ultimately to make but Defense Counsel asserted absolutely nothing to refute it, not even raising an objection to Plaintiff's assertions.

One directly applicable statute is:

SC Code 39-3-140 Pl # 265. Agreement to limit competition by not dealing with or boycotting those not in agreement shall be conspiracy to defraud.

"If any two or more persons ... shall enter into any ... agreement, ... or understanding to control or limit the trade ... or to limit competition in such trade by refusing to buy from ... any other person ... for the reason that such other person is not a member of or a party to such ... agreement, ... or understanding ... such persons shall be guilty of a conspiracy to defraud and shall be subject to the penalties prescribed in this article.

Also --

SC Code 39-3-10 Pl # 263. Arrangements, contracts, agreements, trusts and combinations adversely affecting competition or price declared against public policy.

"All arrangements, contracts, agreements, trusts or combinations (a) between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition ... are declared to be against public policy, unlawful and void. "

Issue

Diehl keeps or kept credit card cash rebates for purchases of goods or services made on behalf of the IHOA.

The Diehl 2009 Contract Page 2 Pl # 367 provided:

2.3 Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors, and laborers. ... Manager agrees not to charge any undisclosed fees.

This only requires that the end price to the IHOA be no more than the IHOA would have paid had no such arrangement existed between KA Diehl and vendors. This does not commit Diehl to reduce the end price to the IHOA or to remit such discounts to the IHOA.

Although discovery was sought on Defendant Diehl, throughout the course of this litigation Defense Counsel never produced a single "DIEHL" document in discovery, only

IHOA records (and only on one day, October 3, 2011 for inspection, Plaintiff being prohibited from bringing others to help scan the eight (8) coffin size tubs of documents).

From Page 5 of that contract.

5.3. In addition to the fees outlined in this section for services rendered, Manager may also receive compensation for their role in providing, investment, and financial products, insurance products, or services and other general services to Association pursuant to a direct or indirect affiliation with an organization. These fees are NOT in addition to those presented by the organization, in no way affect the pricing of the product or services, and are included in the overall contracted service by Association. The partnerships created by Manager create a direct benefit to the Association and in no way distort or interfere with the competitive bidding process. All final decisions on products presented rest with the Board of Association.

What Diehl is saying is that it will receive kickbacks or other value consideration from vendors of goods or services that Diehl provides to the IHOA, and that this will not affect the end price of the goods or services. However, it also says that these "kickbacks" are ultimately paid for from the money that the IHOA pays the vendor.

It is also a federal crime.

* Plaintiff at trial testified that Plaintiff inspected IHOA ledgers (many years worth in evidence) explicitly search for Diehl pass throughs of post-purchase rebates from credit card companies or suppliers, Plaintiff never found a single one. The Court is free to look for same.

A credit card refund (quarterly, annually) or supplier rebate or even a manufacturer coupon rebate will show up after the purchase, billing to IHOA, and payment by the IHOA to Diehl. As such it would be a later and separate accounting entry showing a price adjustment and a parallel cash receipt. Plaintiff did not find a single one. In accounting parlance these are reductions in the cost of goods or services to the IHOA, and unearned taxable income to KA Diehl. These and the overpayment for goods and services by businesses with follow on refunds of the excess are notorious tax evasion techniques for small businesses.

Since Plaintiff was unable to get to Diehl's financial records, despite the fact that Diehl is a co-defendant and this was explicitly plead in the complaint, Plaintiff is unable to plead to the Court the extent of the damage to the IHOA.

It was unrefuted and conceded (by Julie Case at her deposition) that Diehl pays some HOA expenses via Diehl credit card and receives cash or other rebates from bank card issuer.

* Per IRS rules, rebates kept by an intermediary are unearned income to the intermediary. See IRS Announcement 2002-18 PI # 267.

*** It is criminally fraudulent for an agent to receive compensation for any business he conducts on behalf of "his master:"**

At trial Plaintiff laid out the details of US v Tesvich, USDC-Georgia (Northern; Criminal) 1:08-CR-201; Home Depot buying agent. 18 USC 1349.

In that criminal action Tesvich was a purchasing agent for Home Depot. His activities did not increase the cost of any goods or services to Home Depot. However, Tesvich received thousands of dollars from vendor, and a new SUV. The US District Court held that this conduct is illegal under federal law, 18 USC 1349. All consideration received by an agent is the property of the master and the agent has an affirmative duty to disclose and either refuse to receive said consideration or to pass it to the master.

The 2008 Contract (Page 5 Pl # 343) and earlier such contracts agreed to remit such rebates to HOA; under Defendant Rosemary Toth, the contracts were revised to remove this provision from later contracts. Again, Plaintiff's Inspection of IHOA Ledgers shows no such "rebates" paid to any IHOA account.

The IHOA / Diehl contracts up to and including 2008 contained the following text:

2. Manger discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors and laborers. Manager agrees not to collect or charge any undisclosed fees, rebates or discounts; and in the event that any such items are paid to Manager, such fees shall be immediately remitted to Association.

This is what was supposed to happen. The 2009 Board (and later) under Toth was not acting in good faith and with obedience to it's duties as a fiduciary to permit the change which removed this prohibition on kickbacks. It can not be said that Toth and her board were unaware of this because Plaintiff made this known prior to filing suit and in the complaint itself.

The 2008 Contract and prior contracts Page 3 Pl # 343 required purchases to be made in "name of HOA" not in Diehl's name. This would have channeled rebates and discounts to the IHOA and would have resulted in invoices naming the IHOA – which would have prevented Diehl from obtaining manufacturer rebates in Diehl's name. This was dropped in the 2009 and later contracts.

Here's the deleted provision from the 2008 contract:

"9. Manger shall purchase out of the funds of Association equipment, tools, goods and supplies, materials and services as shall be reasonably necessary to perform its duties, including the maintenance, upkeep, repair, replacement, refurbishing, preservation and administration of Development. Whenever possible, purchases shall be made in the name of Association. When making purchases, Manager shall make a diligent effort to obtain the best price available."

ISSUE

Diehl requires potential vendors to pay Diehl to be an "Eligible" Vendor.

The 2009 Contract Page 11-12 Pl # 367 requires "open bidding"; it does not restrict bidding to a "closed" list; and does not authorize Diehl to "surcharge" potential bidders: See Paragraph 2, "Outside Vendors". Paragraphs a b and c.

Subparagraph a of the 2009 contract requires a competitive bidding process.

Subparagraph b of the 2009 contract provides for the distribution of requests for proposals to "potential pre-approved" bidders.

Subparagraph c of the 2009 contract provides for Diehl to evaluate bids, check references and recommend action by the Board.

Plaintiff's witness Butryn, at his deposition, testified extensively about his background in contract management for various government entities, mainly school districts, whose requirements for goods and services included all the requirements of the IHOA. He was read the information, from the Diehl vendor package, that Diehl collects about potential vendor, which does not include any references or information about prior work. The information Diehl collected, it was noted, included insurance information and tax number. Butryn declared any recommendations based on such limited information is useless.

The prior contracts had a prohibition on what became the Diehl Vendor Program. Under Defendant Toth, Diehl was permitted to use the Diehl Vendor program in conjunction with IHOA requirements for goods and services.

From the 2008 Contract Pl # 343, Page 5, which prohibited collecting or charging any fees, rebates or discounts:

"2. Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts ... Manager agrees not to collect or charge any undisclosed fees ... and in the event that any such items are paid to manager, such fees shall be immediately remitted to Association"

Which Plaintiff believes requires remitting the \$200 application fee and the annual

“renewal” fee to the IHOA.

The 2009 contract hedged but still did not provide allow any such “undisclosed fees”.

“2.3 ... Manager agrees not to charge any undisclosed fees”.

At trial Plaintiff asserted, and it was not controverted by Defendants Diehl nor Defendant IHOA, that no such disclosure was ever made (about the up front and annual fees).

This practices also violates South Carolina and federal Statutes relating to fraud and Restraint of Trade. See statutes invoked.

The Diehl contractor program requires contractors to pay Diehl before they are allowed to bid on an IHOA contract for goods or services: From the Diehl Contractor Program document labeled “To Contractor, Supplier and Vendors; From Property Management Services Coordinator”¹¹

“Contractors, Suppliers & Vendors who have filled out the attached forms ... and paid the \$ 200 processing fee will be approved and are eligible for payments for goods or services”

Explicitly not within the criteria is a requirement to provide any references or to meet any standard of experience or training. The forms do not even require stating an applicable license. From the Diehl Vendor Package, page 1 PI # 397

And they are also required to pay an annual fee of \$ 125 – from the Diehl Vendor Certification Program web page, “Step 5: Annual Renewal of \$ 125.00. Don’t be left out. Register Today!” PI # 399

Issue

Diehl also reveals the names of competing vendors.

Per the Vendor Certification Program web page: (page 1) PI # 399

“See the other Approved Vendors in your category”.

There is no functional reason vendors should know who else is bidding or doing business with the IHOA.

¹¹ The phrase “Property Management” or “Property Manager” is a restricted phrase and in South Carolina it is illegal for anyone except a licensed realtor or a licensed realtor firm to use such a phrase in any context. See SC 40-57-20, -30, and -220. At the time Diehl’s “Store Front” sign read “Property Management”. PI #101 and 102.

Issue - Restraint of Trade.

Diehl provides potential vendors who "sign up" the names and contact information of homeowners for the vendors to use for advertising or to solicit services.

Neither KA Diehl nor the IHOA has provided any homeowner a statement of privacy policies, nor asked for permission to release this information to vendors, nor provided an "opt out" method. This disclosure includes the names and information about homeowners, such as Plaintiff, who choose not to sign up to the Diehl / IHOA web site for the explicit reason of not agreeing to such invasions of privacy.

Further, the relationship of Plaintiff and homeowners is with the IHOA – they have no "business relationship" with KA Diehl such as to permit Diehl to use homeowner information for commercial purposes. It violates FTC rules in this regard.

From the KA Diehl Vendor Agreement: Pl #397

"The names of any and all owners are available to you upon request at the office of KA Diehl"

- * This violates homeowners common law expectation of privacy.**
- * Homeowners have not signed any Diehl or HOA privacy agreement.**
- * The Diehl / HOA contract does not allow such disclosure.**
- * This violates FTC Regulations (credit) and federal law imposing privacy controls..
Diehl engages in "on-line" assessment collection via credit card or bank
electronic transactions or checks in the mail.**
- * There is no functional reason for such disclosure.**
- * Neither the HOA nor Diehl will give homeowners such a list.**

From the list of exhibits, it is a matter of fact that Plaintiff Jarmuth demanded the voter / homeowner list at least 3 times and was never given same. But vendors are given an equivalent list.

There is no discretion here:

SC Code 33-31-720. Members' list for voting. Pl # 227

(a) a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting ... The list must show the address ... of ... each member ... This list must be prepared on the same basis and be part of the list of members.

(b) The list of members must be available for inspection by any member for the purpose of communication with other member ... A member ... is entitled on written demand to inspect and ... to copy the list ...

The IHOA / KA Diehl refusal has been used to suppress the effectiveness of dissenting protests. It violates the implied covenant of good faith and fair dealing – which was plead in Plaintiff's Complaint. All of the above was stated in testimony at trial

Issue

Diehl requires the IHOA to Join the "Community Association Institute" (CAI) a trade group which lobbies on behalf of management companies.

(2009 Contract Pl # 367 Page 6 para 8.4)

8.4 Manager, through it's involvement with continuing education and commitment to the Community Association Industry is requiring that during the term of this Agreement, Association or Association Board Members shall maintain a membership in the local chapter of CAI (Community Association Institute). Membership will be paid by the Association."

The Court has the minutes of the Board of Directors. There isn't a single reference to any benefit or participation in CAI activities. There is no good faith reason for Toth, when accepting, not dictating, a management contract (which was never competed) would let the management company dictate such a provision.

The management contract provides for the functions that the management company will perform, their authority, and what their compensation is. It is implied that the management company will have the expertise to substitute for board lack of expertise. Given that the IHOA is buying that expertise, a Board / HOA membership in CAI contributes nothing to the Diehl / HOA relationship. The fact that Diehl gets away with this, apparently with the 61 communities it manages, doesn't make it right. Plaintiff asserts that this "requirement" "affects competition" and "limits competition" from those associations that compete with CAI. The IHOA is told that the IHOA must obtain supplemental expertise from Diehl's choice of sources. Plaintiff points out that the Horry – Georgetown Technical Institute and Coastal Carolina University provide courses and other training in the area of community management, which courses qualify towards realtor licensing. Such a decision is properly a discretionary decision by the HOA, not by it's contractor.

It is also a fraudulent requirement because it fails to disclose that HOA membership in CAI gives Diehl "valuable consideration". See CAI Referral Program. Pl # 702

It was uncontroverted that the KA Diehl Contractor Program also requires prospective contractors to join CAI. At trial, Diehl's employee Beckie Abel was unable to provide a single credible benefit for such membership to real life vendors of goods or services to home owner associations.

The document states:

- Make ONE phone call
- Send ONE e-mail
- Have ONE conversation

That's all it takes to recruit a member and participate in CAI's Every ONE Counts campaign—and win one or more of these rewards:

- A vacation package including air fare, hotel, rental car and spending money
- A 32-inch flat screen TV
- A gift card for \$500 in gas
- A Sirius or XM satellite radio installation and subscription for one year
- Global Positioning System (GPS)

This conduct is within the scope of fraudulent conduct enumerated in USA v Tesvich (a Home Depot buyer in Georgia).

RELIEF: Declare the mandatory HOA / Board member membership void
Permit "voluntary" direct HOA membership, from year to year, if a Board so chooses.

Plaintiff Requests the Following Relief

1. That the IHOA be enjoined from signing any contract which even purports to allow a management company to keep any rebates, discounts, or other consideration related to the purchase of goods or services to the IHOA.
2. That KA Diehl be enjoined from such practices with any home owner association it manages.
3. That KA Diehl be Ordered to refund to any vendor the "fees" it collected from such vendors.
4. That KA Diehl and the IHOA be required to publish or announce requirements for goods and services, (as to KA Diehl, for any association it provides services to) and to accept bids from any responding prospective vendor; that it not engage in any "prequalification" scheme or program.

5. That KA Diehl and the IHOA be required to liberally distribute homeowner / voter lists to home owners on demand.
6. That KA Diehl and the IHOA be required to issue annual statements of privacy rights to home owners.
7. That KA Diehl be required to pay to the IHOA any discounts, rebates, or other consideration it has received for the period reaching back to 2006 related to the provision of goods or services to the IHOA.
8. That KA Diehl be enjoined from releasing any information about home owners to any other entity.
9. That KA Diehl be enjoined from using any information about home owners to solicit business from home owners.
10. That any provision in any contract between KA Diehl and any home owner association restricting in any way the provision of goods or services to a home owner association by said association's board or committee members be and is null and void.
11. That KA Diehl be enjoined from requiring any prospective vendor or any home owner association to join CAI, and that Diehl be required to refund to the IHOA any membership or other fees which the IHOA has paid to CAI.

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- DIVISION 13 -

ILLEGAL DISTRIBUTION OF PROCEEDS OF ILLEGALLY APPROVED ILLEGAL SALE OF ASSETS

Plaintiff's Complaint alleged the IHOA Board in general and Defendant Rosemary Toth in particular acted in violation of their authority and made decisions in their board capacities that were explicitly in violation of The Act and of the Covenants.

At trial a focus was on a particular act, the unanimous decision in 2010 of the Board of the IHOA to sell to Central Electric an easement to run overhead power over IHOA owned property. The agreement also allowed Central Electric to destroy all landscaping in along most of the length of the front entrance, much of which had recently been recently planted at IHOA expense and all of which had been nurtured for many years at IHOA expense. As Toth, Freiboth, and Sullivan testified at depositions and at trial much of the justification of landscaping was that the impact of this landscaping, all of it including particularly the front entrance, was crucial to maintaining property values.¹²

The nature of the front entrance and the destruction which Central Electric did was undisputed at trial.

At Toth's deposition and in trial testimony by Sullivan and through a Notice of Special Meeting and Minutes of the Special Meeting introduced into evidence whose admissibility was not disputed the fact was likewise undisputed that the Board unanimously agreed not to put the decision to the homeowners for a vote of approval.

¹² This was the justification given for maintaining the front entrance at IHOA expense when owned by Horton.

In like testimony and through the testimony of Astorino, Butryn, and Pete Pizzi Deposition testimony was taken that at the special meeting, several homeowners demanded that a vote of approval or disapproval be taken. The deposition testimony is that at least one homeowner begged for the vote. Sullivan testified that the Board refused to even allow this line of discussion, saying that the announcement for the special meeting did not include a vote so the Board would refuse to even hear these homeowner vote demands.

At trial and through the testimony of Butryn and Sullivan it was undisputed that an official Virginia (state) study had been given to the board and other homeowners by Butryn which stated that the quantification of damages far exceeded the amount that the Board accepted from Central Electric. Sullivan's testimony was that the Board did not even consider having an independent appraisal done by an expert knowledgeable about this topic – or by anyone. Sullivan testified that the Board just accepted the Central Electric offer.

At trial and in deposition testimony of Toth and Sullivan it was put into the record that homeowners demanded that Central Electric be compelled to place the power mains underground. The response in the record was that the Board agreed with Central Electric's contention that this would be too costly – to Central Electric – and sided with Central Electric on “bury the power lines” issue rather than with the homeowners whose interests the Board was supposed to protect.

The Court is asked to note from the numerous pictures put into evidence by Plaintiff and the GIS photos put into evidence by Defense Counsel that before the Central Electric installation at the front entrance, no overhead utilities are present throughout the PUD.

At trial it was conceded by Sullivan that homeowners have no equity interest in the area concerned – or in any Common Area – and that with the installation of the Central Electric power line and the total destruction of the landscaping no individual homeowner gave up anything nor had a provable individual loss.

The related documents, the April 6, 2010 Notice of the Special Meeting (Defense #70), three related “Friday Facts” March 12, 2010, March 19, 2010, and March 26, 2012, the Minutes of the April 19, 2010 Special Meeting Pl # 369 Def # 72 all confirmed that no vote was taken, that all related decisions were made by unanimous vote of the Board, including Toth (and Sullivan), and that the Board also decided to and did distribute much of the cash proceeds to homeowners in the amount of \$ 75 per homeowner. These documents and the testimony was that an additional \$ 10,000 was set aside for “contingencies”. Plaintiff asserted that “Contingencies” in the context of the Central Electric destruction of landscaping and the explanation that Central Electric's offer was to provide for restoration was that “contingencies” has to be to restore unforeseen damage which Central Electric was not separately restoring (such as irrigation / sprinkler system damage which would be discovered later).

Plaintiff personally attended and observed all preceding meetings of the IHOA

Board of Directors and the Special Meeting at which the IHOA Board "announced" their decision. Plaintiff did not participate.

An Act of Directors or Officers which directly violates explicit prohibitions or restrictions of the Covenants, the Bylaws, the Articles, or The Act is an ultra – vires act.

An Act of Directors or Officers which is taken when the evidence available indicates that the decision is reckless or contrary to the Association and in particular when the members bring the folly of this to the attention of the Board is an act in violation of the Standards of Conduct.

Plaintiff points out the decision of the Collective Board to distribute proceeds to homeowners gave each director money in their private capacities that they would not have received except for that decision. There was no vote to exclude themselves nor to put into the record anything supportive of their decision except for reference to the offer from Central Electric.

**The decision without a vote is prohibited by The Act.
The approval of above ground utilities is prohibited by The Covenants.
The distribution of cash proceeds is prohibited by The Act.**

Per 32-31-1202(b) the sale required approval of the home owners. The statute requires approval:

- (1) By the Board AND**
- (2) By the Home Owners at a Special Meeting approved by a vote of at least two – thirds of the homeowners attending and voting at the meeting**

OR

- (1) By the Board AND**
 - (2) By a vote of one half plus 1 of the total number of homeowners entitled to vote.**
- whichever is less.**

Rosemary Toth personally announced, at the meeting, that no vote would be taken.

However, in this instance a stricter vote standard is required.

SC 32-31-1202(b) has an exception for a stricter vote standard:

"Unless this chapter, the articles, or bylaws, require a greater vote"

From the IHOA Bylaws, Pl # 548, Section 11.1 "Condemnation":

"11.1 Whenever all or any part of the Common Areas or Recreational Amenities of the Subdivision shall be taken by condemnation or eminent domain, or is conveyed in lieu thereof by the Board acting on the agreement of at least seventy-five (75%) percent of the total vote of the Association"

The Bylaws provided strict and explicit restrictions on what might be done with the cash proceeds received from Central Electric:

Alternative #1: Restore the area and put the remaining funds into the reserves for like requirements:

11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then unless within sixty (60) days after such taking ... at least seventy-five (75%) percent of the total membership of the Association, shall otherwise agree, the Association shall restore or replace such improvements so taken, to the extent practicable, on the remaining lands ... If such improvements are not to be repaired or restored, the award or proceeds shall be retained by and for the benefit of the Association.

Alternative #2:

Put all the funds into the reserves as a contingency for like requirements:

From Plaintiff's # 369, Minutes of Special Meeting April 19, 2010. Bottom of second page. "Breakdown of remaining funds \$ 80,000.00"

" \$ 50,250 Funds to be distributed to 670 homeowners at the rate of \$ 75.00 per unit owner.¹³

\$ 15,000 Funds for potential Master Association landscaping projects (TBD)

\$ 10,000 Funds to be deposited in money market account for contingent expenses¹⁴

\$ 4,750 Funds for tax liability (\$2,186 quoted by CPA – balance as cushion)"

The Court was asked to take judicial notice that this is exactly what was stated in the Meeting Announcement.

Plaintiff, Butryn, Pizzi, and Astorino testified that they did not request this

¹³ Plaintiff asserted that the explanation he heard was that these were new projects outside of the impact area.

¹⁴ Plaintiff asserted that the explanation he heard was that this was for contingencies in the impacted area discovered later or somehow not mitigated by Central Electric.

distribution.

At trial Plaintiff introduced into evidence Pl # 395 from the 2011 IHOA General Ledger that the IHOA Board had used the \$ 10,000 contingency fund to pay a judgment against it won by The Villas HOA sub-association which was unrelated to the Central Electric landscaping destruction and restoration.

At trial Plaintiff argued that the \$ 10,000 was a restricted account. It was undisputed by Sullivan that the \$ 10,000 was the same \$ 10,000 received from Central Electric. Sullivan testified that the Board could use the \$ 10,000 in any manner it deemed.

The Court approved settlement in The Villas v IHOA was entered into evidence to relate the \$ 10,000 to the judgment against the IHOA; the ledger statement itself says this was the purpose of the payment. This document was added at trial as an impeachment document related to the testimony of Sullivan. It's authenticity was not disputed.

Plaintiff has earlier in this Brief addressed the individual and joint liability of Directors and Officers for the illegal distribution of assets SC 33-31-833, and the nature of prohibited distributions SC 33-31-1301 and in particular the Sale of Assets not used in the normal course of business, SC 33-31-1202. Plaintiff had asked the Court to make general rulings which would later be applicable to specific instances.

This is the primary instance with exemplary and provable direct damages to the IHOA.

Plaintiff asks the Court to enter an Order which states that Plaintiff through the preponderance of the evidence enables the Court to make findings of fact and conclusions of law that:

- (1) The IHOA Board was prohibited by the Covenants from approving above ground utilities.
- (2) The landscaping at the front entrance were assets not used in the normal course of business by the IHOA.
- (3) The IHOA owned the front entrance at the time of the events in question.
- (4) The IHOA Board was prohibited by law and the Bylaws from making the transaction with Central Electric without the appropriate consensual vote of the homeowners.
- (5) The Board unanimously decided not to have a vote of home owners.
- (6) A demand for a vote was made by home owners.
- (7) The Board acted recklessly in failing to obtain an independent estimate of the value of the effects of the Central Electric / IHOA decision.
- (8) The Board unanimously decided to distribute \$ 50, 250 to homeowners out of the proceeds from Central Electric.
- (9) The home owners who received that distribution had no equitable or legal right to any portion of that distribution and the Board was aware of this.
- (10) The \$ 10,000 in contingency funds received from Central Electric was a

restricted fund to be used for landscaping purposes.

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

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

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

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

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

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

(17) Any excess money remaining from the proceeds received from Central Electric shall be treated as restricted funds to be used for the restoration of landscaping damage.

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- DIVISION 14 -

GOLF COURSE ASSESSMENTS MUST BE AT THE RATE SET IN THE COVENANTS

“AGREEMENT SHOULD BE VOIDED BECAUSE OF CONFLICTS OF INTEREST AND LACK OF AUTHORITY

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the basis for the rate of assessments for the Golf Course, whichever one that might be, was inflexibly set by the Covenants on a basis inflexibly binding it to the rate of assessments for single family homeowners. The Court was requested to interpret the Covenants and to declare that such is the obligation of the Golf Course.

The Court was also asked to declare that it was an ultra – vires act to alter that in any way without amending the covenants, and that such was never legally consummated.

Some of the details were addressed when the Court was asked to declare whether certain types of acts of the Board were Ultra Vires. To recount:

1. The IHOA Board never authorized the Golf Course Agreement as it was signed by Doug Brown.
2. The IHOA Board itself was illegally in office and had no power to act.
3. There was clearly self dealing and a conflict of interest.

4. The Golf Course never performed as required under the Agreement.

5. The stated reason for the agreement, to obtain a one-half acre parking lot for the Amenity Center, was fraudulent because the developer had the obligation (not the IHOA) to provide so much parking as was required to obtain a Certificate of Occupancy or other permits to use the facilities.

6. The Golf Course never deeded the 1/3 acre contemplated by the Board as the explicitly required additional parking area; it received 1/4 acre instead.

a 2003 Golf Course Agreement between the IHOA (as signed by Doug Brown, putative board president), DR Horton, the Developer, and the Golf Course, should be set aside and voided

The rate of assessment for the Golf Course is stated in Covenants Section 6.5.

The requirement to amend bylaws to alter the basis of assessment is stated in statute, SC 33-31-1021 and the requirement to put it to a vote is stated in SC 33-31-1003..

The entitlement to amend the bylaws by action of the developer excludes any amendment which alters or changes any owner's rights or obligations. Covenants Section 8.5(a) and such amendment is valid only upon the written consent of a majority of the existing homeowners (does not state voting weight).

The board's decision to exchange only the unpaid golf course assessments remaining in 2003 (and no more) for one – third acre was stated in the Minutes of the Board, November 20, 2003.

The documents related to the deed for the one-quarter acre filed with Horry County stated that the land was valued at \$ 5,000, thus it is not an act in good faith to trade this for what the Golf Course agreement itself on page 1 said was a \$ 51,000 debt through August 31, 2003, increasing at \$ 1,750 per month in the remainder of 2003.

The Bylaws at Part I (f) and Part IV Section 4 prohibit any compensation of any kind to directors.

Brown personally received a free golf course membership through at least 2007.

DR Horton received reduced price golf course memberships for his home buyer customers, free rounds of golf, free use of golf course clubhouse area for a sales office, and a very reduced rental rate for the clubhouse for sales events.

The golf course received the value of the IHOA maintaining, in perpetuity, areas of golf course private property.

The IHOA lost \$ 370,366 in actual assessments not paid which the covenants required to be paid, plus \$ 213,404 in non-compounded interest (per the covenants) for a total loss to date of \$ 583,770.

The numbers are from Plaintiff's computation worksheet Pl # 389 supported by IHOA General Ledgers at Pl #390 through #394 plus #705 through #707.

At trial Plaintiff provided uncontroverted testimony that the non-payment or under-payment by the golf course in every year since the inception of the PUD and the conflict of interest when the agreement was made was hidden from home owners by the Boards – all boards – through the present one until after Plaintiff filed his Rule 16 statement January 17, 2012 that he intended to prove this at trial before expected home owner observers.

Plaintiff asserts that because this was hidden from the home owners, statutes of limitations are not tolled.

Plaintiff asks the court to determine that Plaintiff through the preponderance of the evidence has placed sufficient facts and grounds in law before the court for the Court to Order as follows:

- 1. That the rate of assessment of the golf course be and always has been that specified in Section 6.5 of the Covenants, it being fifty times the rate of assessments charged to a single family home owner entitled to use the Amenities of the Association.**
- 2. That the agreement between the golf course, the IHOA, and DR Horton signed on or about November 3, 2003 ("The Agreement") be and is void and was never of force or effect.**

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Defendants	)	
	)	

- DIVISION 15 -

SPENDING ASSESSMENT MONEY TO MAINTAIN LAND NOT OWNED BY IHOA

INCLUDING PRIVATE PROPERTY AND PUBLIC STREETS

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the IHOA was collecting assessments and using them for purposes not permitted by the Covenants.

Specifically, Plaintiff complained that the IHOA was and still is spending large amounts of money coerced from homeowners through assessments which were and are still used to

(1) Maintain private streets and private rights of way not owned by the IHOA;

(2) Maintain and improve golf course property;

(3) Maintain some private home owner property adjacent to the streets;

(4) Maintain the shoulders of streets owned by Horry County; and

(5) Purchase water from the golf course which the Association owns for purposes of irrigating the aboves stated areas, and for the irrigation of a limited area owned by the IHOA around the Amenity Center.

In the Comlaint, in deposition testimony and at trial it was not controverted that the experts to the IHOA on this issue was the (then) Buildings and Grounds Committee and

that the members of that group, particularly Mike Butryn, who testified at trial, was professionally expert in this regard and known to be so by The Board.

It was likewise uncontroverted that in 2008 the Buildings and Grounds committee made a formal presentation to the IHOA Board, chaired by Defendant Toth, apprising the board that most of the landscaping budget was used to maintain areas not owned by the IHOA – and requested that these areas no longer be maintained at IHOA expense or that the owners be billed for such maintenance as provided for by the covenants if the owners were derelict in maintaining these areas.

It was likewise uncontroverted that the 2008 and there after of the Board was to continue to maintain the same areas at IHOA expense and not to seek reimbursement.

At trial Defense Counsel presented as an expert witness Christopher Sullivan. His only claim to expertise was that he had been in the irrigation business for many years. He stated he was familiar with the infrastructure used by the IHOA to irrigate the areas it is irrigating.

His testimony focused on an assertion which is not controverted that it is cheaper to buy water from the golf course than to install a separate IHOA owned well.

He stated that he knows it to be a fact that the Golf Course is drawing water from the various retention ponds around the PUD, which Plaintiff does not dispute.

He stated that he was unaware that the Association owns riparian rights in the retention ponds and had done no calculations in preparation for his testimony to address any alternative other than “buy golf course water Or drill your own well”. He had no actual data on the capacities of the two large ponds which are adjacent to the main areas maintained – the large lake along side The Villas and adjacent to International Club Drive (the “front entrance”) and the large lake to the right of Pickering Drive as one enters Pebble Creek from the Amenity Center.

Photos and Plats were cited to the Court to see that these are lakes, not small retention ponds. Sullivan stated that he could not even estimate the depth of the lakes so as to determine their capability to provide water but admitted that it more likely than not would be sufficient to irrigate the principal IHOA owned common area – the Amenity Center.

At trial Sullivan admitted that he does not read any technical or learned journal related to golf course or home owner assoication maintenance and was unfamiliar with a publication from Clemson University’s Extension Service titled “Irrigation Systems”. While this was not among Plaintiff’s Rule 16 exhibits distributed to the Defendant pre –

trial,¹⁵ it was introduced into evidence as impeachment evidence. The authenticity of this was not controverted.

From page 1 of the Clemson document it was noted that the kind of grass which the IHOA maintains requires one (1") to one and a quarter inch (1 – 1/4 ") of water per week, preferably all at once, once a week. Sullivan's testimony is that the IHOA was watering with this amount several times a week.

The August 22, 2002 deed from Plantation Golf AD to the IHOA for the Amenity Center, Pl # 554 Deed Book 2511 at 967, stated that the Amenity Center land totalled 1.56 acres. From the GIS photos of the area at Pl #123 it can be seen that the retention pond immediately adjacent to the Amenity Center is one – third the size of the entire uncovered Amenity Center area (uncovered meaning areas of grass) and that by the Clemson computation even a three foot deep pond, which this is at least per Sullivan's testimony, would carry the Amenity Center area for between thirty six and twenty four weeks. The small lake on the other side of the golf course drive is at least as deep and as large as the entire Amenity Center area, without even discounting the "covered" area of the lot.

Looking at Defense Map 2 a GIS photo of the area and comparing it to Plaintiff's #460 Plat Book 181 at 89, one can see that proceeding just "up" Pickering Drive from the Amenity Center area there is a very large LAKE to the right of Pickering which even goes further and to the rear of the first four houses on Pickering drive in Pebble Creek.

Sullivan admitted that by his observation, which was not controverted, this other lake is at least several feet deep and from the documents it may be concluded that this lake is approximately three times the size of the Amenity Center complex, not discounting for "covered" land.

Plaintiff has already demonstrated that by the Covenants the Association holds the Riparian rights to the water in these lakes and ponds.

Clearly there is no need to drill for the water to irrigate IHOA property – water that the Association owns can be readily pumped in sufficient quantities from lakes and ponds nearby that the IHOA with little more cost than a one time pump cost, tied into existing irrigation piping, and that the IHOA should be receiving payment from the Golf Course for water the golf course draws from the lakes and ponds, not the other way around.

At trial Sullivan testified that he was completely unaware of the program that the Grand Strand Water and Sewer Authority ("GSWSA") has to provide free, treated water to golf courses and associated areas for irrigation purposes. Plaintiff proffered that GSWSA bears the total cost of bringing the treated water to the point where it can be accessed by the golf course or homeowners association.

¹⁵ Every one of Defense Counsel's exhibits were given to Plaintiff in the courtroom moments before the trial began. The day prior to the trial an ambiguous list of these documents, but not the documents themselves, were provided Plaintiff by Defense Counsel.

Sullivan stated that he was unaware that the Indian Wells PUD (which is nearby) found that retention ponds and lakes in the community were sufficient to provide satisfactory irrigation using the Clemson standards, and that this resulted in satisfactory greens and lawns.

In trial, Butryn testified that the Buildings and Grounds committee informed the IHOA Board (in 2008 under Toth) that almost all the irrigation and grounds maintenance was done on land that is not owned by the IHOA – not the Common Area – and recommended that this cease and desist to the extent that it was not reimbursed by the property owner, including the shoulders of the roads. Butryn testified that at the time Toth, on behalf of the Board stated that the IHOA would continue it's current (at the time) practices which Plaintiff testified and Sullivan and Butryn agreed continue to this day.

**Assessments May Only Be Imposed to Maintain the Common Area
Anything Not Owned by the Association is NOT the Common Area**

Covenants Article I Definitions

Section 1.2. Assessment shall mean and refer to an Owner's share of the Association's charges for Common Expenses and funding of reserves

From the covenants it is clear that roads and areas open to the public are not common areas:

Section 1.6. Common Areas shall mean and refer to all real and personal property now or hereafter owned by the Association for the common use and enjoyment of the Owners or designated by the Developer as Common Areas, together with any improvements thereon. Such areas are intended to be devoted to the common use and enjoyment of the members of the Association as herein defined, and are not dedicated for use by the general public; and the general public shall thereby have no easement of use or enjoyment therein.

PAST BOARD KNOWLEDGE OF THE ISSUE

In Toth's deposition testimony she admitted that she had been a member of the "Transition Committee" prior to being elected to the Board in September, 2007. At the deposition she admitted that the appointed authority was the director controlled board then in place. She admitted that the transition committee was in place from November 16, 2006 until the September 2007 election.

At the Toth deposition she was presented with what is Plaintiff's Exhibit 3 to that deposition, a letter from another member of the Transition Committee, Reggie Corfield, to her by name.

It read is part:

"Dear Rosemary

I know you are having a meeting today and as promised, I am giving below my comments on Tracy Fisher's¹⁶ response. There were many questions addressed to her but I do not believe she answered all of them. .. I wonder if she is saying something on their [Horton's] behalf? If this is indeed the position DRH is taking then I believe the HOA is under no obligation to maintain them and I would respond as follows: ...

I take the position that if DRH does not convey the common areas and the Amenity Center at or prior to transition, we should not use Association funds to maintain them. I do not believe we are obligate to do so either and here is why?

The definition of common areas is found in Article 1 sec 1.6 which says "Common areas shall mean and refer to all real and personal property now or hereafter owned by th Association for the common use ... Key word is OWNED. What we do not "own" is not common area all though DRH "allows" us to use it. ...

[underlining and Capitalization by Reggie Corfield in the original]

Then go to Art. III sec 3.1 ... "Association shall maintain and keep inn good repair all portions of the common areas. Landscaping, maintenance, ponds, water courses, Insurance and on and on which is our entire POA budget of approximately 400 thousand dollars a year.

Common area is defined as what HOA owns and so we are clearly under no obligation to maintain what we do not own. Yes, we may not have access to the Amenity Center but why should be [sic] pay for the upkeep of DRH's property? ...

Thanks. Reggie

DAMAGE TO THE ASSOCIATION

Butryn and Pete Pizzi testified at trial that they were the IHOA's undisputed experts on buildings and grounds issues. They testified as to how on the behalf of the IHOA with the pre-knowledge and consent of the IHOA Board in 2008 visited the Horry County Engineering Department and Planning Commission to obtain detailed plats and other official documents mapping the drainage system, at least of Pebble Creek, and the official record of ownership of lands in the PUD then maintained, or which might be maintained, by the IHOA. They testified as to having bought at Butryn's personal expense a "survey wheel" to relate what is on the ground to what is on the plats and descriptions.

¹⁶ Tracy Fisher is an attorney in the law firm of Wilcox Buyck. She is also Plaintiff's attorney of record on real estate matters relating to the PUD. In the conversation referred to, Fisher represented the builder, DR Horton, and not the IHOA.

This was all uncontroverted at trial as was Butryn's knowledge and expertise in this area.

At trial it was not disputed that in 2008 Butryn and Pete Pizzi wrote the specifications that since that time have been used for all Landscaping / Buildings and Maintenance contracts, and that KA Diehl at the time had nothing comparable and was given this for Diehl's later use.

At trial Sullivan (a member of The Glens board and a former member of the IHOA board) testified that the IHOA is maintaining one of the two tracts which are The Glens' common areas.

In the Deposition of Butryn and of Pete Pizzi both identified the Buildings and Grounds Presentation they wrote, along with Mike Templeton, another member of their Committee, which was presented to the Board at an official meeting on June 25, 2008, Pl #330. At # 331 is the "Cost Breakout" numbers that Plaintiff took from the presentation, which Butryn identified as the numbers in his presentation.

Butryn at trial stated that the area labelled "Common HOA Area" actually included nothing more than the shoulders of the County owned roads and that the IHOA owned and maintained area consisted only of the Amenity Center complex. This was undisputed.

From that chart at Pl # 331 the Court was asked to note that if only the IHOA owned Amenity center was considered, only 7.55 percent of the landscaping budget was spent on what was actually Common Areas – owned by the IHOA. Thus only \$ 4,908 out of \$ 65,000 was being spent to maintain the Common Areas – and thus home owners are being improperly assessed for purposes that the covenants do not give The Asssociaiton the authority to levy assessments for.

Put another way, the IHOA Board under Toth was mis-appropriating \$ 60,000 out of \$ 65,000 in that area of the budget.

At trial Butryn testified that although his numbers calculated on the basis of acreage indicated that the IHOA was spending \$ 24,390 a year to maintain golf course property, because that area was more labor intensive it was certain that the per hour cost was actually far more.

Butryn testified that the advice of the Committee was to either cease and desist from doing any maintenance on anything but the IHOA owned Common Area or to maintain only such additional area as the IHOA will be reimbursed to maintain.

At trial the Court was asked to refer to the 2008 General Ledger for the Golf Course Pl #707, which documents that in 2008 the Golf Course only paid \$ 13,872 but was receiving landscaping services on it's property in the amount of at least \$ 24,390.

The Court is asked to note that a property owner is supposed to receive no direct services to his property by reason of payment of assessments and this represented a mis-

application of money which should have been used for other IHOA purposes.

From Pl # 389 the Court is asked to note that in 2008, the Golf Course was required to pay \$ 42,000, not the \$ 13,872 actually paid and was not entitled to receive the \$ 24,390 (or more) of services.

At trial the Court was asked to take judicial notice that per IRS regulations, a non-profit home owner assoication is not permitted to provide goods or services to property owners.

As was admitted at trial by current Board President Freiboth, these practices and consequent damages continue to this day. The damages thus far exceed the \$50,000 (or more) from 2008.

Plaintiff asserts that the facts are sufficient to show that the 2008 Board, presided over by Defendant Rosemary Toth, did not act in good faith or otherwise as required by The Act.

RELIEF REQUESTED

Plaintiff asserts that he has by the preponderance of the evidence provided facts and applicable citations of law entitling him to the following relief:

1. That Defendant Rosemary Toth be and is required to pay to the IHOA the sum of One Dollar (\$ 1.00) as a token of the consequential damages her misconduct caused the IHOA in 2008. The Court further finds that her conduct with regard to use of IHOA landscaping money was intentional and that she acted against the beset advice available to her in her capacity as Board Member and IHOA President.
2. That because of SC 33-31-851, the indemnificatin of board members or officers, Toth may not be indemnified for this award and that she is personally liable for the cost of her defense in this litigation.
3. That it is unlawful for the IHOA to spend assessment funds on areas not owned by the IHOA which are not also declared to be Common Areas within the PUD.
4. That the IHOA is enjoined from collecting in the form of assessments any funds for, and is likewise enjoined from expending any IHOA funds for any purpose at all upon lands which are not (a) in the PUD; (b) owned by the IHOA; and (c) declared to be Common Areas.

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

- DIVISION 16 -

**DEFENDANT IHOA AND
DEFENDANT ROSEMARY TOTH
ILLEGALLY DENIED PLAINTIFF
PERMISSION TO ERECT
SWING SET**

Plaintiff's "3596" Complaint alleged that various provisions of the Covenants had been deleted; that such were being enforced by the Defendant none the less; and that additional restrictions on the free use of property were being imposed by the Defendants which were not to be found in the Covenants. It also complained about the violation of the implied covenant of good faith and fair dealing.

Plaintiff's "11320" Complaint added the specific issues that the IHOA was interfering with Plaintiff's use of property and harassing Plaintiff by demanding that Plaintiff conform to the then non-existent Covenant Section 7.2, the ARB requirement. This Complaint further complained about IHOA disregard for the procedural rules in the IHOA's purported Bylaws.

In paragraph 19 of the 11320 Complaint Plaintiff raised the issue of Prior Review of plans by the ARB.

In paragraph 20 of the 11320 Complaint Plaintiff raised the issue of the IHOA ignoring procedural mandates of it's purported Bylaws, and attempting to use those Bylaws as ostensible authority for restrictions on the free use of property not to be found in the Covenants.

In paragraph 21 of the 11320 Complaint Plaintiff raised the issue that ARB rules were being used to extend the limitations on property in ways not explicitly stated in the covenants.

In paragraph 22 of the 11320 Complaint plaintiff plead that

“The actions of Defendant constitute harassment and tortuous interference with” Plaintiff’s lawful use of his property.

With regard to the swing set, Plaintiff’s trial testimony alleged that the Defendants violated the implied covenant of good faith and fair dealing (which was asserted in the 3596 complaint).

What Happened

On July 21, 2009, months after Plaintiff filed the 3596 complaint, Plaintiff filed an ARB Request to install a swing set Plaintiff # 601.

In that application it recounted that Cartman, Plaintiff’s neighbor on that side who was a member of the ARB, objected to anything near his house which might bring with it the noise of children playing. Plaintiff’s application stated alternatives which Plaintiff offered to install at Plaintiff’s expense, such as a fence or hedge to buffer the noise (which was hypothetical) and to hide the view. Maureen Sullivan, at trial, testified that she saw Plaintiff at the pool with three very well behaved little foster girls. At the time Sullivan was a member of the Board so the Board clearly knew Plaintiff had foster children for whom this was to be used. The application perpetuates that Cartman had stated that he bought his house with the understanding that Pebble Creek is a retirement community devoid of children. While there are restricted communities limiting residence to persons over a certain age, the PUD is not one of them.

The application pointed out that “The Architectural Guidelines have no restriction on where a swing set may be placed”. It went on to quote the only provision -- securely anchoring them.

The application contained a photo of a swing set at 109 Pickering, down the street, of another at 105 Keswick, in Pebble Creek, of another next door (on the side away from Cartman) at the Paar residence, A manufacturer’s photo of the one proposed was included showing it smaller than any of the others. An architectural drawing from the manufacturer was included showing the safe footprint requirement to be 10 feet by 32 feet, stating that this could only be found where Plaintiff intended to set it up. A survey plat was included which showed the swing set would be far back from the front of Plaintiff’s house, in fact midway along the side of Plaintiff’s house. Another photo showed there was insufficient room at the rear for a swing set. A last photo showed the very large expanse available where Plaintiff proposed to put it – AND that this was no wheres near the front of Plaintiff’s house.

On August 5, 2009 Pl #602 the IHOA, through KA Diehl, denied the request. Cartman had participated in the ARB decision making – had not been required to leave the room at that time. The ARB would not allow Plaintiff to hear or observe the decision making. This was violative of the The Act's requirement for open meetings and, if any hypothetical privacy was involved, it related to Plaintiff and thus it was Plaintiff's to assert, which he did not.

The letter was actually sent by Defendant KA Diehl's employee Julie Case. The reason she gave was as follows:

"The installation of a swing set on the side of a home which is visible on the street ... is prohibited". "This application must be denied based on the location of the swing set".

There is no such restriction in the covenants Pl #547 nor were there in the ARB Guidelines at the time, Pl #600.

The ARB guidelines at the time are at Pl #600. Per it's own title, these are just "guidelines" and not "rules". If the IHOA wanted to call them "rules" they should have written so. Per case law, this doesn't matter because covenant restrictions will not be extended by rules or by construction or implication.

Swing sets in the Guidelines are address at "L Recreational Equipment #2 Swing sets" on page 4 of the guidelines.

It Reads: " Swing sets must be approved by the ARB and if approved must be securely anchored per hurricane specifications".

Plaintiff's neighbor, Jay Cartman, was at the time on the ARB. When Plaintiff, as a good neighbor, informed Cartman that Plaintiff intended to place a swing set on the side yard Cartman responded by stating that he hates kids and hates their noise and as an ARB member he will make sure that Plaintiff's swing set never gets built. Cartman was allowed to participate at the ARB meeting considering Plaintiff's swing set. The ARB always has stated that it will not allow anyone in the room while it deliberates who does not participate in the deliberation at hand.

The Court is asked to note that Plaintiff offered to erect a palm tree bed or a fence to screen the swing set from Cartman. This was ignored by the ARB.

Interrogatories in Discovery

Turning to Defendant's answers to interrogatories, Pl # 605 and 604, one finds that the IHOA authorized the construction of seventeen swing sets. One of them Sobczyk, is in a side yard at the identical location where Plaintiff desired to place his swing set.

At trial Pete Pizzi testified that Mr. Sobczyk is his son – in – law, that Pizzi has visited both the Sobczyk house and that of Plaintiff, that the Sobczyk is identical to that of

Plaintiff; that Pizzi is aware of where Plaintiff would have erected Plaintiff's swing set, that Sobczyk's is in the side yard in the exact location where Plaintiff's would have been set up.

Plaintiff testified that the photos of Sobczyk's house were shot by Plaintiff standing in the road way, thus the Sobczyk swing set is visible from the road. Plaintiff also testified that at the time a neighbor on the other side, Paar, had a swing set which had no landscaping nor fence to obstruct the view from Plaintiff's yard or kitchen window or from the street. Pizzi testified that the Sobczyk lot also had limited space in the rear making it impossible or unsafe to install a swing set there.

Cartman's wife is a diabetic. Prior to this incident she had told Plaintiff that she is a diabetic and had shown him the disposable injector she uses. Right after this many of these needles started showing up in Plaintiff's yard. At the time Plaintiff had several foster children and the swing set was for their use. Plaintiff saw Cartman walk by the areas where these needles were found – said strolls occurring immediately before the needles were thrown into the yard, where they had not been prior to the strolls. This was a hazard to the foster children. Police reports were made. Horry County police responded. They took the injectors into custody, hopefully to be fingerprinted. These are reflected in a number of police reports. A picture of one such injectable is at Pl #620.

Plaintiff's SC Human Rights Complaint

Another neighbor, Fletcher, a friend of Cartman's, who lives across Pickering from Plaintiff, also was on the ARB at the time. Since this denial with the participation of Cartman followed Cartman's statement that he will have the swing set denied because he hates kids and their noise, and because there is nothing in the covenants nor the ARB guidelines to support the denial, Plaintiff filed a Human Rights Complaint.

The Human Rights Complaint is at Pl # 614.

In response to this on November 16, 2009 Defendant Toth wrote the Human Affairs office, Pl # 603, She wrote,

"The ARB has never approved a swing set in any location other than the back yard".

Her response to the Human Rights Commission had another statement in it that implied that Plaintiff had re-applied for the Swing Set to another ARB panel which did not include Cartman or Fletcher – and that the denial could not have been influenced by Cartman's anti – children bias.

It was a lie.

Plaintiff never submitted a second Swing Set Application.

Toth also wrote that the disapproval came from the ARB and not from the IHOA,

skirting the issue as to who has the authority to enforce the covenants and whether the ARB is in fact a servant of the IHOA Board.

Plaintiff asks the Court to conclude that it is more likely than not that the Human Rights Commission did not enforce the civil rights complaint because of Toth's lie, not because the discrimination was unfounded.

PHOTOS

At trial Plaintiff introduced photos to put a face on what was going on.

At Pl # 610 is the Swing Set Plaintiff wanted to install. Plaintiff had already bought it and the pieces are sitting inside Plaintiff's garage. Plaintiff bought it because similar swing sets are to be found around the PUD and there was no reason to be found in the covenants why Plaintiff should not install it where he planned to.

This is not nearly as large as the one sold in Sam's Club or the one's commonly found along the Grand Strand.

From the manufacturer's photo it can be seen that it requires a safe area around the swing set of 15' x 26' so that a child coming off a swing will not bang into a house, tree or fence. At Plaintiff's house such an area is only found on the left or right side of Plaintiff's house. Plaintiff's rear yard does not have that much space – the developer sited the house placing the uncovered areas on the left or right.

The Court can see that safe area at Plaintiff's # 613, the safe area sketch provided by the manufacturer.

The Court was asked then to look at another swing set found around the PUD. This one is found at 1212 Hargate Street. It is the Sobczyk house. Plaintiff asserted and it was not controverted that it is the same model as Plaintiff's and 1212 Hargate has the same lot size / placement issues as Plaintiff – the large safe areas is on the right side of that house – exactly where Plaintiff proposed to place his swing set. Plaintiff # 611 / 612. The swingset Sobczyk installed, however, is much larger than that of Plaintiff. Instead of the straight slide it has a curved slide and is three levels, one level higher than Plaintiff's swing set.

The Court was next asked to look at several more swing sets around the neighborhood – as shown to the ARB in the swing set application Pl # 601. On the third physical page numbered "2" are pictures of swing sets at 109 Pickering Drive which is bigger than Plaintiff's proposed swing set. There also is another one shown which is at 105 Keswick. It also is bigger. Turning the page one sees an all-metal one at 249 Pickering – across the Cul De Sac from Plaintiff's house and with no landscaping to block it from being seen, in all its glory, from Plaintiff's dining room window – and from two other houses on the Cul De Sac. If the Cul De Sac is Pickering Drive, this playset can be seen from the road. At 239 Pickering is another one similar to Plaintiff's.

The Court was asked to note, specifically, that the ARB / IHOA approved a swing set larger than that proposed by Plaintiff on the same side yard for the same type of house that Plaintiff lives in.

The Court was next reminded that through Amendment #1 (May 10, 2000, Pl ## 551) to the Covenants, the Developer deleted the requirement to seek ARB approval at all, Section 7.2. The existence of this was known to the IHOA because it was the sole Amendment to the Covenants on it's web site, In addition, Plaintiff mentioned this deletion in the Application.

Section 7.2 of Covenants as it had existed is at Pl 547.

The play set was fully within the setback and building line requirement of Section 7.11, which are set out in Pl #609, the accessory structure restrictions imposed by Horry County when it approved the PUD. The Open Storage restriction, Section 7.31, was "waived". There are no further Covenant provisions which, by speculative enlargement, could possibly apply.

The court is asked to recall the Harrogate approval in the side yard. .

CASE LAW

At Trial Defense Counsel failed to cite any cases contrary to those cited by Plaintiff, nor did Defense Counsel contest the asserted meaning of the cited cases.

Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007. The Court ruled that enforceable controls over use of property have nothing to do with rules – the must be explicitly and unambiguously stated in the Covenants.

The lower court wrote:

- (1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;
- (2) the 1965 Declaration does not prohibit Cromer's motor home;
- (3) the Association abandoned its right to approve of fencing;

The SC Court of Appeals wrote:

:

We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners. Further, we recognize the master ruled the 1985 Regulations were invalid because they were improperly signed, acknowledged, and indexed

... nor will a restriction be enlarged or extended by construction or

implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

Relating to this, in 1999 swing sets were common.

The Arcadian covenants challenged stated

7. ... Lot owners will comply with such reasonable regulations as the Developer may make

The Appellate Court wrote:

This provision gives the Developer the power to enact regulations with respect to the [specified prohibitions] parking or storage of commercial vehicles, boats, or machinery.

The Appellate Court that stated –

if the grantor had wanted to restrict mobile homes, he could have done so."
Id. at 5, 498 S.E.2d at 86

“However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts.”

“Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures.”

Upheld that the Association thus waived its right to review / approve. The Court is reminded of the extensive variation in swing sets throughout the PUD and the large number of them. The Defendant admitted to at least 17 it had approved in Defendants’ Response to Interrogatories Pl 604 Pl 605.

By this reasoning, Plaintiff is likewise permitted to have other items in his yard which were in wide spread use in 1999 when the Covenants were drawn and which are not mentioned in the restrictions – such as model garden trains.

“Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants.” Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998).

Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980):

"The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution."
Taylor, 32 S.C. at 4, 498 S.E.2d at 864.

In another case, Hardy et al v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 the South Carolina Supreme Court held that the applicable

"rule of construction [is] that any ambiguity must be strictly construed against the party seeking enforcement." Citing Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902

"Deed restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land." -- Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dismissed); Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981).

"Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." -- Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).

And from Arcadian Shores –

"However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."

"Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

Upheld that the Association thus waived its right to review / approve.

The Court is reminded of the Sobczyk swing set on Harrogate, and the swing set across the street from Plaintiff "which is visible on the street". Plaintiff took the Harrogate pictures from the street so obviously Harrogate is visible too. As a matter of fact, every picture Plaintiff took of swing sets was taken from the street.

From Arcadian Shores ---

... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it

may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

The Court is reminded that the over-arching rule of construction for covenants is that ambiguity must be resolved in favor of the free use of property and this section is clearly very ambiguous and lends itself to selective and capricious application – and misuse by vindictive neighbors.

Given the Harrogate approval, the lack of a specific covenant or ARB guideline restriction, the large number of prior approvals, the wide variation in the individual swing sets, the Court is asked to direct the IHOA to cease and desist from interfering with Plaintiff's swing set and to declare that it is a lawful installation and to rule that the denial was selective, capricious, and a denial of Plaintiff's lawful use of his property..

RELIEF REQUESTED

Plaintiff has presented applicable statutes and case law and the preponderance of the evidence to demonstrate he is entitled to the following Order of Court:

- (1) That the Defendants IHOA, Rosemary Toth, and KA Diehl, acting in concert together, willfully acted to deprive Plaintiff of the free use of property by using standard and regulations that they knew or should have known either did not exist or were inapplicable.
- (2) That Defendant Rosemary Toth, in her answer to the South Carolina Human Affairs Commission, acted willfully and unlawfully to obstruct the Plaintiff's lawful resort to relief from that Commission.
- (3) That there are no restrictions on the placement of swing sets within the PUD other than the Horry County set back requirements.
- (4) That the Defendants are enjoined from any action directly or through others acting on their behalf or in concert with them from enforcing any restriction on swing sets and from imposing any restriction on the free use of property not explicitly stated as a restriction on use in a section of the Covenants not "waived" or "deleted".
- (5) That Defendant Toth is ordered to provide Plaintiff a written apology for the action of the IHOA.
- (6) That Defendant Toth is ordered to write to the South Carolina Human Affairs Commission relating that in conjunction with Jarmuth's prior Human Affairs complaint
 - (a) Jarmuth did not submit a second swing set application and as such no such re-application was denied by another ARB panel which did not include Cartman or Fletcher;
 - (b) The IHOA has approved another swing set for another house in the PUD of

the same model as Jarmuth's in the same side yard location as that requested.

(7) Payment by the Defendants of Punitive damages in an amount that the Court deems appropriate.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
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The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 17 -

**DEFENDANT IHOA's DENIAL OF PLAINTIFF's FENCE
WAS ARBITRARY, CAPRICIOUS,
NOT BASED ON A COVENANT RESTRICTION
AND INTENTIONALLY MEANT TO INJURE PLAINTIFF**

Plaintiff's "11320" Complaint alleged the IHOA unlawfully and knowingly imposed fines for supposed violation of non-existent covenant provisions and non-existent architectural review board rules. It also asserted a claim of interference with allowed uses of Plaintiff's property. There is no provision in the Covenants, Bylaws, or ARB Guidelines related to landscape edging and never has been.

At trial Defense Counsel called current IHOA board president Freiboth to the stand as their witness. She also called a Diehl employee, Beckie Abel. Plaintiff called Michael Butryn, Pete Pizzi and Louis Astorino to give related testimony as to the facts they know. Under questioning witnesses testified as follows:

1. Freiboth --That he was knowledgeable about the Covenants (Pl # 547) and all their amendments, as well as the putative Bylaws (Exhibit C to the Covenants, Pl # 548) for the IHOA and in particular Section 13 relating to Procedures; and that he likewise was knowledgeable about the July 1, 2010 ARB Guidelines in force in 2010 (Pl #371).. Also, that he was the President of the IHOA Board when events surrounding Plaintiff's "Fence or Wall" occurred.

2. Freiboth testified that the ARB is parallel to the IHOA Board and not a committee of the IHOA which Plaintiff controverted. This issue is addressed separately (supra) in this Brief.

3. Freiboth testified that it was his belief that if Plaintiff was dis-satisfied with the ARB decision at issue here it was Plaintiff's burden to appeal that to the IHOA Board – and he further testified that Plaintiff did not do so.

4. Freiboth testified that if Plaintiff had filed an “appeal”, then the IHOA Board would have investigated the situation and drawn some conclusions about how the situation should be handled. Freiboth testified that since Plaintiff did not file an “appeal” of the ARB decision, the IHOA board took the ARB's decision as final and considered the “fine” upheld.

5. Freiboth testified that the contractor, Defendant KA Diehl, was allowed by covenants and bylaws and ARB Guidelines to impose fines when Diehl on it's own decided that a violation of covenants had occurred, and that Diehl, on it's own, was empowered to issue “cease and desist” letters as well.

6. Freiboth testified that the Diehl violation letter was considered dispositive of an alleged violation and the burden was on the home owner to prove a violation had not occurred.

7. Beckie Abel, another Defense witness, was also called to testify and she testified that her employer, KA Diehl, gets paid a certain sum of money to issue violation letters, and that payment is made whether or not the alleged violation is a violation; Abel also testified that Diehl gets paid for a Diehl employee periodically to scour the neighborhood looking for violations and as such, many violations do not begin with a complaint from another homeowner.

8. Plaintiff's witness Louis Astorino testified that he believes KA Diehl employees trespass in his yard because they have accused him of violations which are only visible from his back yard, the area beyond that being occupied by a lake.

9. Both Astorino and Pete Pizzi testified about violation letters from Diehl regarding either non-existent violations or situations approved by Diehl or by Toth or by the Developer, often with readily available correspondence to prove it. Witnesses testified as to problems with Diehl continuing to demand payment for fines after they had been paid.

10. Witnesses testified about fines being imposed by the ARB or by Diehl at the onset of a violation incident. Astorino testified that his voting rights had been suspended prior to a hearing before the IHOA Board.

11. After convoluted examination, Freiboth conceded that the items that the IHOA was calling a “wall” were actually flower bed edgers, but that somehow Plaintiff could hypothetically have used them as part of a wall.

12. In testimony, Freiboth conceded that the edgers about which the IHOA was complaining could not contribute to the support of a fence in any way.

13. In testimony Freiboth conceded that Plaintiff had applied for the erection of a vinyl fence supported by fence posts – not a wall – and that the implication of this was that there would be “air space” between the fence and the landscape edgers.

14. Freiboth testified that he had personally seen what was actually installed and Freiboth testified that despite this and the language of the application, the IHOA was asserting that Plaintiff had intended to build a wall and that the edgers were a wall.

15. Butryn testified that in the course of his business he had drawn specifications for and supervised the erection of fences and walls for school districts, and that no wall was installed and what was installed was useless in the context of either a fence or a wall.

16. Freiboth was unable to explain and did not controvert that the minutes of the meetings of the board of directors of the IHOA include not a single instance of the Board hearing an appeal of a covenant violation and that the do not include a single instance of the imposition by the Board of a fine or a suspension of rights.

17. Abel testified that numerous fines had been imposed by Diehl and collected from homeowners by Diehl over the years and numerous letters had been written for which Diehl had been paid.

18. Freiboth admitted at trial that Plaintiff had not erected the fence that had been applied for – not a post nor a panel, and that Plaintiff had not put in the requisite paver base material that Butryn testified must be laid in the earth – at least twice the width of the wall and at some depth – underneath where a wall is to be erected.

19. Freiboth conceded that he was aware that the IHOA had approved the identical landscape edgerse for use elsewhere in Plaintiff's lot and elsewhere in the neighborhood and that in fact such landscape edgers were common throughout the neighborhood.

At trial Plaintiff testified that

(1) The fence and edgers were related to the invasion of Plaintiff's property by Cartman following the swing set issue, in particular following Plaintiff's use of Cartman's statement about children in Plaintiff's Human Affairs Commission complaint. After the Complaint Cartman proceeded to pound stakes into that portion of Plaintiff's irrigation and sprinkler system located near their common property line. Plaintiff testified that Cartman further put up “no trespassing” signs facing Plaintiff's house – well into Plaintiff's property. Plaintiff testified that this destroyed the functionality of that section of the system.

(2) That Cartman repeatedly sprinkled used hypodermic needles previously used by Cartman's wife for her diabetic condition and that this endangered the foster children who lived with Plaintiff. Plaintiff testified that there are numerous police reports

filed by the Horry County Police where they collected the evidence and filed reports of these incidents.

(3) Plaintiff's complaint asserts that Cartman was behaving erratically and making threats to Plaintiff's wife.

(4) That the Horry County Police suggested to Plaintiff that the resolution of this problem required that Plaintiff hire a licensed surveyor to resurvey the line, to install property stakes and that the surveyor install additional iron pipes on the boundary. Plaintiff testified that he was told that to resolve the issue and avoid a physical confrontation Plaintiff should then immediately pull a string line between the surveyor stakes and install a garden bed with edgers along side but barely into Plaintiff's property, which should resolve the issue of intent related to Cartman pounding stakes into Plaintiff's irrigation system. The Horry County police had been shown the photos of Cartman actually pounding such stakes into Plaintiff's irrigation system and other signs Cartman had installed on Plaintiff's property. A picture showed Cartman with a saw in hand emerging from a hedge largely on Plaintiff's property. These pictures are in evidence.

(5) Plaintiff testified that the ARB submission which was made with the notation that it preserved Plaintiff's objections and reservations about the IHOA's authority and the existence of any requirement for application or the existence of fence restrictions, included a request to erect a fence and another request to install the landscape edgers which were installed, and that the illustration had two lines – one for the fence which was disapproved and one for the edgers which was approved.

(6) Plaintiff testified that the IHOA has also approved those same edgers on the portion of the property line leading from the curb (actually, across the county right of way over which Plaintiff has an encroachment permit) in conjunction with a flower bed in plain view of the road, and that the edgers in the rear which are called a "wall" can not even be seen from the road.

**THE COVENANT PROVISIONS REQUIRING
PRIOR ARB APPROVAL AND
REGULATING FENCES DO NOT EXIST AND ARE NOT LEGALLY ENFORCEABLE**

The HOA asserts Plaintiff violated the provisions in the Covenant Pl # 547 which require prior HOA Architectural Review Board approval of all changes, and the covenant provision regulating fences. It attempts to enforce a non-existent covenant restriction on Fences.

Plaintiff asked the Court to declare that these provisions are unenforceable because:

- * They have been deleted.
- * They have been "waived" by inconsistent enforcement

Plaintiff also preserved his objection that the Defendant IHOA is not the homeowners' association for the Planned Unit Development and thus lacks standing in the matter.

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007; 2007 S.C. App. LEXIS 98; the SC Court of Appeals upheld the lower court decision that homeowner association regulations are unenforceable and invalid unless they are "properly signed, acknowledged, (and) or indexed". In that same case the Court of Appeals noted that

"Waiver has been defined as the intentional relinquishment of a known right. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). ... However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. citing Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In upholding the Arcadian judgment finding that the homeowners association waived its control over fences and other issues, the Court noted that

"the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

This Court is invited to examine the numerous pictures of fences throughout the neighborhood which have been expressly permitted by the HOA which fences:

- are over four feet high;
- are adjacent to a street;
- are between adjacent properties;
- are sometimes not within the approved list but never – the – less the IHOA has chosen to waive enforcement of the putative fence provision in the covenants;
- are approved projects similar to the so called "wall" which definition of plaintiff's

lawn edging Plaintiff objects to.

At trial Plaintiff asked the Court to look at the evidentiary pictures of fences and walls within the PUD which have been either approved or permitted to remain. As all photos were taken by Plaintiff from the street it is seen that all fences are visible from the street.

- Pl # 2 8 foot high plastic fence on Pickering Drive.**
- Pl # 3 8 foot high plastic fence on Pickering Drive.**
- Pl # 4 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street.**
- Pl # 5 Right side of 120 Seville - GSWSA 8 foot high wood fence.**
- Pl # 6 Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive.**
- Pl # 8, # 9, # 10 Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line.**
- Pl # 12 Similar fences at 184 Seville.**
- Pl # 13 Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth.**
- Pl # 14 Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court.**
- Pl # 15 Fence at 166 Seville.**

At trial Plaintiff testified about the background: how Cartman campaigned to deny Plaintiff the installation of a swing set in the area where the IHOA later said Plaintiff built a wall without prior ARB approval. While the matter with the Human Affairs Commission was pending, as has been related, Cartman is alleged to have been dropping used hypodermic needles on Plaintiff's yard. Pl # 620. This was perpetuated in Horry County Police reports, who came numerous times to investigate and took possession of each needle.

Carman proceeded to install stakes and no trespassing signs on Plaintiff's side of their common lot line --- destroying Plaintiff's sprinkler system in that area. On September 3, 2010 Plaintiff took a picture of Cartman pounding a stake into Plaintiff's sprinkler system on Plaintiff's side of the common lot line. Pl #621. At this time Cartman was still a member of IHOA's ARB.

Cartman also cut his own hedges, Pl #622 on September 3, 2010, and falsely accused Plaintiff's wife of doing so. Cartman later sued Plaintiff's wife in magistrate court over this but was thrown out of court for having no plausible case on a motion for summary judgment made on Jarmuth's behalf by Jarmuth's counsel of record in the case.¹⁷

At Pl #623 are several of Cartman's stakes driven into Plaintiff's sprinkler line. Cartman topped these with "No Trespassing" signs. Plaintiff ultimately complained about

¹⁷ **Cartman actually filed two such Magistrate Court Complaints, both of which were defended by Counsel and both of which never got beyond Carman's presentaiton of his putative grounds.**

this violation of the "no sign" covenant and Cartman was ordered to remove said signs and stakes.

Plaintiff discussed this trespass with the Horry County Police and rather than have Cartman arrested for vandalism, malicious destruction of property, and trespass Plaintiff took the suggestion of the Police and had his common property line professionally surveyed – an unnecessary expense.

Thereafter Cartman proceeded to try to move the survey stakes. However, at the foot of each Plaintiff had paid the surveyor to drive 2 foot steel pins at the survey points where the stakes were also placed. At Pl # 624 is a survey stake that Carman was seen, by Plaintiff, moving numerous times. Plaintiff reset this each time it was moved – to the location of the steel pin. At Pl # 625 are several pictures to show the Court the problem that the IHOA ARB official, Cartman was causing as he drove even more, larger stakes into Plaintiff's sprinkler system across the line now marked by the survey. At this point the Police suggested installing landscaping edging along the property line, exactly as the HOA had previously approved elsewhere as edging on Plaintiff's property, and as was in widespread use around the PUD.

The September 7, 2010 Complaint that Plaintiff sent the IHOA about Cartman is at Pl #626.

There is no provision in the ARB Guidelines or Covenants relating to landscaping edging. As will be reiterated, the Covenant provision relating to Prior ARB approval was "waived" as was the provision relating to "fences and walls".

On September 27, 2010 the ARB / IHOA / Defendant KA Diehl sent Plaintiff a "Violation Notice". Pl # 627. Per the letter, without a hearing or Board action, Defendant KA Diehl, acting ultra-vires, imposed a \$ 50 fine on Plaintiff. There is no covenant provision permitting a contractor to impose a fine – ever. There is no covenant provision permitting any fine of any sort by the IHOA except with the record of the board by vote recorded in the minutes of a board of directors meeting. There is no such record. This was simply Defendant KA Diehl making money for itself, because KA Diehl gets \$ 10 or more dollars per violation letter, whether they are valid or not. Again, this occurred after Plaintiff "turned Cartman in".

The letter stated that the ARB Guidelines was the source of authority.

The ARB guidelines are not the source of authority for anything. They are not even rules, although ARB rules are not able to extend the covenants.

The letter cited Section 7.2 asserting that Prior Approval of the ARB is required prior to ANY modification to the property can be done. It ignored the issue that there is no Section 7.2 any longer.

On May 5, 2010, which was several months before, at a Board Meeting, Pl # 370,

page 3 Section VI New Business para C New Violation Policy the Board announced that as of May 1, 2010 it was announced that no fine will be imposed prior to a final hearing. This is in accord with a provision, long ignored, in the purported IHOA Bylaws . Pl # 548, Bylaws page 45 Deed Book 2117 Page 1399. "The Board shall not impose a fine, suspend voting rights or infringe upon or suspend any rights of an owner unless and until the following procedures are followed" which procedures are notice and a hearing. The IHOA did not follow it's own procedure. The enforcement procedure has no provision for KA Diehl to do anything but send the notice. For Defendants it's all about the money, not covenants or rules.

The ARB Guidelines which supposedly were in effect are Pl #371.

On page numbered 2 of the document, actually the third page, Section II, Paragraph E, it lists "Items which need no approval". So KA Diehl's letter that everything needs approval is contradicted by their ARB Guidelines. More items which do not need approval were separately announced at other board meetings and homeowner correspondence from Diehl.

The Guidelines regarding landscaping are in Section L, physical page 4 numbered 3.

That section talks about not destroying large trees or bushes and doing all sorts of lawn and garden maintenance, all without ARB application or approval. There is no guidance on flower bed maintenance.

On page numbered 5 Section S is the section on Fences. Through bylaws the IHOA can not resurrect restrictions which had been clearly deleted such deletion being a clear statement that the deleted behavior is now permitted. There is nothing in this section to even suggest that this applies to lawn edging, for which there are no guidelines.

The letter cites the bylaws section on authority for enforcement, Section 13.2, proving that the author, KA Diehl employee Julie Case read the bylaws, but it ignores the section following, 13.2, Procedure, of which Diehl and the IHOA is in violation.

The Court is asked to examine section 13.2 of the Bylaws.

The Court is asked to note that in the IHOA's counter-claim it calls what Plaintiff installed a "wall". Not a fence, not landscaping. A wall.

At this point it will help if the Court Takes notice of exactly what the IHOA is calling a wall installed without obedience to the deleted 7.2 ARB Prior Approval and the deleted covenant section on fences.

The photo at Pl #21 has the view of Plaintiff's yard from Pickering Drive. The Court is asked to note the landscape edging around the tree bed to the left, the palm tree bed to the right, and around the planting bed in the front of the house. Looking along the right side of the house the IHOA claims that Plaintiff built a wall. An invisible wall.

The photo at Pl #22 is a direct on view of the supposed right end of the wall. Note the existing edging around the hedges surrounding the power box. Note the edging around the flower beds to the left and right of the power box, which have also been approved by the IHOA as edging. Then look to the left of the left hand flower bed at the same edging blocks. These are now, according to the IHOA, a wall. The photo at Pl #23 is the flower bed with edging approved by the IHOA. At #24 is a larger picture. At #25 is the same edgers approved for one of Plaintiff's Palm beds. Note that although Plaintiff has an encroachment permit from Horry County, the Palm bed is set back to the property line. This illustrates the issue of lawns which do not belong to homeowners but which extend onto the county streets.

At Photo # 26 the "wall" can be seen to the left, dividing Plaintiff's lot from Cartman's. The edgers are entirely on Plaintiff's lot. Per the suggestion of the Horry County Police this placed a line down which could not be moved without difficulty and which now protects Plaintiff's sprinkler system which has not yet been repaired. The supposed wall is from the left edge of the picture to the center. As the Court can see, it is landscaping edgers and not a wall.

If the IHOA had not interfered, a second line of edgers would have been laid and the middle area filled in as a flower bed. There has never been covenant controls over flower beds. From Pl # 27 the same edgers can be seen dividing Plaintiff's lot from his other neighbor. Somehow for eight or more years this has not been a wall.

Photo Pl #28 shows the existing flower bed which Plaintiff wants to extend. These flower beds were approved. Pl #40 and #42 show longstanding edging in other nearby homeowner's yards – across the cul de sac, which the IHOA is not calling a wall. The one at #42 belongs to John Bianchi, a former board member. Plaintiff's palm beds were modeled on his., including the edgers.

On September 29, 2010 Plaintiff paid the \$50 putative ARB "fine" which the letter said had been added to Plaintiff's "Association account in accordance with the ARB Guidelines".

The July 2010 ARB Guidelines are at Pl #371.

The July 2010 ARB Guidelines contradict the IHOA purported Bylaws, Pl 548, because the bylaws state in Section 13.3 the following:

13.3.1 A Written Demand to cease and correct the issue within ten days. No fine is provided for.

13.3.2 The Board, not the ARB, serves the homeowner with notice of a hearing the Board schedules. The homeowner does not request same. A potential fine is to be mentioned as a potential sanction if the board does not rule in the homeowner's favor at the hearing.

13.3.3 A hearing and a decision.

On September 30, 2010, the next day, Plaintiff submitted a complete ARB Application package to KA Diehl, the IHOA's contractor. Pl #629. On page 1 it contained the stipulation that it did not waive any objections to the IHOA being the association or to the validity of some or all of the covenants or rules.

On page 4 of the submission Plaintiff checked the box "lawn edging" as well as "fence".

Page 5 was a plat of Plaintiff's lot overlaid with what was desired: It showed three things:

1. Flower beds around the power box. This was seen in the pictures on either side of the power box. Pl # 24.
2. Brick edging along the property line, as suggested by the Horry County Police, all the way from the curb to Plaintiff's rear property line. This to quickly take care of Cartman's destruction of Plaintiff's sprinkler system.
3. A vinyl fence running from behind the power box all the way back to Plaintiff's rear property line.

Page 6 and Page 7 were pictures of the Vinyl Fence, typical of the fences shown in pictures of fence around the neighborhood. Both sides were "good" sides.

Page 8 thru 11 was Plaintiff's encroachment permit from Horry County to place landscaping in the area between the curb and the property line.

Page 1 related that the Horry County Police advised installing first a string line and then edging all the way along the common property line between Cartman and Plaintiff, from front pin to rear survey pin. The ARB application called for a line of edgers AND a fence, not one or the other, not the edgers up front and the fence in the back.

It is noted that vinyl fence posts embedded in concrete, Pg 6 of the application, and these support the panels, pg 7 of the application. Brick edgers are not a part of a vinyl fence. Their function was to place a mark on the ground where Cartman would thus not be able to destroy irrigation systems any further. They are not part of a fence system. They are several inches below such a fence. Vinyl fences are suspended several inches above the ground.

On October 8, 2010 Pl # 631 KA Diehl's Julie Case wrote Plaintiff on behalf of the IHOA, not of the ARB, stating that Plaintiff's request to install a flower bed and edging had been approved. The edging requested was all the way from the curb to the rear property line. This edging, which they approved, they now call a wall.

The same day Julie Case of Diehl for the IHOA wrote Plaintiff another letter, for which they earned another \$10 or more, stating that they had disapproved Plaintiff's request for a vinyl fence with a brick foundation. Actually, this is the same "edgers" that they had separately approved. As was shown by the pictures previously placed into evidence these are the same edgers which separate Plaintiff's property from the other neighbor's lot, and which surround all of Plaintiff's planting beds – and which are in common use through out the neighborhood.

On October 11, 2010, Pl # 633, Plaintiff demanded the putative appeal mentioned in the ARB Guidelines which is the same review that the Board is supposed to automatically schedule without being asked. This pointed out that Section 7.4, fences, of the covenants had been deleted as had the ARB application Section 7.2. The letter noted other infirmities, such as Bob Berman being both an ARB member and a board member, while the Covenants state a person can hold only one office at a time.

THE ABOVE DOCUMENT IS THE APPEAL THAT FREIBOTH TESTIFIED AT COURT THAT PLAINTIFF NEVER MADE.

At trial Plaintiff pointed out, and it was not controverted, that this procedure does NOT require a home owner to make an appeal but rather puts the burden on the IHOA board to schedule such an appeal, independently, to serve the notice of the hearing, to conduct the hearing "on the record of the minutes of the board" and to enter a decision "on the record" – and that no fine or suspension of rights may be made until this has all been completed AND there has been a finding on the record that a violation has occurred.

At trial Freiboth, when confronted with the document which was titled "Appeal", still claimed this was not an "appeal" because on an inner page Freiboth claimed that Plaintiff had explicitly "waived" his right to an appeal. Freiboth was insructed to read the text which did not say a waiver of an appeal but instead the text put the IHOA on notice of Plaintiff's intent to litigate this – in parallel – in court. For approximately twenty minutes Freiboth had been testifying under oath that Plaintiff had not filed anything that could be taken as an appeal and that the IHOA board had expected Plaintiff to appeal.

On October 20, 2010, based on the postmark on the envelope attached to the IHOA letter dated October 14, 2010, PI # 634 (envelope pg 2), the IHOA answered with the 6 day back dated letter through Beckie Abel of Diehl. She acknowledged receiving the letter of October 11, 2010 which was titled "Putative Appeal of October 8 2010 Disapproval of Fence". Her letter stated that

"Unless you successfully appeal the ARB decision, you must remove the brick fence foundation..."

She disregarded that the letter she referred to was an appeal. Plaintiff can not physically drag the requisite people into an appeal room. So the IHOA has refused to hold the appeal hearing – but they continue to impose an illegal fine for disregard of two non-existent covenant sections by erecting a fence that does not exist.

But that is not the end of it. On October 24, 2010, PI # 635, Plaintiff wrote the IHOA and reminded them of their refusal to follow section 13.3 of the Bylaws and their refusal to hold an appeal. There was never a response from the IHOA to this.

Plaintiff asks the Court to consider this a willful and malicious evasion of the IHOA Board's obligations and obstruction of Plaintiff's rights.

The Court is invited to draw the conclusion that Defendant has imposed a frivolous fine and frivolously and maliciously violated the implied covenant of good faith and fair dealing. Defendant is attempting Prior Restraint for which they have no legal basis to request.

On February 8, 1999 Plantation filed Covenants. # 547.
On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. The document "waived" the ARB Requirement and all fence restrictions. # 551.

Plaintiff invited the Court to take judicial notice of Black's Legal Dictionary, First Edition, Page 1231 from which it is clear that a "waiver" equates to deletion: PI #97 & 98.

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows:

"WAIVE, v. To abandon or throw away; as when a thief, in his flight,

throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*

In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.

A person is said *to waive* a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

The waiver of fence restrictions is more defining than if there had been no fence restrictions in the first place. It is an explicit act by the developer showing that it was his desire that there not be any fence restrictions. If that was not his desire, he could have modified the fence provision. He waived the complete restriction.

Likewise the requirement to seek prior approval from an Architectural Review Board. By "Waiving" this requirement instead of modifying it the developer conclusively showed his intention that homeowners should be free to use their property.

The absence of a fence restriction coupled with numerous instances where fences have been installed implicates the Arcadian Court Decision. By allowing fences in side yards and elsewhere the Defendant HOA has "waived" it's right to regulate these – if that right existed at all.

In Anderson v. Buonforte, Opinion No. 3998 , SC Court of Appeals filed June 13, 2005 the Court wrote

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." citing See Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ().

In Penny Creek v Fenwich Tarragon; 375 S.C. 267; 651 S.E.2d 617 the SC Court of Appeals held that

"restrictions on the use of property are historically disfavored. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). "Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication." Rhodes v. Palmetto Pathway Homes, Inc., 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property" Hardy, 369 S.C. at 166, 631 S.E.2d at 542".

In Cimino v Dill (1982) 108 Ill. App. 3d 782, 785, 439 N.E.2d 980 the Illinois Court

of Appeals held noted that

doubts and ambiguities in the covenants should be resolved in favor of natural rights and against restrictions (Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905),

“A waiver is a voluntary and intentional abandonment or relinquishment of a known right.” Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992).

On March 18, 2011 Defendant responded to certain Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer:

16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.

ANSWER: Listed below are the dates, names and addresses where fences have been permitted:

1. February 4, 2004 - Diskin - 505 Crawley Place
2. September 1, 2004 - Bernardo - 182 Pickering Drive
3. September 22, 2004 - Cipriani - 186 Seville Drive
4. September 28, 2004 - Tempelton - 826 Castlebridge Court
5. October 15, 2004 - Buller - 513 Dunham Court
6. February 2, 2005 - Lattig - 208 Whitchurch Street
7. March 8, 2005 - Small - 166 Seville
8. June 13, 2005 - Wronka - 170 Seville
9. August 5, 2005 - Anthony - 831 Castlebridge Court
10. August 16, 2005 - Bergman - 405 Moat Court
11. September 8, 2005 - Sweeney - 704 Hawick Street
12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court
13. March 3, 2006 - Dougherty - 280 Pickering Drive
14. March 6, 2006 - McCray - 805 Castlebridge Court
15. March 6, 2006 - Sconyers - 253 Whitchurch Street
16. March 13, 2006 - Hamden - 230 Pickering Court
17. May 3, 2006 - Walker - 849 Castlebridge
18. May 3, 2006 - Zielenski - 1019 Knightsbridge Court
19. July 11, 2006 - Boudreau - 105 Keswick Court
20. October 13, 2006 - Russell - 139 Wicklow
21. October 13, 2007 - Weibel - 252 Marbella
22. April 9, 2007 - Proctor - 174 Seville -
23. June 27, 2007 - Pappas - 501 Turret Court
24. July 3, 2007 - Benjamin - 627 Locke Court
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court

- 27. January 18, 2008 - Crawford - 521 Tamarindo Court
- 28. September 22, 2010 - Kinsey - 236 Whitchurch

The waiver did not eliminate the enforcement of the remaining restrictions. Individual homeowners or the HOA could come forward and "counsel" homeowners – after the fact – about actual violations. If a homeowner or the HOA sincerely believed a violation of the covenants existed after the fact, it could sue to enforce the covenants.

IHOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

“[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.” Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument:

COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2:

Section 2.2 reads:

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.

Unsold units incorporate single family lots on which houses have not yet been constructed.

The last paragraph of Section 7.2 read: "Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.4, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.4 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the argument is grounded in substantial law – which is not the situation here.

RELIEF REQUESTED

1. **Return of Plaintiff's \$ 50 plus interest.**
2. **An order enjoining the Defendants, all of them, from attempting to enforce Sections 7.2 and 7.4 against anyone.**
3. **Court Costs plus all other costs because Plaintiff's suit against the IHOA and other Defendants is in fact a suit to enforce provisions of the covenants and such suits are entitled to complete costs, not just court costs.**
4. **A written apology published to every homeowner for the actions against Plaintiff, stating that the ARB application process and the fence restriction do not exist.**
5. **Punitive damages in an amount to be set by the court.**

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

- DIVISION 19 -

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

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

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

“ the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.”

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

Jarmuth's Case No 2010-CP-26-11320 began as a Magistrate Court complaint with the IHOA as the single defendant. It's case number in that Court was 2010-CV-26-1072943, The IHOA filed it's Answer to that Complaint, while still in the Magistrate

Court, on November 16, 2010. The IHOA was represented in that case by McNair, the same law firm that represents all Defendants in the "3596" case, and by the same attorneys.

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

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

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

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

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

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

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

Counter – Claim Failed to State Date of Tort

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

Co – Defendant KA Diehl Has No Cause of Action

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

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

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

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

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

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

Prior Approval

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

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

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

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

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

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

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

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

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

Plaintiff at trial led Freiboth through an admission that the IHOA was not the complainant in the Human Affairs Complaint, that this was not a civil action, and that at

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

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

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

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

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

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

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

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

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

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

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

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

He admitted that Section 13.2 begins:

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

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

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

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

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

Second Prong – Brick Wall

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

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

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

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

to file an "appeal".

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

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

In this instance there was no continuing violation.

No invitation to or hearing or finding took place.

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

There are no sanctions against Plaintiff lawfully imposed.

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

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

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

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

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

Plaintiff entered into evidence Pl # 634 which is the IHOA's response to Plaintiff's October 11th 2010 Appeal. The IHOA response was mailed October 21, 2010, exactly ten days after Plaintiff mailed his appeal, to fraudulently make it look that Plaintiff had been

given timely notice to file an appeal. The IHOA letter mailed October 21, 2010, as evidence by the postmark to the IHOA envelope which is page 1 of the exhibit, and the letter at page 1 being mis-dated October 14, 2010, now stated that fines and sanctions will continue "Unless you successfully appeal the ARB decision"

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

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

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

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

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

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

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

**THE SPECIFIC ALLEGATIONS OF THE
COUNTER CLAIM ARE FALSE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The denial letter further is at odds with facts and law, because that letter also gave as it's reason for denial:

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

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

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

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

Once again, "brick wall" is alleged.

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

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

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

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

3. The allegation of Defense Counsel in this paragraph is that instead of mitigating, Plaintiff acted recklessly and "threatened to sue". The actual documents show that an action at law was not mentioned until the Plaintiff's letter to the IHOA reminding it that the IHOA Board was remiss in it's procedural obligations and that it had ignored Plaintiff's "appeal" leaving Plaintiff no recourse except an action at law. No threat was made. Plaintiff used the phrase:

"I reserve my right".

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

Again Defense Counsel uses the phrase "brick wall".

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

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

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

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

The Defense assertion of deb in paragaphs 72/44 in and of itself is fraudulent and frivolous:

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

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

At trial Beckie Abel an employee of KA Diehl who was a Defense witness was directed by Plaintiff to discuss the Community Association Institutes classes. Under oath she indicated that she had extensive training from this purported source of applicable knowledge, one area of which, Plaintiff recalls, was applicable law and procedures. Abel testified at trial that she has been engaged in home owner association management for many years and Diehl has been present since the first Board meeting of record, September 10, 2002.

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

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

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

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

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

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

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

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

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

RELIEF

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

- (1) Denial with prejudice of each and every counter - claim of the Defendants.
- (2) A finding that the Defendants IHOA and KA Diehl acted maliciously, purposely, and without authority to interfere with Plaintiff's lawful use of property.
- (3) A finding that the Defendants, both the IHOA and KA Diehl, acted fraudulently towards Plaintiff and knowingly violated the rules of procedure they stated were applicable to their actions.

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

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

- DIVISION 20 -

DEFAMATION

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

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

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

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

The deposition testimony of Rosemary Toth was that she concurred in the matter.

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

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

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

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

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

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

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

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

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

After numerous repeated professions of knowledge about the web site, Sullivan was shown page 4, which has a date of May 28, 2009. That date is significant because it perpetuates the contents of the web site at the time AND shows that on that date the web

site had been fully assembled, and that material, such as the "Click Here", had been assembled ahead of time so that the link destination would be known and the link would work. This was a lot of technical work. The material which was sent in writing also had to be uploaded to the web site and converted to Adobe Acrobat files.

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

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

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

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

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

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

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

At trial Plaintiff put into evidence Pl # 522, material he received directly from Angela Goodman the proprietor of Carolina Mail House pursuant to a subpoena duces tecum and also pursuant to a FOIA request Plaintiff submitted to the US Postal Service – after he was unable to get this material directly from the IHOA or Diehl defendants. The authenticity of the material was uncontroverted.

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

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

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

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

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

It states that:

The Sender was Julie Case.

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

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

That it was sent to PUD property owners.

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

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

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

From page 4 of Plaintiff's # 526 it may be seen, and this was not controverted, that the IHOA / KA Diehl web site contains the following:

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

The following four (4) separate documents:

- Jarmuth v Cox
- Jarmuth v Frinzi

- Jarmuth v Reynolds
- Jarmuth v Weiss

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

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

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

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

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

In his trial testimony, Plaintiff's witness Louis Astorino testified that a home owner, John Marzetti, who Astorino pointed to in the Court room, and William Fletcher, a neighbor across the street from Plaintiff who (Fletcher) at the time was an IHOA appointed member of an IHOA committee, both told Astorino that "Jarmuth is a Pedophile". Astorino further elaborated that this was after the IHOA letter about Plaintiff was mailed and that he had not heard any statement from any home owner relating to Plaintiff prior to the mailing.

Defense did not call Marzetti to contradict Astorino.

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

Plaintiff does not controvert that is exactly what they did.

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

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

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

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

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

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

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

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

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

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

Comments included that Plaintiff had caused these home owners pain and suffering,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This was a lie.

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

Their reckless disregard as well as the content of the List of Lawsuits, which was more than a list of lawsuits, injured Plaintiff in and of itself.

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

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

The List of Lawsuits

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

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

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

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

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

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

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

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

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

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

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

This was all untrue.

First, Plaintiff was represented by attorney Pamela Folickman.

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

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

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

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

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

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

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

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

Nothing could be further from the truth.

Plaintiff never sued Patterson. There was no such case.

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

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

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

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

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

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

Plaintiff testified that this was in fact a "sting" operation to deal with a dishonest DOJ contracting officer who colluded with the major contractor with the DOJ who was defrauding both the DOJ and vendors. Plaintiff testified that after the records were copied by a team of attorneys, it was proven that the contractor, with the knowledge and collusion of the contracting officer, was "selling" the DOJ non-existent Word Perfect licenses (which he had not bought for resale) and non-existent Oracle data base licenses. The contractor

had also sold the DOJ the software the DOJ used for scheduling and managing civil and criminal cases – without paying the author, and this resulted in bankrupting the firm. Plaintiff testified that ultimately the US Bankruptcy Court for the District of Columbia ordered the DOJ to pay the bankruptcy estate the proper licensing fees for that software. There were other issues such as mis-representing hardware and pricing violations.

But no case description was provided by Defendants.

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

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

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

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

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

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

This was not a civil case as home owners would understand it.

Plaintiff had a valid cause of action.

The "case" was not denied on the merits.

The complaint never asserted that Jarmuth was given a party line. Defendant's choice of text was an absolute deception.

The purported "finding" was not the "finding" of the Commission.

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

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

The description written by the Defendants themselves indicated that:

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

And by implication, Plaintiff was again pro se.

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

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

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

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

At trial Plaintiff testified as follows:

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

Case No. 11, Jarmuth v Reynolds. Plaintiff put into evidence Pl # 502, an involuntary Chapter 7 Bankruptcy Petition involving Oxana Turetsky about which more

was said later. On Page 3 it can be seen that Ern Reynolds was the attorney of record for Plaintiff.

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

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

The Defendants here wrote an untruth, that "the Appellate Court confirmed the jury verdict". This parallel case never went to the jury, which had been seated. It was dismissed on procedural grounds. The implication was that a jury had ruled against Jarmuth – a serious matter and one which carries weight for a homeowner. This never happened. Perhaps the trial court felt it was enough that Weiss was "fired for cause" by the federal government.

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

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

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

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

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

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

The Turetsky case 93-7054 is #26 on the Party Case index and was filed on April 13, 1993, in the middle of Jarmuth's DC federal case. It is nonsensical to state that Jarmuth was protesting the removal of his case to the federal court when he put it there before. The fact of the matter was that Turetsky had "removed" the case from Prince George's County in Maryland to the USDC-MD trial court although it was already moved to the federal trial court in DC, a year earlier. When the federal Maryland trial court "kicked it back" to state court, it accidentally wrote language which seemed to "dismiss" Plaintiff's claims in federal court in DC – which it could not do to a parallel trial court with prior jurisdiction. Upon information and belief, Turetsky appealed the rejection of her "removal" which was denied.

-- Conclusion --

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

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

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

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

The communications injured Plaintiff's reputation.

Relief

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

The defamatory material was emailed successfully to 354 recipients which email

redirected each one to the same material as in the postage mailing, at Defendants' web site – as if this was part of each email.

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

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

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

And to further order that

- (1) the Defendants immediately remove all material related to Plaintiff from any web site under their ownership, access or control;**
- (2) the Defendants send a letter of apology to every individual to whom they emailed or mailed the material relating to Plaintiff.**

By:

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

FORM 16
CERTIFICATE OF COUNSEL IN RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2000-CP-26-3596
Consolidated with
Case No. 2010-CP-26-11320

Ronald Jarmuth, Pro Se

Appellant

v.

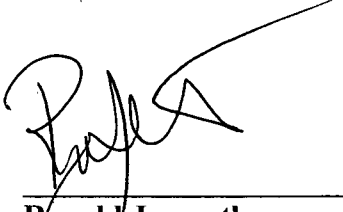
The International Club Homeowners
Association, Inc., Rosemary Toth,
and K. A. Diehl & Associates

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Record on Appeal complies with Rule 210 SCACR and contains all material proposed to be included by any of the parties and not any other material.

July 27, 2013



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

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal No. 2013000714

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth, Appellant,

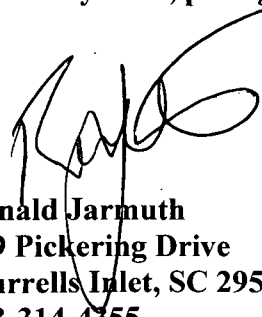
v.

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

PROOF OF SERVICE

I certify that on July 11, 2013 I hand served Appellant's Record On Appeal on Respondents through Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164; and that on July 27, 2013 I served Appellant's corrections to the Record on Appeal on Respondent's common counsel by United States Priority Mail, postage prepaid, sent to the same address.

July 27, 2013


**Ronald Jarmuth
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Appellant, Pro Se**