

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

Case No. 07-CP-18-337

D. R. Horton, Inc.,.....Plaintiff,
v.
Wescott Land Company, LLC Defendant,

Thomas R. Hawkins and Wescott Land Company, LLC,.....Appellants,
v.
D.R. Horton, Inc.,.....Respondent.

RECORD ON APPEAL VOLUME II of II

M. Dawes Cooke, Jr.
K. Michael Barfield
BARNWELL WHALEY PATTERSON & HELMS, LLC
885 Island Park Drive
Charleston, South Carolina 29492
(843) 577-7700
Attorneys for Appellants

Neil Haldrup, Esquire
Elmore & Wall, PA
P. O. Box 1200
Charleston, SC 29402
(843) 329-9500

-AND-

Charles E. Carpenter, Jr., Esquire
Carmen V. Ganjehsani, Esquire
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 900
Columbia, SC 29201
(803) 758-2886
Attorneys for Respondent

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ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

3E: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 282 through 286
CHS-05-460A

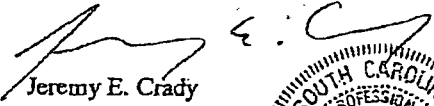
Dear Mr. Sanders:

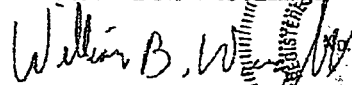
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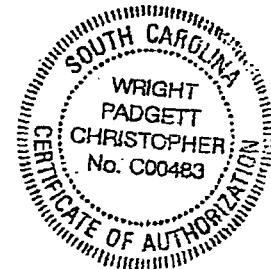
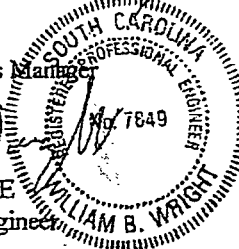
Care should be taken to verify no standing water is present within the footing excavations and any loose disturbed soils are removed prior to concrete placement. In addition to the footing depths, any organic material should be removed from the building pad area prior to placing the concrete slab.

We appreciate the opportunity to be of service on this project. If you have any questions, please contact us.

Respectfully submitted,
WPC


Jeremy E. Crady
Construction Services Manager


William B. Wright, PE
Senior Registered Engineer





ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

E: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 279 through 281
CHS-05-460A

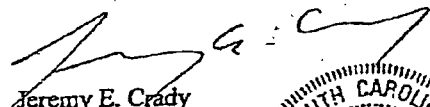
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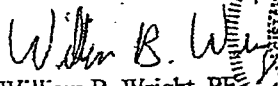
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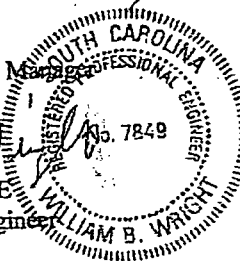
We appreciate the opportunity to be of service on this project. If you have any questions, please contact us.

Respectfully submitted,
WPC


Jeremy E. Crady

Construction Services Manager


William B. Wright, PE
Senior Registered Engineer





ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

E: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 274 through 278
CHS-05-460A

Dear Mr. Sanders:

As requested, WPC has inspected the soil conditions for foundation support for the above referenced lots at the Wescott the Farm, 3E development in Charleston, SC. Prior to our arrival, the corners of the planned buildings were flagged, and our engineering technician performed hand augers and dynamic cone penetrometer tests (DCP) at each location to a depth of 4 feet below the existing ground surface. The DCP test results and soil classifications from the hand auger cuttings were reviewed by a geotechnical engineer. Based on the fieldwork and engineering review, it is our opinion that an allowable soil contact bearing pressure of 2,000 pounds per square foot (psf) can be achieved at a minimum footing depth of 12 inches below the existing ground surface.

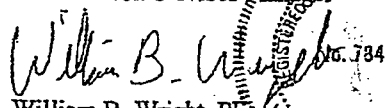
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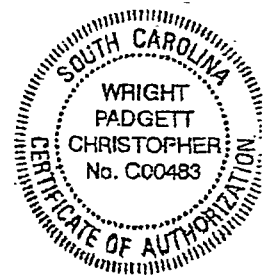
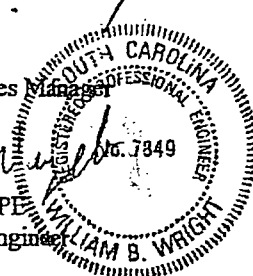
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Respectfully submitted,
WPC


Jeremy E. Crady

Construction Services Manager


William B. Wright, PE
Senior Registered Engineer





ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

RE: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 269 through 273
CHS-05-460A

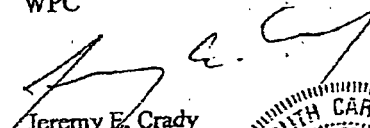
Dear Mr. Sanders:

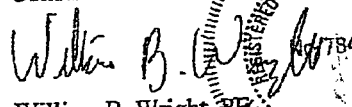
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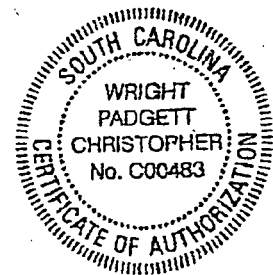
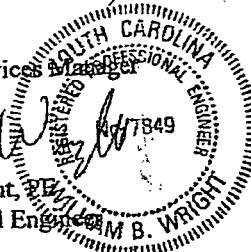
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Respectfully submitted,
WPC


Jeremy E. Crady
Construction Services Manager


William B. Wright, P.E.
Senior Registered Engineer



000394



ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

3E: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 264 through 268
CHS-05-460A

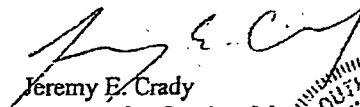
Dear Mr. Sanders:

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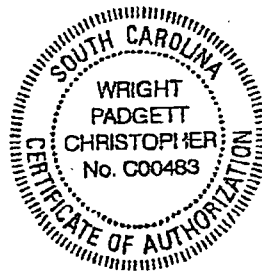
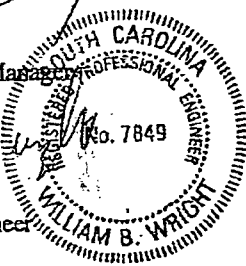
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WPC


Jeremy E. Crady

Construction Services Manager


William B. Wright, PE
Senior Registered Engineer





ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

RE: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 261 through 263
CHS-05-460A

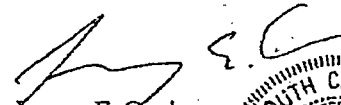
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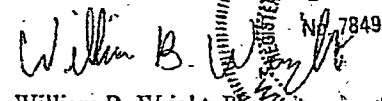
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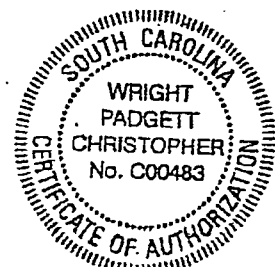
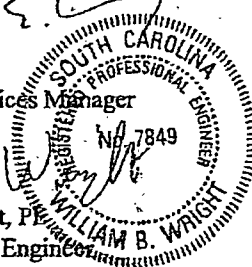
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Respectfully submitted,
WPC


Jeremy E. Grady
Construction Services Manager


William B. Wright, PE
Senior Registered Engineer





ENGINEERING, ENVIRONMENTAL
& CONSTRUCTION SERVICES

May 1, 2006

Mr. Jeremy Sanders
Carolina Clearing & Grading
7150 Byhawke Circle
Charleston SC 29418

E: Foundation Evaluations
Wescott, The Farm, 3-E
Charleston, SC
Lots 256 through 260
CHS-05-460A

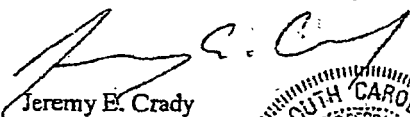
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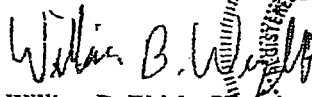
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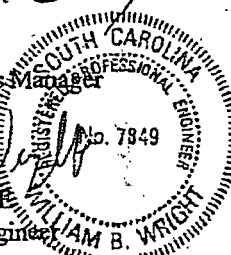
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Jeremy E. Crady
Construction Services Manager


William B. Wright, PE
Senior Registered Engineer

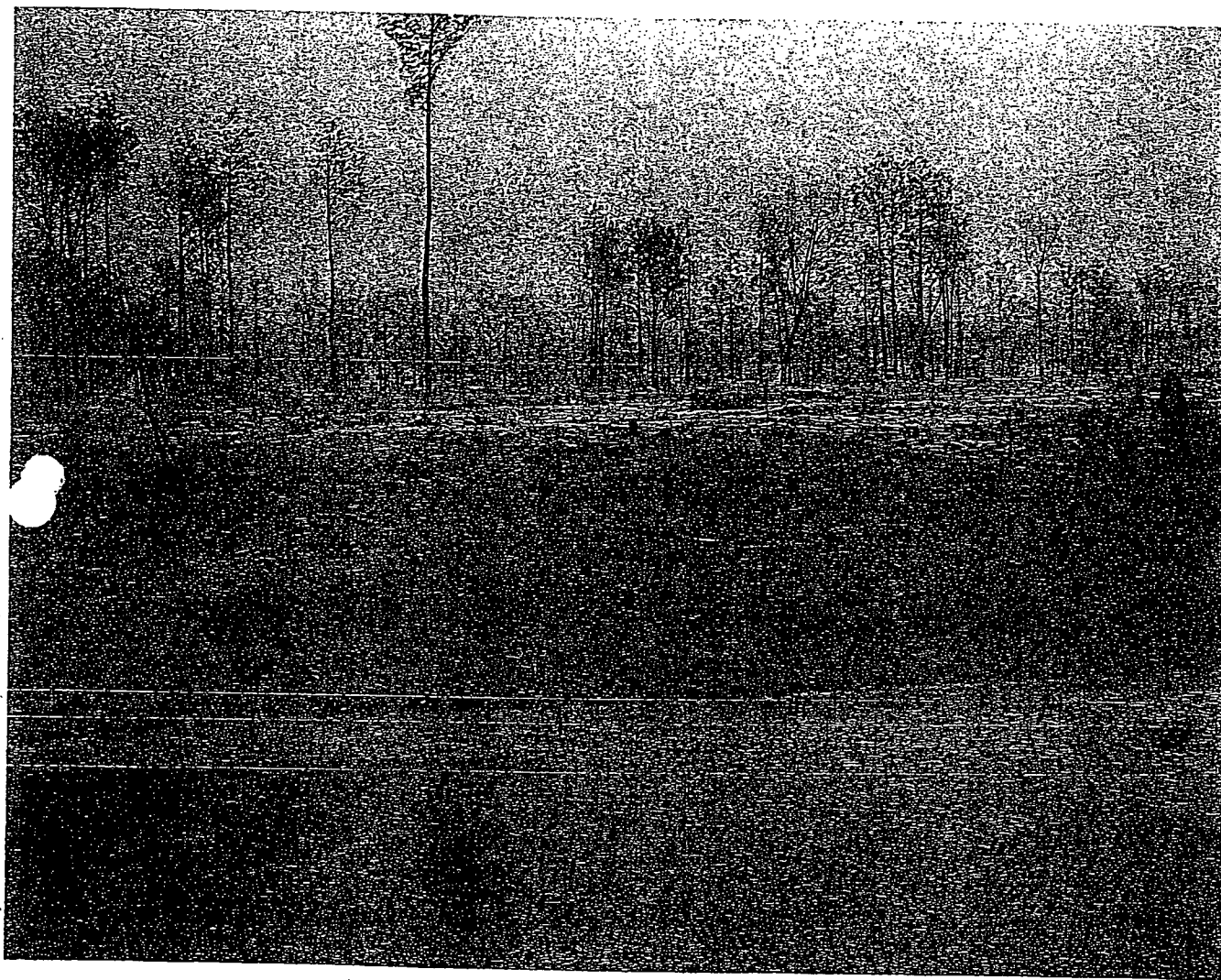


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EXHIBIT "C"

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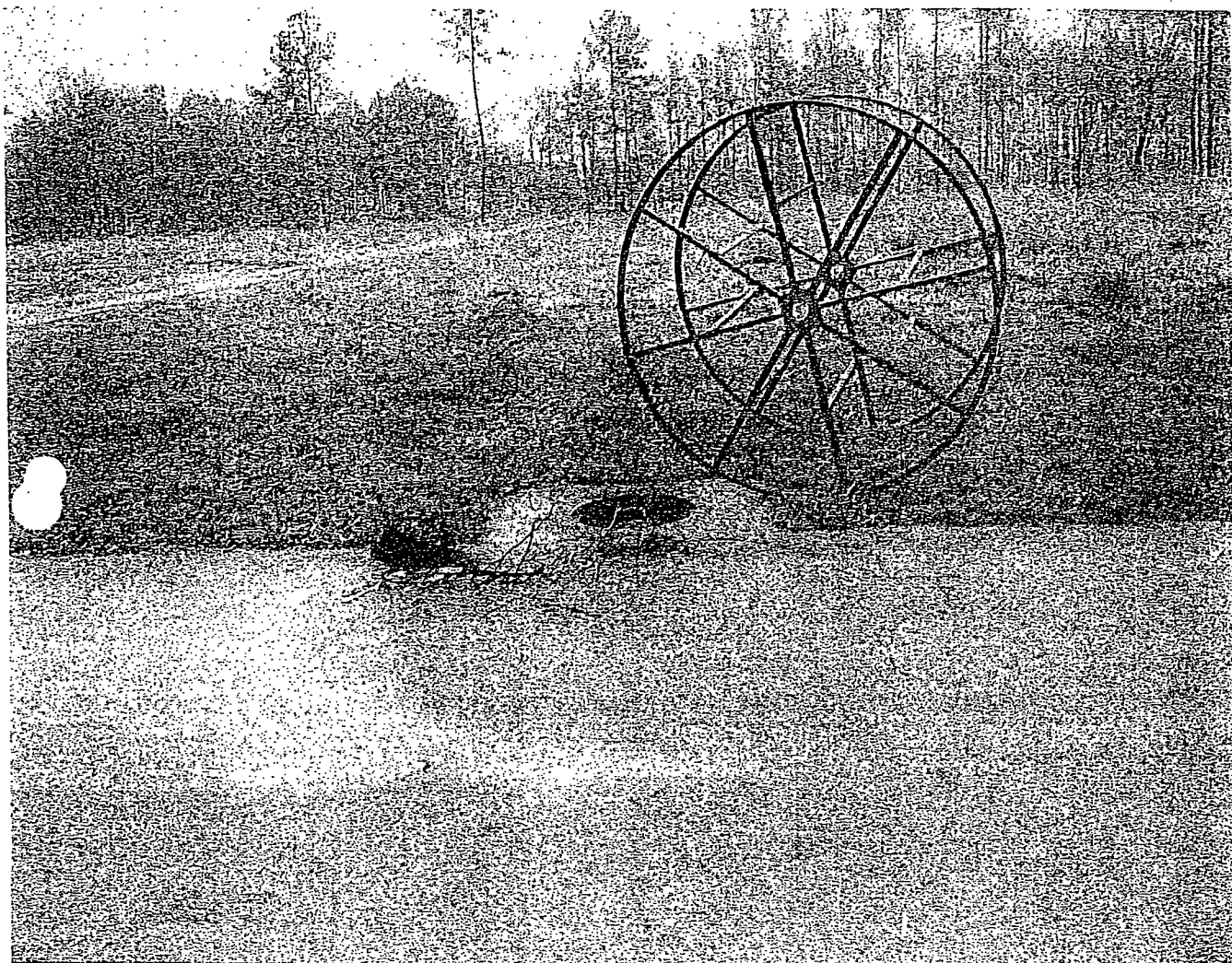
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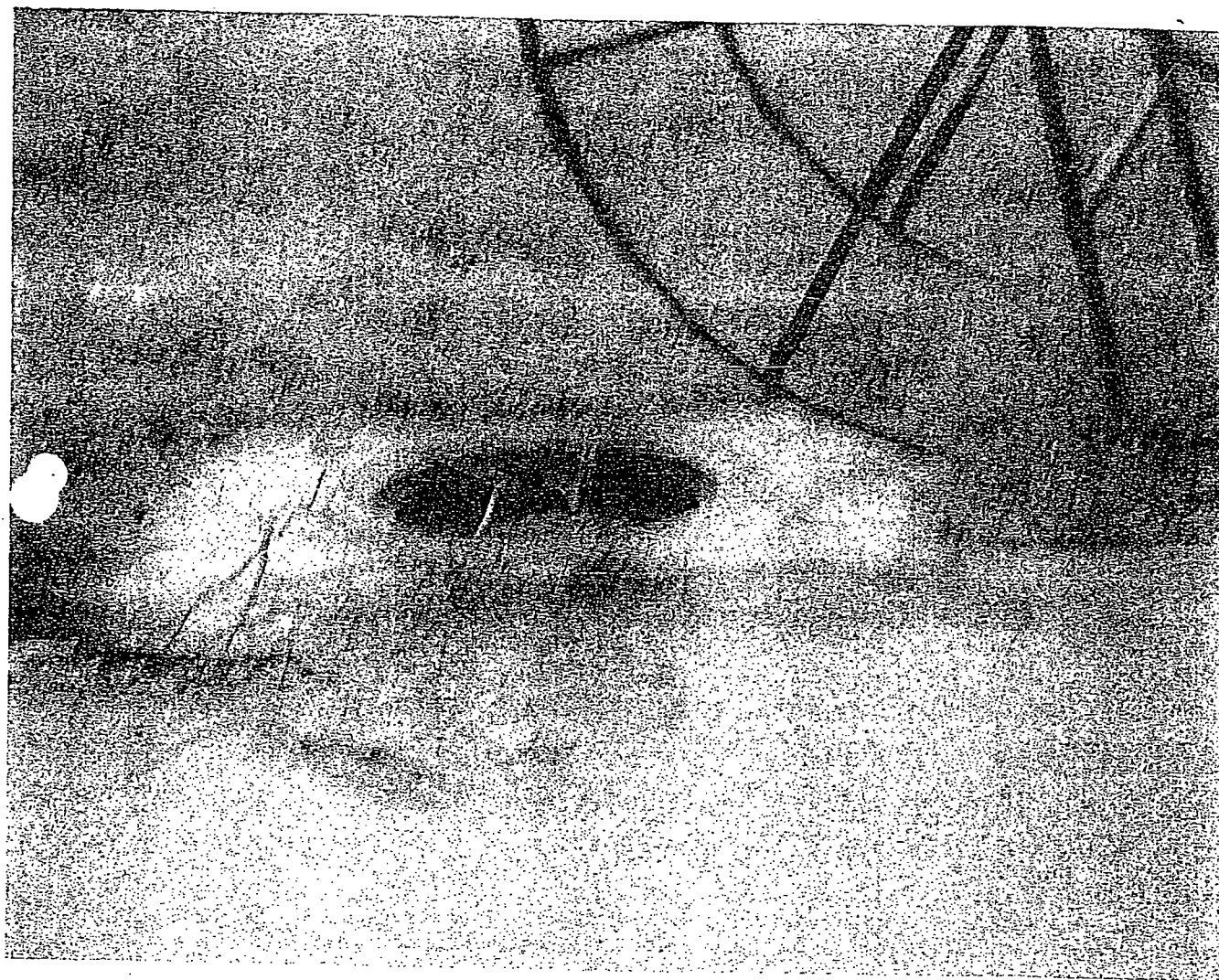
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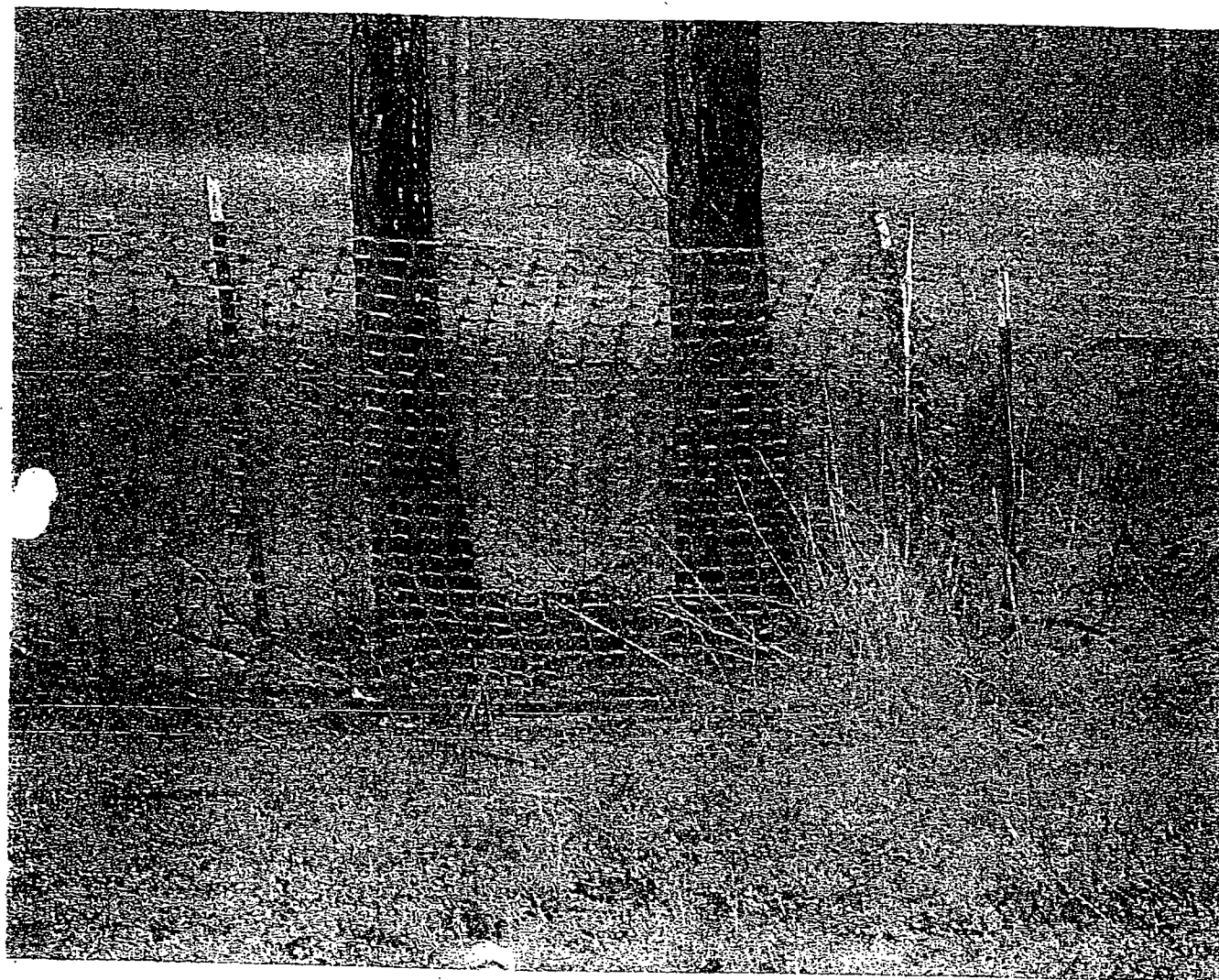
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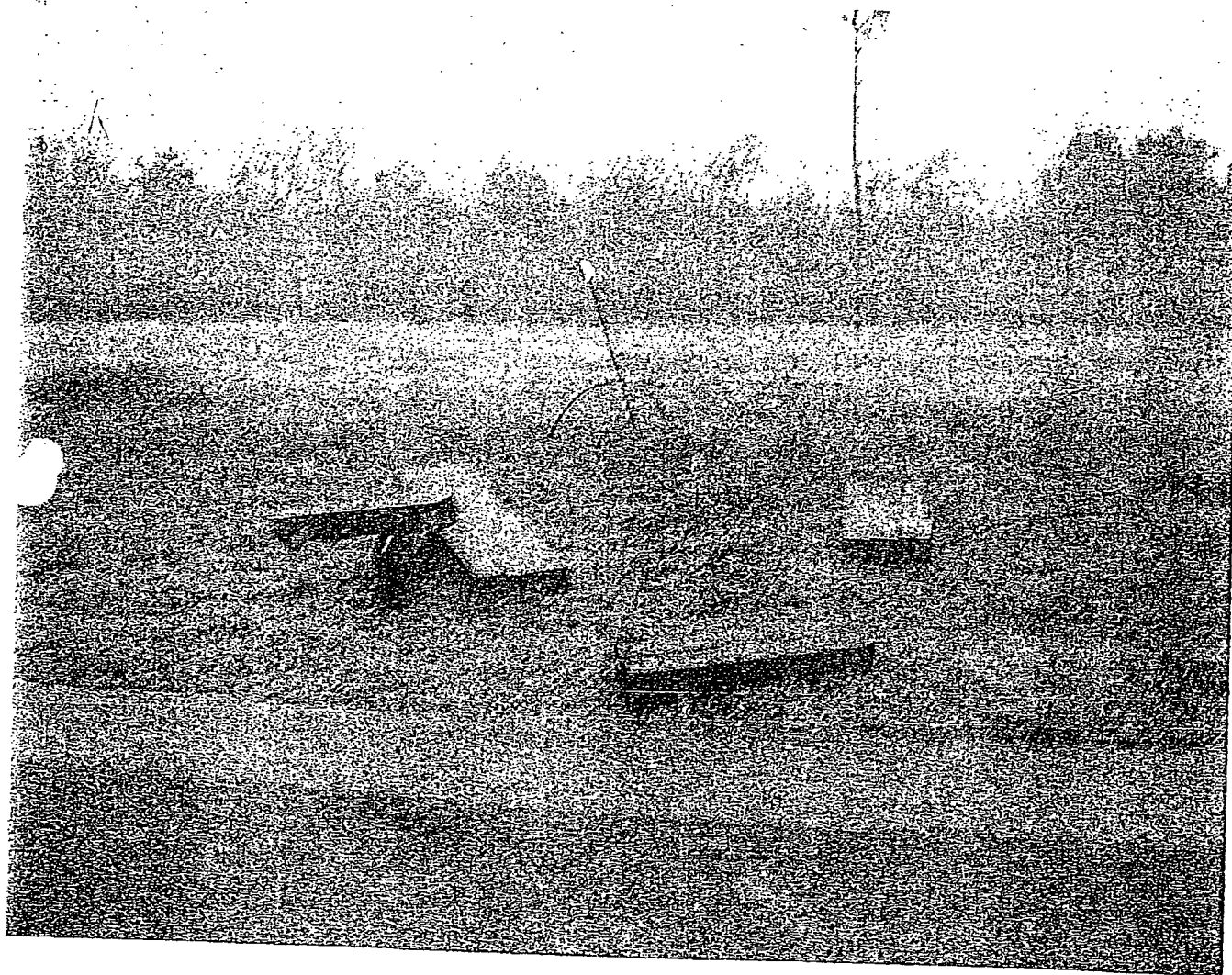
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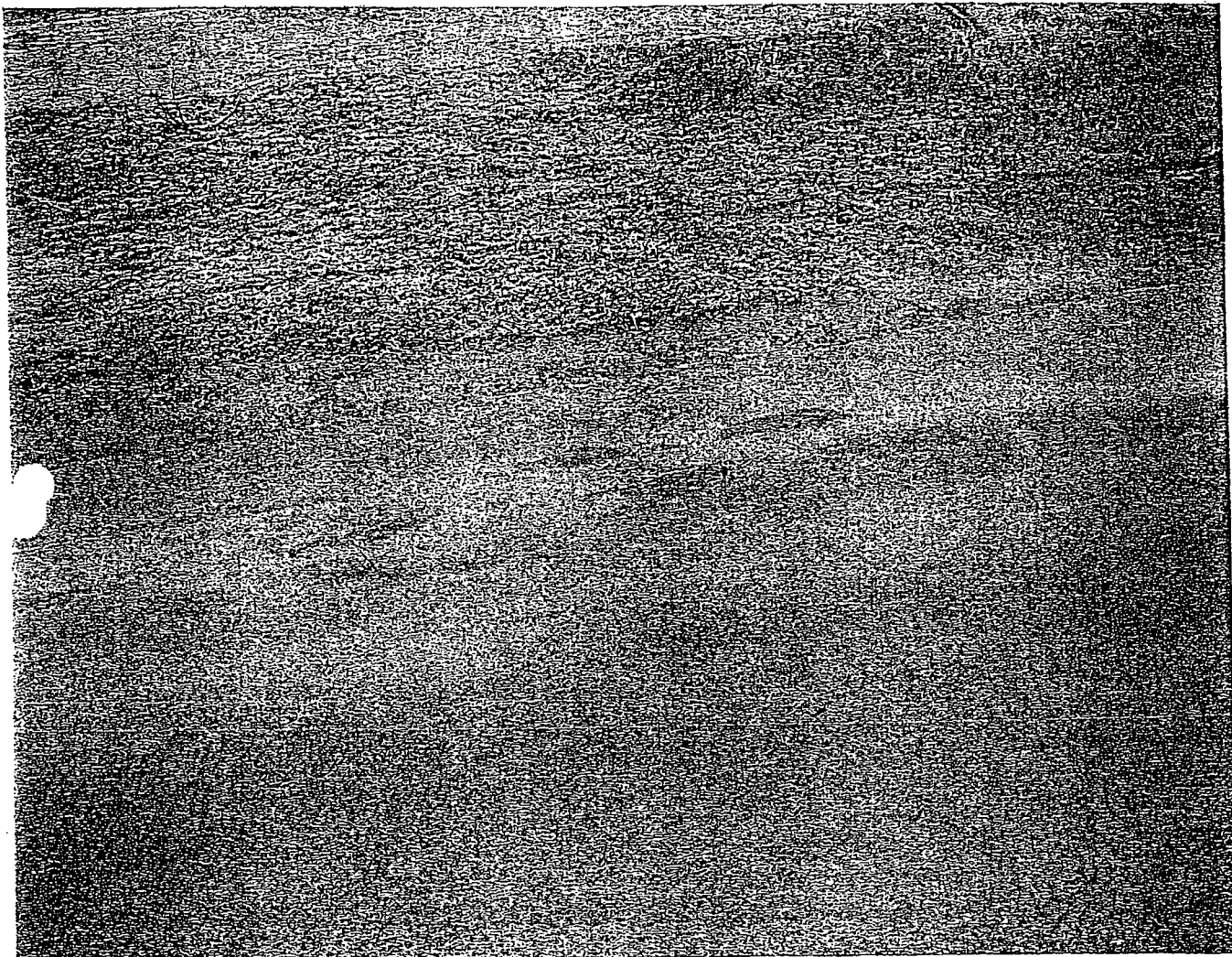
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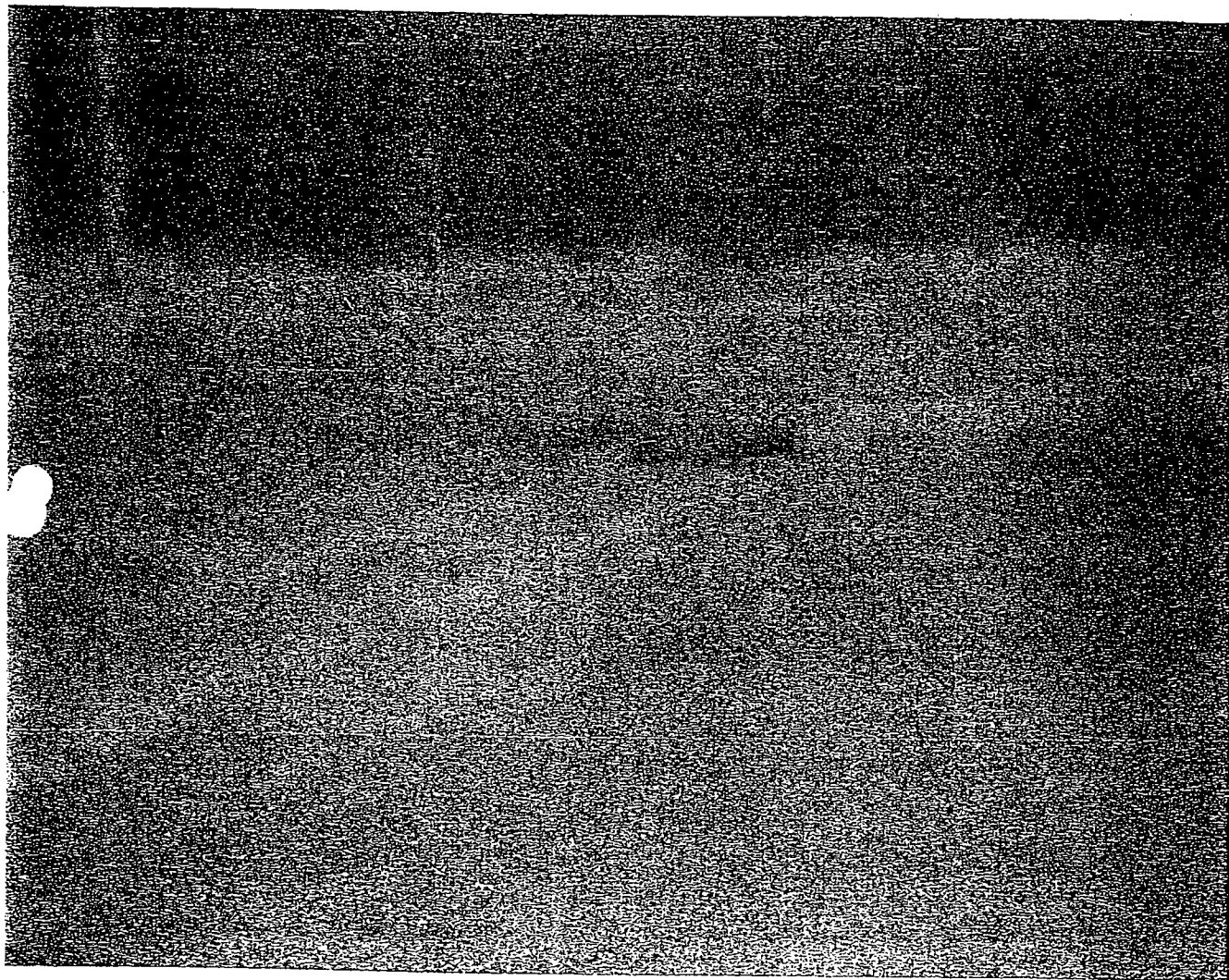


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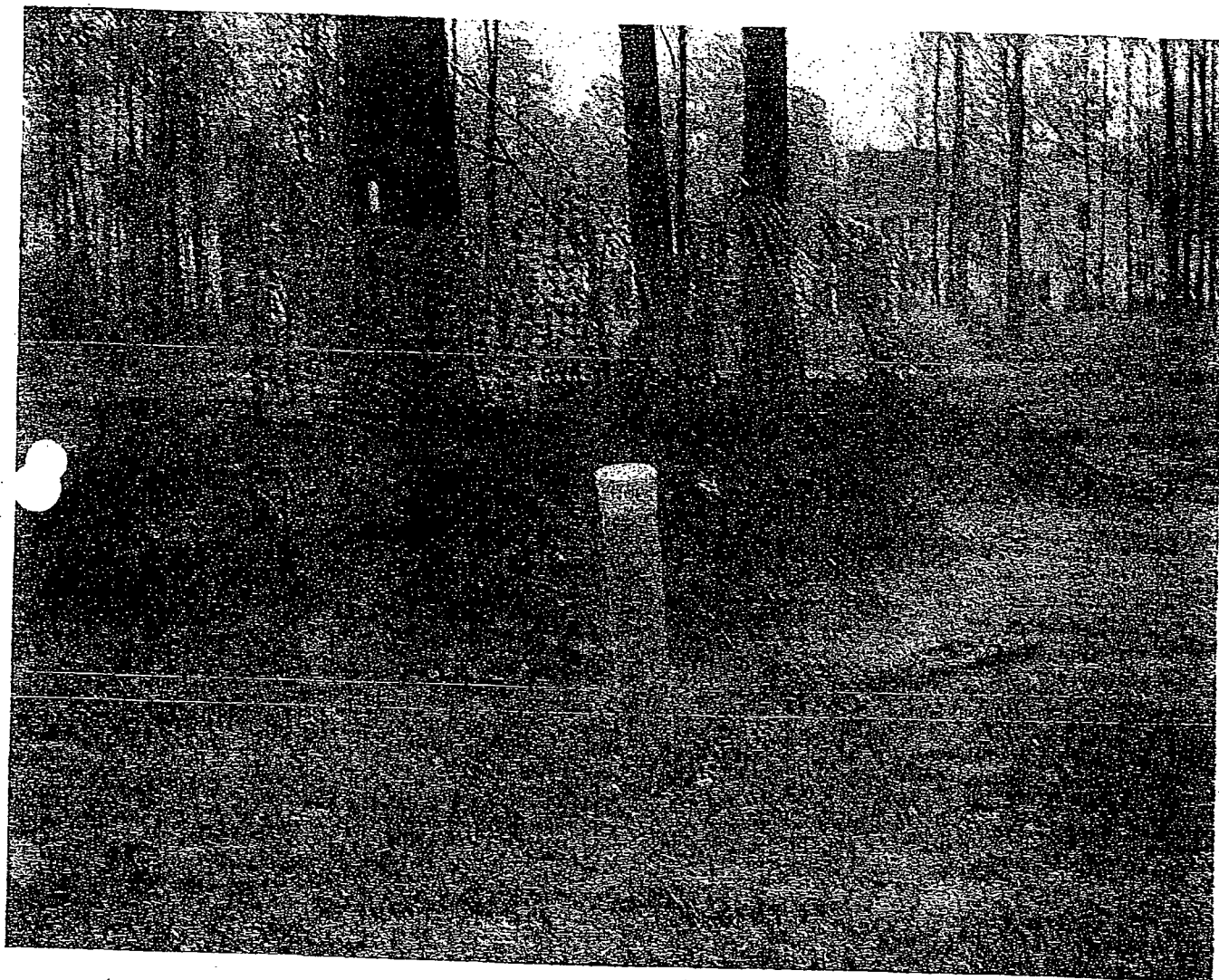




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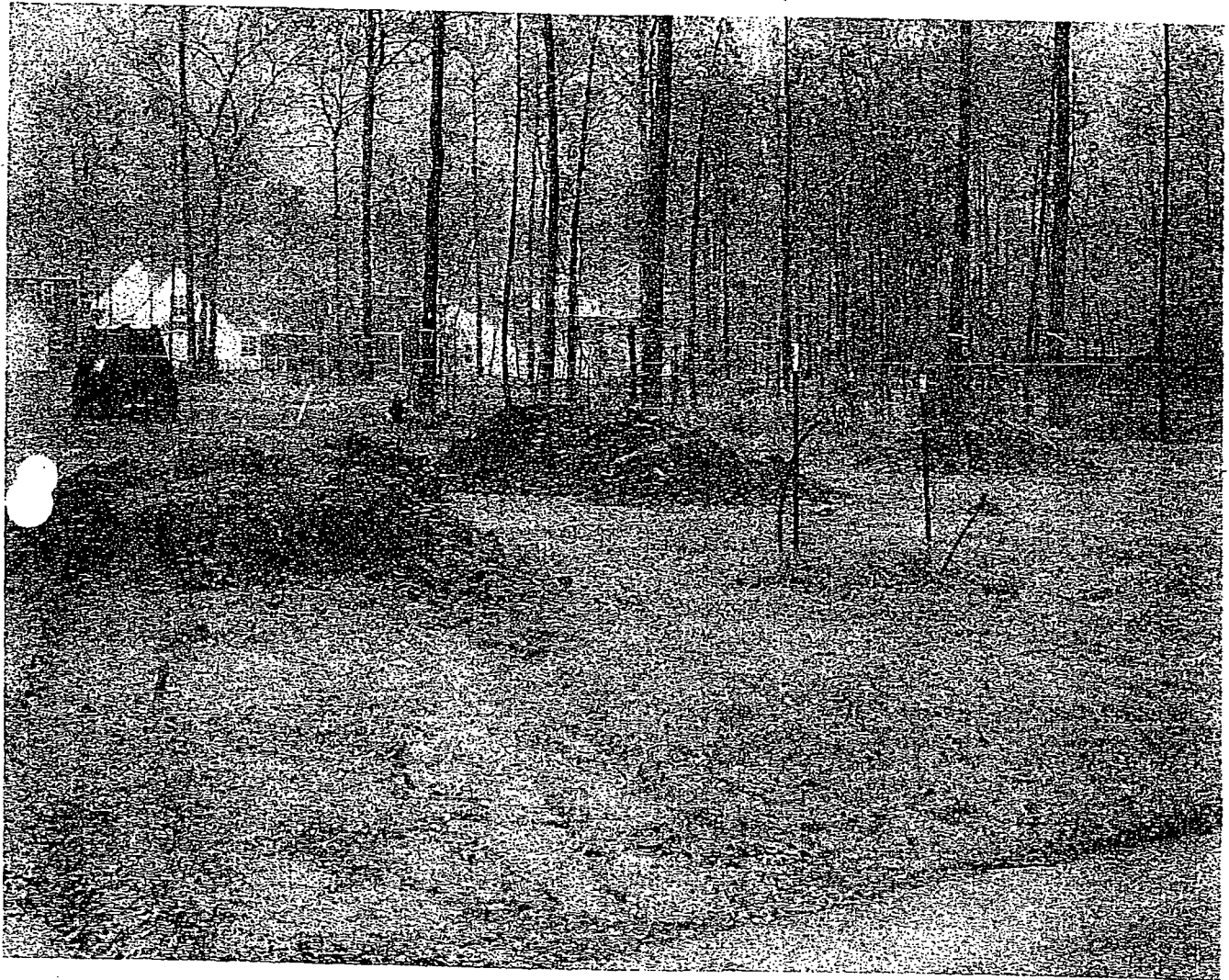
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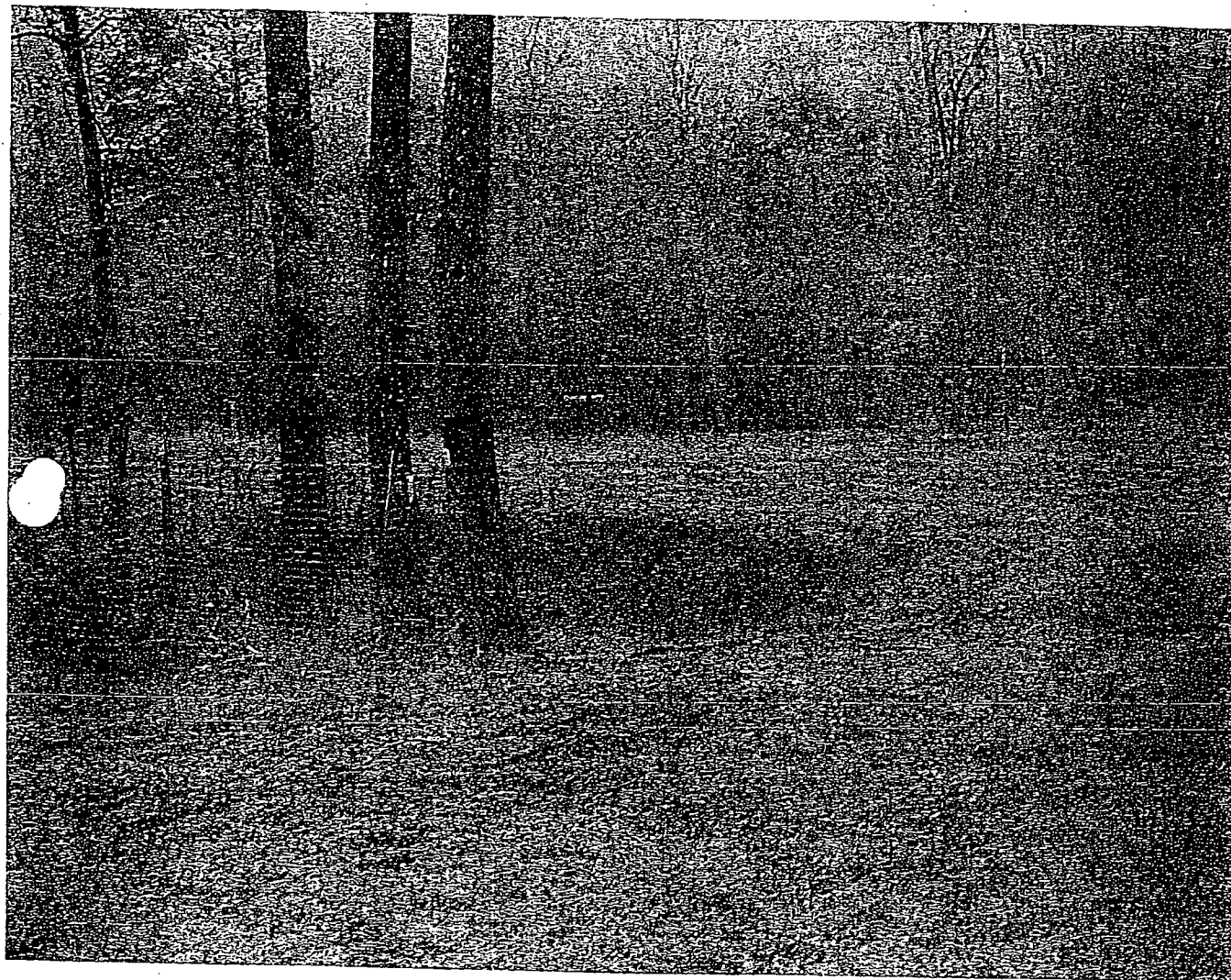
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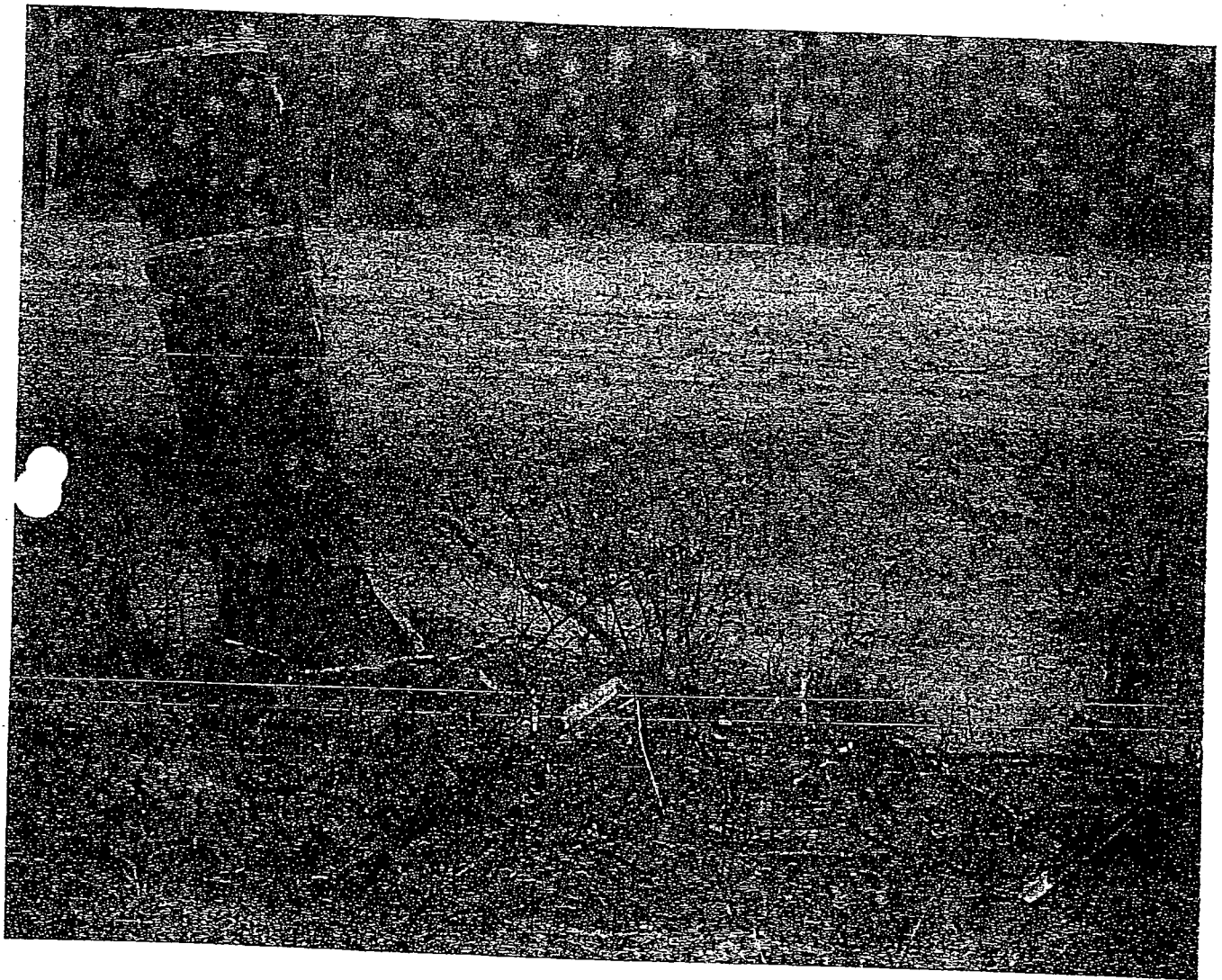
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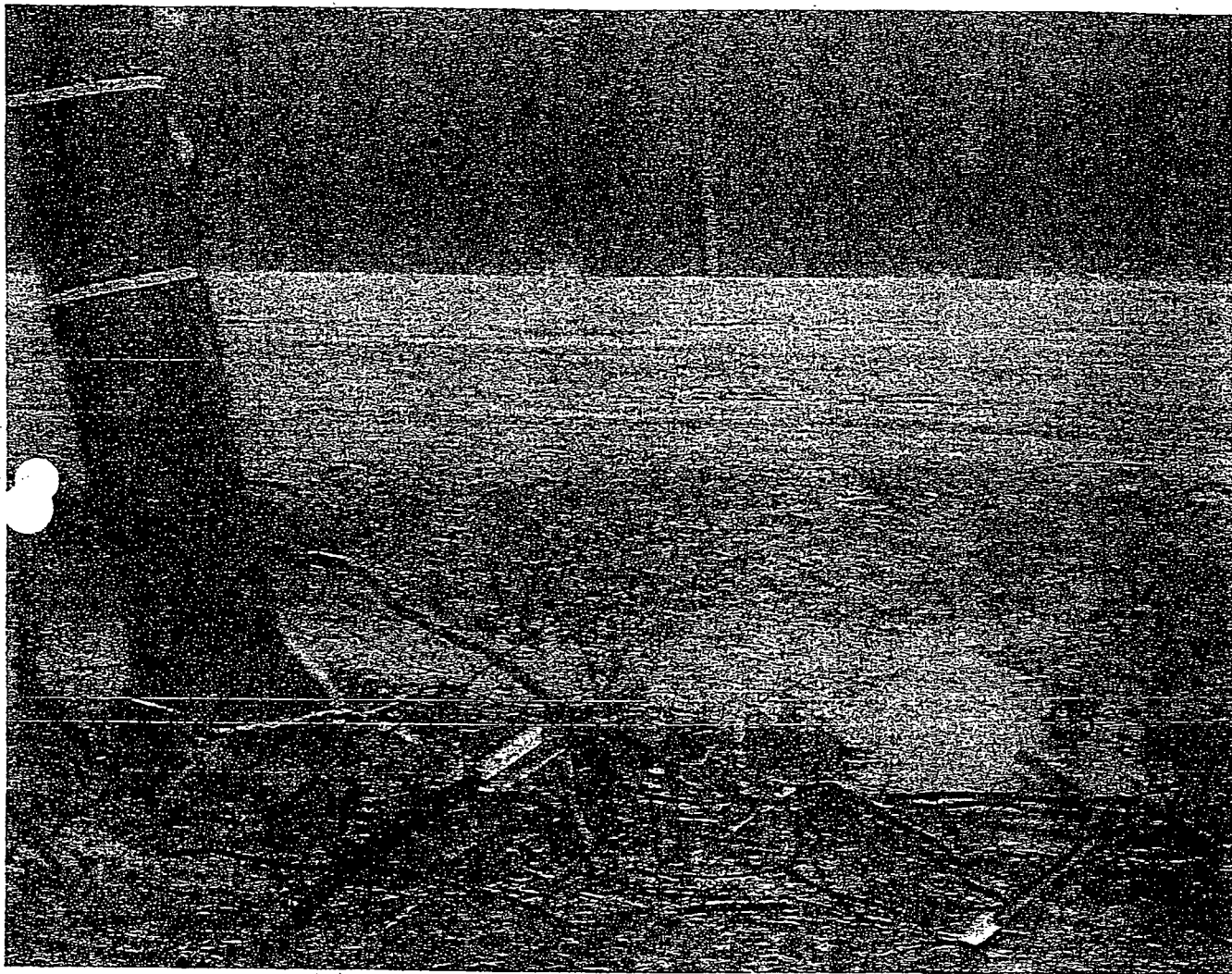
000417



000418



000419



000420

EXHIBIT “G”



O. Kenneth Bagwell, Jr.
Vice President and General Counsel
Northeast Region

August 18, 2006

VIA FACSIMILE TRANSMISSION
(Original by First-Class Mail)



Steven L. Smith, Esq.
Smith & Koontz
Post Office Box 40578
Charleston, SC 29423-0578

Re: Contract between Wescott Land Company, LLC ("Wescott") and D.R.
Horton, Inc. ("Horton") dated November 15, 2004 (the "Contract")

Dear Mr. Smith:

As promised in my letter to you dated August 11, 2006, enclosed please find a draft of the Second Amendment for your review. Horton will prepare for closing on the first takedown on Tuesday, September 5, 2006.

Best regards.

Sincerely,

O. Kenneth Bagwell, Jr.
O. Kenneth Bagwell, Jr.

OKB/vll

Xc: Doug Brown, President
Coastal Carolinas Division
D.R. Horton, Inc.

Richard Shively, City Manager
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Scott Varn, Project Manager
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

503 Wando Park Blvd. • Suite 200 • Mt. Pleasant, SC 29464 • (843) 284-5000
Fax: (843) 284-5060 • Email: okbagwell@drhorton.com

000422

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made August 21, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (37 townhouse lots) shall occur on or before September 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (37 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (36 townhouse lots) shall occur on or before March 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

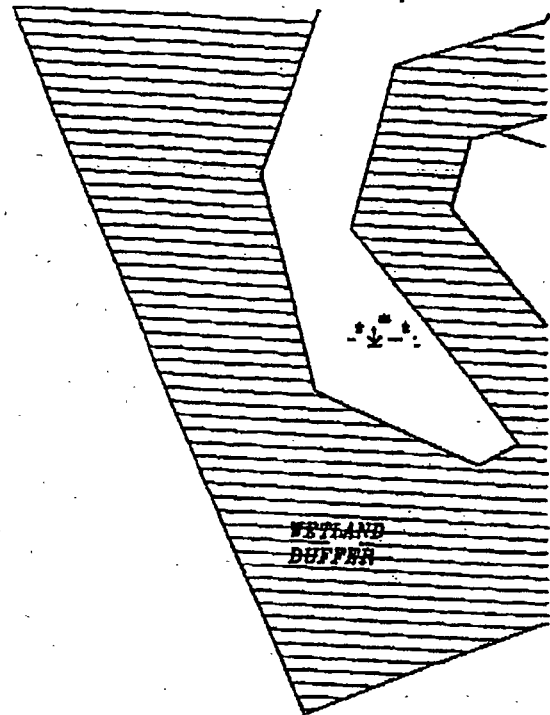
Print Name: _____

Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Utility
Plan



UNDERGROUND RESIDENTIAL DISTRIBUTION IN SUBDIVISION & APARTMENTS

THE SOUTH CAROLINA ELECTRIC & GAS COMPANY SHALL:-

1. FURNISH AND INSTALL PADS AND TRANSFORMERS.
2. FURNISH AND INSTALL U.G. PRIMARY, SECONDARY, AND SERVICES.

THE DEVELOPER SHALL:-

1. PERFORM ALL REQUIRED WORK IN ACCORDANCE WITH S.C.E.&G. COMPANY UNDERGROUND DISTRIBUTION RESIDENTIAL OR APARTMENTS & CONDOMINIUMS BOOKLET.
2. INSTALL METER SOCKET, 8' GROUND ROD, GROUND CLAMP, GROUND WIRE, CONDUIT, AND SUITABLE BUSHING. (SEE S.C.E.&G. DRAWING #9-B1.) LINE SIDE CONNECTIONS AT METER SOCKET TO BE MADE BY S.C. ELECTRIC GAS COMPANY. LOAD SIDE CONNECTIONS TO BE MADE BY DEVELOPER.
3. WHERE APPLICABLE, PROVIDE SUITABLE PROTECTION FROM VEHICLES, EQUIPMENT, ETC. PROTECTION SCHEME MUST BE APPROVED BY S.C.E.&G.

NOTES:-

1. PRIMARY CABLE TO BE MINIMUM OF 4 FEET FROM ANY BUILDING AND A MINIMUM OF 8 FEET FROM PARALLEL RUNS OF SEWER, DRAINAGE, OR WATER.
2. ALL TRANSFORMERS SHALL HAVE A MINIMUM CLEARANCE TO ANY PERMANENT STRUCTURE OF 4 FEET ON SIDES AND REAR AND 12 FEET IN FRONT. NO STRUCTURES SHALL BE ERRECTED OVER A PAD MOUNTED TRANSFORMER.
3. A 10' MINIMUM WIDTH CORRIDOR, SUITABLE FOR HEAVY TRUCK ACCESS, SHALL BE PROVIDED TO WITHIN 12' OF THE TRANSFORMER.
4. ALL PAD LOCATIONS ARE APPROXIMATE, FINAL LOCATIONS ARE TO BE SPOTTED ON JOB SITE BY S.C.E.&G. COMPANY REPRESENTATIVES.
5. METERS ARE TO BE INSTALLED ON BUILDINGS. LOCATIONS TO BE SPOTTED BY S.C.E.&G. COMPANY REPRESENTATIVES.
6. WHERE S.C. ELECTRIC & GAS COMPANY INSTALLS SERVICES, SHOULD THE SERVICE EXCEED 125 FEET, THE OWNER SHALL BE REQUIRED TO PAY IN ADVANCE THE DIFFERENCE IN COST.

*They refused to
sign because of
this.*

GENERAL NOTES

1. ALL U.G. PRIMARY UNLESS OTHERWISE
2. ALL U.G. SECONDARY UNLESS OTHERWISE
3. ALL U.G. SECONDARY UNLESS OTHERWISE
4. ALL STREET LIGHT WIRE TO BE INSTA
5. STREET LIGHTS ARE MOUNTED ON 12' (TOTAL OF 13)
6. INSTALL 12 50K

EXHIBIT "H"

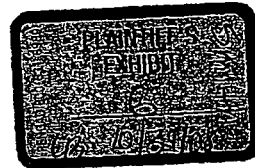
Sarah Mock

From: Mitchell M Flannery
Wednesday, September 13, 2006 1:59 PM
tdfraylick@knology.net
Subject: Farm @ Wescott
Attachments: SECOND AMENDMENT TO LAND PURCHASE CONTRACT proposed by Bagweel
B-21-06.doc
Importance: High

Tim,

Thanks for your time. As I mentioned before we have 36 units funded for takedown 1 and will agree to take 40 units down the 2nd phase and 36 the last phase. I do not want to have to send this \$\$ back and ask for it again at a later date but if we can not close in the next 2 weeks I will be forced to send it back. I am going to propose to my Division President that we possibly shrink the takedowns to 2 months apart rather than 3 months apart with the first closing immediately. We both are pretty adamant about how we view the contract so it will not benefit either party if we start butting heads. I will get back with you shortly.

Mitchell



SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made August 21, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (37 townhouse lots) shall occur on or before September 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (37 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (36 townhouse lots) shall occur on or before March 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

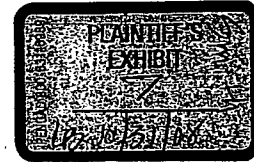
Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Sarah Mock

From: Mitchell M Flannery
nt: Monday, September 18, 2006 9:38 AM
tdfraylick@knology.net
cc: Taylor, Gray; Larry Dodds
Subject: 2nd Amendment - Modified for Takedown Schedule
Attachments: 2nd Amendment 9-18-06 - Modified by Flannery.pdf
Importance: High



Tim,

As I mentioned last week we have 36 units funded and I need to either close on this in the next few weeks or I'll have to send the money back to corporate and that isn't always a good thing. As we discussed both groups do not see eye to eye as the contract stands and if we don't amicably try to move forward we are going to get into something we both don't want to deal with. To give a little I am proposing to shrink the takedown over 2 months rather than 3 and basically if we can close now you are really only 4 months out of this phase being completely taken down. If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal. I have not run this by corporate but I have run our numbers and shrinking to two months may work. Please call me today to discuss what direction you all would like to take so we can prepare the closing. Thanks

Mitchell M. Flannery
Land Acquisition Manager
Coastal Carolina Division
Hilton Head / Savannah / Charleston / Myrtle Beach / Wilmington
D.R. Horton
America's Bullder
Direct Line Myrtle Beach: 843-652-2309
Direct Line Charleston: 843-284-5034
Cellular: 843-318-1253
E-Fax: 469-522-8236

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made September 18, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (36 townhouse lots) shall occur on or before October 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (40 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (34 townhouse lots) shall occur on or before February 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Maureen Bowler



From: Shetterly, Mike M. [Mike.Shetterly@ogletreedeakins.com]
nt: Friday, January 12, 2007 3:11 PM
ssmith@scnlaw.com
Subject: FW: PDF File - Microsoft Word - Westcott amended contract amendment_doc
Attachments: PDF Document - Microsoft Word - Westcott amended contract amendment_doc

As I mentioned, this has not been approved by the region's general counsel. Once we think we have it in line with what everyone wants, we will run it up in the hopes we only have to do it once. Let me know your thoughts.

Mike

Michael M. Shetterly | Ogletree Deakins | 300 North Main Street (29601) Post Office Box 2757, Greenville, SC 29602 | Telephone (864) 271-1300 | Facsimile (864) 235-4754 | mike.shetterly@odnss.com | www.ogletreedeakins.com

Unless expressly stated to the contrary herein, (a) nothing contained in this message was intended or written to be used, can be used, nor may be relied upon or used, by any taxpayer for the purpose of avoiding penalties that could be imposed upon the taxpayer under the Internal Revenue Code of 1986, as amended; and (b) any written statement contained herein relating to any federal tax transaction or issue may not be used by any individual or entity to, recommend or support the promotion or marketing of any such transaction or issue.

This transmission is intended by the sender and proper recipient(s) to be confidential, intended only for the proper recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that the dissemination, distribution or copying of this message is strictly prohibited. If you receive this message in error, or are not the proper recipient(s), please notify the sender at either the e-mail address or telephone number above and delete this e-mail from your computer. Receipt by anyone other than the proper recipient(s) is not a waiver of any attorney-client, work product, or other applicable privilege. Thank you.

-----Original Message-----

From: PDF Printer [<mailto:helpdesk@odnss.com>]
Sent: Friday, January 12, 2007 3:10 PM
To: Shetterly, Mike M.
Subject: PDF File - Microsoft Word - Westcott amended contract amendment_doc

Attached is the PDF document that you recently printed. Adobe Acrobat Reader is necessary to view this file. Acrobat Reader can be obtained from <http://www.adobe.com/products/acrobat/readstep.html>

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

SECOND AMENDMENT TO
CONTRACT OF SALE

The Parties to this amendment are D.R. Horton, Inc., a Delaware Corporation (Purchaser) and Westcott Land Company, LLC, a South Carolina Limited Liability Company (Seller). Where referred to together, the two entities shall be referred to as the "Parties."

WHEREAS, the Parties entered into a contract of sale of land dated November 15, 2004, which was from time to time amended; the subject of that property was more specifically defined in the agreement, but generally concerned all or certain portions of land reflected in plats on file in Dorchester County bearing T.M.S. Numbers 163-00-00-006 and 163-00-00-008 (Hereinafter referred to as the "Agreement");

WHEREAS, the Purchaser has purchased most of the land pursuant to that agreement and its amendments;

WHEREAS, the Parties are in dispute about several issues concerning the remaining property to be purchased under the contract;

WHEREAS, the Parties desire to resolve all differences concerning the respective obligations of the parties under the prior contract and its amendments, and to enter into this amendment, but neither party desires to waive their rights to argue their respective positions and contentions concerning the first contract, should the terms of this amendment not be fully executed or complied with by the Parties;

AND WHEREAS, as it relates to the prior portions of the above described property that have already been purchased by Purchaser prior to the date of execution of this agreement, the parties wish to agree that any and all rights, promises, warranties, obligations, and liabilities set forth in the above referenced Agreement that survived the issuance of the deeds conveying other portions of the property set forth in the Agreement are not affected or modified by this amendment.

NOW THEREFORE, for and in consideration of the mutual promises and agreements set forth herein, the parties agree to amend the above referenced contract and close on the remaining portion of the contract as follows and under the following conditions:

I. DESCRIPTION OF REMAINING PROPERTY.

The parties agree that the Property subject to this amendment is all that remains of the property contemplated to be sold under the above referenced Agreement, together with all contemplated improvements thereon. The property to be conveyed is a developed tract of 110 town-home lots, described in the above referenced agreement as phases 3E-1,

3E-2, and 3E-3. More specifically, those phases comprise the entire portion of the following property description:

ALL that certain piece, parcel, or tract of land together with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres as designated on plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deeds Office for Dorchester County in Plat Cabinet L at Page 15 on June 22, 2006. Said tract having such size, shape, dimensions, buttings, and boundaries as will be referenced to said plat more fully appear.

BEING a portion of that property conveyed to Wescott Land Company, LLC by herein by deed of Tommy R. Hawkins, dated June 30, 2005, and recorded in the ROD Office of Dorchester County in Book 4795 at page 232 on July 6, 2005.

Said portion being a part of TMS No. 163-000-000-006.

II. NON-WAIVER.

To the extent this agreement is fully executed by both Parties, the above Agreement is valid, enforceable and modified only to the extent set forth in this Amendment. However, the parties execute this Amendment with the understanding that there is a dispute about whether the prior contract has been properly terminated. Seller takes the position that the above referenced contract was properly terminated and is no longer in effect as a result of Purchaser not purchasing the entire tract of remaining property within Seller's contention of the proper timeline, with cure periods having expired. Purchaser disputes that contention and asserts it has always had the right to close on the property in phases and that it attempted to do so, but was rebuffed. Purchaser also contends Seller has failed to perform certain conditions precedent to Purchaser's performance, and therefore, no obligation to purchase on the remaining property has matured. Seller disagrees with these contentions. There is also a dispute between the parties about who owes the 2006 taxes on the Property. The Parties agree that unless this amendment is fully executed by both parties, and Purchaser fully performs as set forth herein (unless the failure to perform is solely caused by Seller), that neither party has waived any position taken on the enforceability of the above referenced Agreement, or any breach thereto.

III. SALE AND PURCHASE OF THE PROPERTY.

Purchaser agrees to waive any right it may have to a phased takedown and to purchase the Property in its entirety on or before February 2, 2006, and Seller agrees to sell Purchaser the Property at that time and in a manner and in accordance with the provisions of the Agreement, together with all warranties, representations, and conditions precedent contained therein.

Purchaser agrees to pay a total of three million three hundred thousand dollars (\$3,300,000.00) for the Property. Said amount shall be paid to Seller, minus one hundred sixty thousand dollars (\$160,000), which shall be placed in Escrow as described in section IV(b) below (Post Closing Escrow).

Purchaser agrees to pay any 2006 property taxes assessed on the Property by Dorchester County over and above the standard agricultural rates that would have been assessed had the Property not been improved.

IV. ESCROWS.

a. Upon closing and conveyance of the above described property, any and all Earnest Money, letters of credit, or other notes deposited in the Escrow Account pursuant to Section 1(c) of the Agreement (hereinafter referred to as "Earnest Money") shall immediately be returned to Purchaser.

b. Post Closing Escrow. At closing, one hundred sixty thousand dollars (\$160,000) of the purchase amount shall be placed into an escrow account deposited with Dodds and Hennessey, L.L.P. (the "Escrow Agent"). Said amount shall be held by the Escrow Agent until Seller has performed all work described herein in section V below. If Seller fails to satisfactorily perform all of such work to Purchaser's satisfaction (which the parties agree shall be determined by Thomas and Hutton Engineering acting in its corporate capacity. Upon Thomas and Hutton's refusal to act in such capacity, then upon the mutual agreement of a third party engineer, which shall not be unreasonably withheld, and upon an inability to agree upon a third party engineer, then upon Purchaser's reasonable interpretation of the work described in part V below). The work described in part V below must be satisfactorily performed within two (2) weeks after closing date. Any delay in performance or completion of said work beyond the two (2) week period, then Purchaser may receive a return of the amount of Escrow funds payable to Seller by one thousand (\$1000) dollars per day until completed.

V. SELLER'S POST CLOSING OBLIGATIONS.

That within two weeks after Closing, Seller will perform the following work at its own cost and to Purchaser's satisfaction, as defined in IV(b) above:

a. To make each of the 110 lots has a non-graded building pad which is at least fifty feet (50') wide and sixty feet (60') deep, and is a minimum of twelve inches (12") above curb;

b. To make each of the 110 lots graded flat, constructed at ninety-five percent (95%) compaction as tested by Thomas and Hutton engineer, together with proper compaction of 2000 PSF and is located within any applicable setbacks;

c. To clear the Property of any trash, construction materials, debris, brush, partially constructed buildings, and materials;

d. To clean all stormwater drains from any debris that washed into the roads and storm drains;

e. That Seller shall grade and rework the storm drainage on the back side of the Property to make it consistent with the proposed plan submitted by _____ in _____.

VI. RIGHT TO CURE SECTION.

For purposes of the following obligations set forth in this amendment, the right to cure section in the Agreement is not applicable, and time is of the essence:

- a. Purchaser closing and tendering funds by February 2, 2006;
- b. Seller's performance of the post closing work described in Section V.

For all other obligations on the part of either party, the right to cure section in the Agreement still applies.

VII. CORPORATE APPROVAL OF CONTRACT BY OFFICER OF PURCHASER. Notwithstanding anything contained in this Amendment to the contrary, neither this contract, nor its superseding of the Prior Agreement, shall be valid and enforceable obligation of purchaser unless the Agreement is executed by either one of Donald R. Horton, Donald J. Tomnitz, or Brian Gardner, each an officer of the purchaser, within 10 days of execution of Purchaser's representative.

IN WITNESS HEREOF, the Parties hereto have executed this Contract in multiple copies, each of which shall be deemed to be an original, on the dates set forth below.

WITNESS:

SELLER:

Westcott Land Company LLC

By: _____

Its: _____

Date of Execution

PURCHASER

D.R. Horton, Inc. (a Delaware Corp)

By: _____

Its: _____

Date of Execution

Corporate approval:

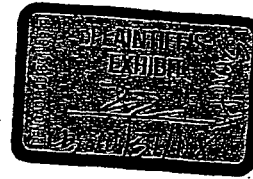
By: _____

Title: _____

Date of Execution

Maureen Bowler

From: Steve Smith [ssmith@scnlaw.com]
Sent: Tuesday, January 16, 2007 2:46 PM
To: Shetterly, Mike M.
Subject: amended version from Smith
Attachments: Westcott amended contract amendment.doc



From: Shetterly, Mike M. [mailto:Mike.Shetterly@ogletreedeakins.com]
Sent: Tuesday, January 16, 2007 2:05 PM
To: ssmith@scnlaw.com
Subject: Word version

<<Westcott amended contract amendment.doc>>
Per your request.

Michael M. Shetterly | Ogletree Deakins | 300 North Main Street (29601) Post Office Box 2757, Greenville, SC 29602 | Telephone (864) 271-1300 | Facsimile (864) 235-4754 | mike.shetterly@odnss.com | www.ogletreedeakins.com

Unless expressly stated to the contrary herein, (a) nothing contained in this message was intended or written to be used, can be used, nor may be relied upon or used, by any taxpayer for the purpose of avoiding penalties that could be imposed upon the taxpayer under the Internal Revenue Code of 1986, as amended; and (b) any written statement contained herein relating to any federal tax transaction or issue may not be used by any individual or entity to, recommend or support the promotion or marketing of any such transaction or issue.

This transmission is intended by the sender and proper recipient(s) to be confidential, intended only for the proper recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that the dissemination, distribution or copying of this message is strictly prohibited. If you receive this message in error, or are not the proper recipient(s), please notify the sender at either the e-mail address or telephone number above and delete this e-mail from your computer. Receipt by anyone other than the proper recipient(s) is not a waiver of any attorney-client, work product, or other applicable privilege. Thank you.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

SECOND AMENDMENT TO
CONTRACT OF SALE

The Parties to this amendment are D.R. Horton, Inc., a Delaware Corporation (Purchaser) and Westcott Land Company, LLC, a South Carolina Limited Liability Company (Seller). Where referred to together, the two entities shall be referred to as the "Parties."

WHEREAS, the Parties entered into a contract of sale of land dated November 15, 2004, which was from time to time amended; the subject of that property was more specifically defined in the agreement, but generally concerned all or certain portions of land reflected in plats on file in Dorchester County bearing T.M.S. Numbers 163-00-00-006 and 163-00-00-008 (Hereinafter referred to as the "Agreement");

WHEREAS, the Purchaser has purchased most of the land pursuant to that agreement and its amendments;

WHEREAS, the Parties are in dispute about several issues concerning the remaining property to be purchased under the contract;

WHEREAS, the Parties desire to resolve all differences concerning the respective obligations of the parties under the prior contract and its amendments, and to enter into this amendment, but neither party desires to waive their rights to argue their respective positions and contentions concerning the first contract, should the terms of this amendment not be fully executed or complied with by the Parties;

AND WHEREAS, as it relates to the prior portions of the above described property that have already been purchased by Purchaser prior to the date of execution of this agreement, the parties wish to agree that any and all rights, promises, warranties, obligations, and liabilities set forth in the above referenced Agreement that survived the issuance of the deeds conveying other portions of the property set forth in the Agreement are not affected or modified by this amendment.

NOW THEREFORE, for and in consideration of the mutual promises and agreements set forth herein, the parties agree to amend the above referenced contract and close on the remaining portion of the contract as follows and under the following conditions:

I. DESCRIPTION OF REMAINING PROPERTY:

The parties agree that the Property subject to this amendment is all that remains of the property contemplated to be sold under the above referenced Agreement, together with all contemplated improvements thereon. The property to be conveyed is a developed tract of 110 town-home lots, described 3. More specifically, the entire portion of the following property description:

ALL that certain piece, parcel, or tract of land together with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres as designated on plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deed's Office for Dorchester County in Plat Cabinet L at Page 15 on June 22, 2006. Said tract having such size, shape, dimensions, buttings, and boundaries as will be referenced to said plat more fully appear.

BEING a portion of that property conveyed to Wescott Land Company, LLC by herein by deed of Tommy R. Hawkins, dated June 30, 2005, and recorded in the ROD Office of Dorchester County in Book 4795 at page 232 on July 6, 2005.

Said portion being a part of TMS No. 163-000-000-009.

II. NON-WAIVER.

The parties execute this Amendment with the understanding that there is a dispute about whether the prior contract has been properly terminated. Seller takes the position that the above referenced contract was properly terminated and is no longer in effect as a result of Purchaser not purchasing the entire tract of remaining property within Seller's contention of the proper timeline, with cure periods having expired. Purchaser disputes that contention and asserts it has always had the right to close on the property in phases and that it attempted to do so, but was rebuffed. Purchaser also contends Seller has failed to perform certain conditions precedent to Purchaser's performance, and therefore, no obligation to purchase on the remaining property has matured. Seller disagrees with these contentions. There is also a dispute between the parties about who owes the 2006 taxes on the Property. The Parties agree that unless this amendment is fully executed by both parties, and Purchaser fully performs as set forth herein (unless the failure to perform is solely caused by Seller), that neither party has waived any position taken on the enforceability of the above referenced Agreement, or any breach thereto.

III. SALE AND PURCHASE OF THE PROPERTY.

Purchaser agrees to waive any right it may have to a phased takedown and to purchase the Property in its entirety on or before February 2, 2007, and Seller agrees to sell Purchaser the Property at that time and in a manner and in accordance with the provisions

of the Agreement, together with all warranties, representations, and conditions precedent contained therein.

Purchaser agrees to pay a total of three million three hundred and twenty three thousand dollars (\$3,323,000.00) for the Property. Said amount shall be paid to Seller, minus one hundred sixty thousand dollars (\$57,000), which shall be placed in Escrow as described in section IV(b) below (Post Closing Escrow).

Purchaser agrees to pay all property taxes assessed on the Property by Dorchester County over and above the standard agricultural rates that would have been assessed had the Property not been improved.

IV. ESCROWS.

a. Upon closing and conveyance of the above described property, any and all Earnest Money, letters of credit, or other notes deposited in the Escrow Account pursuant to Section 1(c) of the Agreement (hereinafter referred to as "Earnest Money") shall immediately be returned to Purchaser.

b. Post Closing Escrow. At closing, fifty seven thousand dollars (\$57,000) of the purchase amount shall be placed into an escrow account deposited with Dodds and Hennessey, L.L.P. (the "Escrow Agent"). Said amount shall be held by the Escrow Agent until Seller has performed all work described herein in section V below. If Seller fails to satisfactorily perform all of such work to Purchaser's satisfaction (which the parties agree shall be determined by WPC Engineering, Environmental & Construction Services, Inc. acting in its corporate capacity. Upon WPC's refusal to act in such capacity, then upon the mutual agreement of a third party engineer, which shall not be unreasonably withheld, and upon an inability to agree upon a third party engineer, then upon Purchaser's reasonable interpretation of the work described in part V below). The work described in part V below must be satisfactorily performed within thirty days after closing date, weather permitting.

V. SELLER'S POST CLOSING OBLIGATIONS.

That within two weeks after Closing, Seller will perform the following work at its own cost and to Purchaser's satisfaction, as defined in IV(b) above:

a. To clear the Property of any trash, construction materials, debris, brush, partially constructed buildings, and materials;

b. To clean all stormwater drains from any debris that washed into the roads and storm drains;

c. ~~That Seller shall re-grade the north side of the Property to make it consistent with the proposed plan submitted by~~ on:

VI. RIGHT TO CURE SECTION.

For purposes of the following obligations set forth in this amendment, the right to cure section in the Agreement is not applicable, and time is of the essence:

- a. Purchaser closing and paying funds to Seller by February 2, 2006;
- b. Seller's performance of the post closing work described in Section V.
- c. Both Purchaser and Seller agree that time is of the essence. If this transaction is not closed on or before February, 2007, then this amendment and all contracts and amendments entered into between the parties shall be null and void, and seller shall be free to sale the property to any other party without recourse from the purchaser.

VII. CORPORATE APPROVAL OF CONTRACT BY OFFICER OF PURCHASER. Notwithstanding anything contained in this Amendment to the contrary, this amendment, shall not be a valid and enforceable obligation of purchaser unless the Agreement is executed by either one of Donald R. Horton, Donald J. Tomnitz, or Brian Gardner, each an officer of the purchaser.

IN WITNESS HEREOF, the Parties hereto have executed this Contract in multiple copies, each of which shall be deemed to be an original, on the dates set forth below.

WITNESS:

SELLER:

Westcott Land Company LLC

By: _____

Its: _____

Date of Execution

PURCHASER

D.R. Horton, Inc. (a Delaware Corp)

By: _____

Its: _____

Date of Execution

Corporate approval:

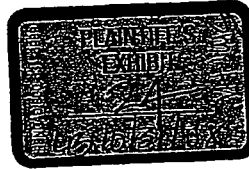
By: _____

Title: _____

Date of Execution

Maureen Bowler

From: Steve Smith [ssmith@scnlaw.com]
Sent: Tuesday, January 16, 2007 3:51 PM
Subject: Shetterly, Mike M.
Attachments: FW: Word version
Westcott amended contract amendment.doc



From: Peggy Rochay
Sent: Tuesday, January 16, 2007 3:45 PM
To: Steve Smith
Subject: FW: Word version

From: Steve Smith
Sent: Tuesday, January 16, 2007 2:47 PM
To: Peggy Rochay
Subject: FW: Word version

From: Shetterly, Mike M. [mailto:Mike.Shetterly@ogletreedeakins.com]
Sent: Tuesday, January 16, 2007 2:05 PM
To: ssmith@scnlaw.com
Subject: Word version

<<Westcott amended contract amendment.doc>>
Per your request.

Michael M. Shetterly | Ogletree Deakins | 300 North Main Street (29601)
Post Office Box 2757, Greenville, SC 29602 | Telephone (864) 271-1300 |
Facsimile (864) 235-4754 | mike.shetterly@odnss.com |
<<mailto:mike.shetterly@odnss.com>> www.ogletreedeakins.com

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STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

SECOND AMENDMENT TO
CONTRACT OF SALE

The Parties to this amendment are D.R. Horton, Inc., a Delaware Corporation (Purchaser) and Westcott Land Company, LLC, a South Carolina Limited Liability Company (Seller). Where referred to together, the two entities shall be referred to as the "Parties."

WHEREAS, the Parties entered into a contract of sale of land dated November 15, 2004, which was from time to time amended; the subject of that property was more specifically defined in the agreement, but generally concerned all or certain portions of land reflected in plats on file in Dorchester County bearing T.M.S. Numbers 163-00-00-006 and 163-00-00-008 (Hereinafter referred to as the "Agreement");

WHEREAS, the Purchaser has purchased most of the land pursuant to that agreement and its amendments;

WHEREAS, the Parties are in dispute about several issues concerning the remaining property to be purchased under the contract;

WHEREAS, the Parties desire to resolve all differences concerning the respective obligations of the parties under the prior contract and its amendments, and to enter into this amendment, but neither party desires to waive their rights to argue their respective positions and contentions concerning the first contract, should the terms of this amendment not be fully executed or complied with by the Parties;

AND WHEREAS, as it relates to the prior portions of the above described property that have already been purchased by Purchaser prior to the date of execution of this agreement, the parties wish to agree that any and all rights, promises, warranties, obligations, and liabilities set forth in the above referenced Agreement that survived the issuance of the deeds conveying other portions of the property set forth in the Agreement are not affected or modified by this amendment.

NOW THEREFORE, for and in consideration of the mutual promises and agreements set forth herein, the parties agree to amend the above referenced contract and close on the remaining portion of the contract as follows and under the following conditions:

I. DESCRIPTION OF REMAINING PROPERTY.

The parties agree that the Property subject to this amendment is all that remains of the property contemplated to be sold under the above referenced Agreement, together with all contemplated improvements thereon. The property to be conveyed is a developed tract of 110 town-home lots. More specifically, the entire portion of the following property description:

ALL that certain piece, parcel, or tract of land together with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres as designated on plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deed's Office for Dorchester County in Plat Cabinet L at Page 15 on June 22, 2006. Said tract having such size, shape, dimensions, buttings, and boundaries as will be referenced to said plat more fully appear.

BEING a portion of that property conveyed to Wescott Land Company, LLC by herein by deed of Tommy R. Hawkins, dated June 30, 2005, and recorded in the ROD Office of Dorchester County in Book 4795 at page 232 on July 6, 2005.

Said portion being a part of TMS No. 163-000-000-009.

II. NON-WAIVER.

The parties execute this Amendment with the understanding that there is a dispute about whether the prior contract has been properly terminated. Seller takes the position that the above referenced contract was properly terminated and is no longer in effect as a result of Purchaser not purchasing the entire tract of remaining property within Seller's contention of the proper timeline, with cure periods having expired. Purchaser disputes that contention and asserts it has always had the right to close on the property in phases and that it attempted to do so, but was rebuffed. Purchaser also contends Seller has failed to perform certain conditions precedent to Purchaser's performance, and therefore, no obligation to purchase on the remaining property has matured. Seller disagrees with these contentions. There is also a dispute between the parties about who owes the 2006 taxes on the Property. The Parties agree that unless this amendment is fully executed by both parties, and Purchaser fully performs as set forth herein (unless the failure to perform is solely caused by Seller), that neither party has waived any position taken on the enforceability of the above referenced Agreement, or any breach thereto.

III. SALE AND PURCHASE OF THE PROPERTY.

Purchaser agrees to waive any right it may have to a phased takedown and to purchase the Property in its entirety on or before February 2, 2007, and Seller agrees to sell Purchaser the Property at that time and in a manner and in accordance with the provisions

of the Agreement, together with all warranties, representations, and conditions precedent contained therein.

Purchaser agrees to pay a total of three million three hundred and twenty three thousand dollars (\$3,323,000.00) for the Property. Said amount shall be paid to Seller, minus fifty seven thousand dollars (\$57,000), which shall be placed in Escrow as described in section IV(b) below (Post Closing Escrow).

Purchaser agrees to pay all property taxes assessed on the Property by Dorchester County over and above the standard agricultural rates that would have been assessed had the Property not been improved.

IV. ESCROWS.

a. Upon closing and conveyance of the above described property, any and all Earnest Money, letters of credit, or other notes deposited in the Escrow Account pursuant to Section 1(c) of the Agreement (hereinafter referred to as "Earnest Money") shall immediately be returned to Purchaser.

b. Post Closing Escrow. At closing, fifty seven thousand dollars (\$57,000) of the purchase amount shall be placed into an escrow account deposited with Dodds and Hennessey, L.L.P. (the "Escrow Agent"). Said amount shall be held by the Escrow Agent until Seller has performed all work described herein in section V below. If Seller fails to satisfactorily perform all of such work to Purchaser's satisfaction (which the parties agree shall be determined by Thomas and Hutton in its corporate capacity. Upon Thomas and Hutton's refusal to act in such capacity, then upon the mutual agreement of a third party engineer, which shall not be unreasonably withheld, and upon an inability to agree upon a third party engineer, then upon Purchaser's reasonable interpretation of the work described in part V below). The work described in part V below must be satisfactorily performed within thirty days after closing date, weather permitting.

V. SELLER'S POST CLOSING OBLIGATIONS.

That within thirty days after Closing, Seller will perform the following work at its own cost and to Purchaser's satisfaction, as defined in IV(b) above:

a. To clear the Property of any trash, construction materials, debris, brush, partially constructed buildings, and materials;

b. To clean all stormwater drains from any debris that washed into the roads and storm drains;

c. That Seller shall re-grade the north side of the Property to make it consistent with the proposed plan submitted by _____ on _____.

VI. RIGHT TO CURE SECTION.

For purposes of the following obligations set forth in this amendment, the right to cure section in the Agreement is not applicable, and time is of the essence:

- a. Purchaser closing and paying funds to Seller by February 2, 2006;
- b. Seller's performance of the post closing work described in Section V.
- c. Both Purchaser and Seller agree that time is of the essence. If this transaction is not closed on or before February 2, 2007, then this amendment and all contracts and amendments entered into between the parties shall be null and void, and seller shall be free to sale the property to any other party without recourse from the purchaser.

VII. CORPORATE APPROVAL OF CONTRACT BY OFFICER OF PURCHASER. Notwithstanding anything contained in this Amendment to the contrary, this amendment, shall not be a valid and enforceable obligation of purchaser unless the Agreement is executed by either one of Donald R. Horton, Donald J. Tomnitz, or Brian Gardner, each an officer of the purchaser.

IN WITNESS HEREOF, the Parties hereto have executed this Contract in multiple copies, each of which shall be deemed to be an original, on the dates set forth below.

WITNESS:

SELLER:

Westcott Land Company LLC

By: _____

Its: _____

Date of Execution

PURCHASER

D.R. Horton, Inc. (a Delaware Corp)

By: _____

Its: _____

Date of Execution

Corporate approval:

By: _____

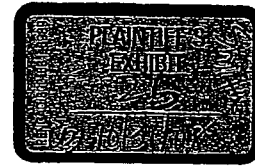
Title: _____

Date of Execution

EXHIBIT "I"

Maureen Bowler

From: Shetterly, Mike M. [Mike.Shetterly@ogletreedeakins.com]
nt: Friday, January 26, 2007 2:53 PM
Subject: ssmith@scnlaw.com
Attachments: Westcott and DR Horton
PDF Document - Microsoft Word - OKB_26Jan07 rev_doc



Steve,

Please see attached proposed amendment for the closing on the 1st.

Mike

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made January 26, 2007, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again, and reaffirm the validity and enforceability of the original agreement.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The only portion of the Property remaining to be purchased by Purchaser is that portion comprising the townhouse lots. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract. The townhouse lots are located on that 16.62 acre tract of land (the "Townhouse Tract") shown by that plat of survey entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDUAL (16.6C AC.) CREATING PHASE 3E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deed's Office for Dorchester County in Plat Cabinet L at Page 15.

2. Exhibit B to the Contract is hereby amended to provide that: (a) Closing on the entire Townhouse Tract (including 110 townhouse lots) shall take place on February 1, 2007; and (b) the purchase price for the Townhouse Tract shall be Three Million Three Hundred Thousand Dollars (\$3,300,000.00).

3. At Closing, Purchaser shall pay all property taxes assessed and due against the Property by Dorchester County over and above the standard agricultural rates that would have been assessed had the Property not been improved, and Seller shall pay the remainder.

4. At Closing, fifty seven thousand dollars (\$57,000.00) of the sales proceeds due to Seller shall be placed in an escrow account deposited with Dodds and Hennessey, L.L.P. (the "Escrow Agent"). Said amount shall be held by the Escrow Agent until Seller has performed all work described herein in Section 5 below. If Seller fails to satisfactorily perform all of such work to Purchaser's satisfaction (which the parties agree shall be determined by Thomas &

Hutton Engineering, Inc.) then Purchaser may perform such work. In such event, the Escrow Agent shall promptly pay to Purchaser, from the escrowed funds, the actual cost incurred by Purchaser in performing such work, plus an administrative fee of ten percent (10.00%). The work described in Section 5 below must be satisfactorily performed within thirty days after closing date, weather permitting.

5. That within two weeks after Closing, Seller will perform the following work on the Townhouse Tract at its sale cost and to Purchaser's satisfaction:

- a. Seller will clear the Townhouse Tract of any trash, construction materials, debris, brush, partially constructed buildings, and materials;
- b. Seller will clean all stormwater drains and roads;
- c. Seller will re-grade the north side of the Townhouse Tract to make it consistent with the proposed plan prepared by Thomas & Hutton attached hereto as Exhibit A.
- d. Each of the 110 lots shall be graded flat, constructed at ninety-five percent (95%) compaction as tested by WPC Engineering, Environmental & Construction Services, Inc, together with proper compaction of 2000 PSF. All building pads shall be located within all applicable setbacks.

6. For purposes of the following obligations, the right to cure section of the Contract (Section 9) shall not be applicable, and time shall be of the essence:

- a. Closing on February 1, 2007;
- b. Seller's performance of the post closing work described in Section 5 above.

7. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

8. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

Purchaser:

D.R. Horton, Inc.

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Name: _____

Title: _____

Date: _____

EXHIBIT “J”

Shetterly, Mike M.

From: Shetterly, Mike M.
nt: Tuesday, January 30, 2007 10:49 AM
Subject: 'Steve Smith'
RE: Westcott and DR Horton



I'm not really sure how you can say that, but I'll call you in a minute and see what your complaints are.

-----Original Message-----

From: Steve Smith [mailto:ssmith@scnlaw.com]
Sent: Tuesday, January 30, 2007 10:44 AM
To: Shetterly, Mike M.
Subject: RE: Westcott and DR Horton

This is not at all what we agreed to. Please call me as soon as possible

-----Original Message-----

From: Shetterly, Mike M. [mailto:Mike.Shetterly@ogletreedeakins.com]
Sent: Friday, January 26, 2007 2:53 PM
To: Steve Smith
Subject: Westcott and DR Horton

Steve,

Please see attached proposed amendment for the closing on the 1st.

ke

EXHIBIT "K"

COPY

Plaintiff,

) DEPOSITION OF:
) STEVEN SMITH, ESQ.

Defendant.

000460

1 Q And then looking again at Exhibit 2, then
2 moving on to paragraph 1c, which is for phase 3E-1,
3 which is for 37 lots on or before the later of
4 January 1, 2006, or upon final plat approval and
5 recordation 37 lots at \$25,500.

6 A That's what it says.

7 Q And were all the conditions precedent met on
8 January 1 of 2006 for phase 3E-1?

9 A The only thing I know is that they were met,
10 according to my contract, on July 19th of 2006.

11 Q You said according to your contract.

12 A I'm sorry. According to my client on July
13 19th, 2006, and according to Horton's attorney
14 Bagwell on August 10th, 2006. I don't have any other
15 independent knowledge.

16 Q And you agree that the contract required
17 Wescott to satisfy those conditions precedent within
18 six months of the date indicated on the takedown
19 schedule?

20 A I don't know. If you could show me where it
21 says that.

22 Q Sure. If you would look at Exhibit 1, the
23 paragraph under section 15 that follows the laundry
24 list of conditions precedent. It's about halfway
25 down that paragraph. I'll read it to you.

1 If seller has not achieved substantial
2 completion by six months past the estimated date in
3 the takedown schedule with regard to any lots to be
4 purchased, purchaser shall have the right at
5 purchaser's sole and exclusive discretion to either,
6 i, terminate the contract or, ii, extend the date for
7 achievement of substantial completion.

8 A Yeah. Oh, I agree with that. I think what
9 it says is, it says: Seller will use his best
10 efforts to achieve substantial completion within six
11 months of the takedown schedule. If that's what
12 you're asking?

13 Q Right. And you agree that even if we use
14 the July 19th date, that that was more than six
15 months after phase 3E-1 was supposed to achieve
16 substantial completion?

17 A Yeah. And I would assume that Horton -- you
18 know, they have two rights if they don't do it. One
19 is to terminate the contract, which we know they
20 didn't do, unfortunately. Their other right is to
21 extend the date of achieving for substantial
22 completion. So, I assume they extended the date for
23 achievement of substantial completion.

24 And, again, I don't know when substantial
25 completion was obtained on C, D, or E. I don't know.

1 I just know that it was all completed, according to
2 my client, on the dates, and according to Bagwell on
3 the dates that I said earlier.

4 Q But you agree that as of July 1 of 2006 if
5 the conditions precedent had not been satisfied, that
6 D.R. Horton could terminate the contract or agree to
7 extend the period?

8 A I think at any time prior to obtaining
9 substantial completion, they could have either
10 terminated the contract or extended the date as long
11 as those six-month time periods were met.

12 Q And did you -- are you aware of any
13 communication where D.R. Horton exercised either one
14 of those rights?

15 A I am not.

16 Q And if they had the right to terminate as of
17 July 1 of 2006, then the parties would have been free
18 to execute any new contract or an amendment to the
19 contract that may have existed at that time?

20 A They could have done -- I mean, to me, it's
21 an either/or. They've either got to terminate it or
22 extend it. I don't think you can just leave it in
23 limbo. And as far as I know, they did not terminate
24 it; but if they had terminated, yeah, everybody would
25 have been free to do whatever they wanted to.

1 said something. I think it held them in default,
2 terminated the contract.

3 (Plaintiff's Exhibit No. 9 marked.)

4 Q I'm going to show you what I am going to
5 mark as Exhibit 9, which is the letter that I think
6 you might be referring to dated November 10th of
7 2006. No. I'm sorry. Yes.

8 A I remember now. Yeah. This is the letter I
9 wrote.

10 Q Okay.

11 A And I was -- you know, I was trying to be
12 overly-cautious. And we couldn't remember whether
13 the 60-day, the way I read it, whether the 60-day
14 period ran from a default period or ran from a notice
15 of default. So, we gave them 60 days, and we gave
16 them an additional 60 days to cure.

17 Q What are you saying that that, according to
18 your conservative view, when do you say that that
19 time started to run?

20 A The date contained in his letter, again what
21 I mean by his, is the guy from Horton. I keep
22 forgetting his name. Bagwell. August 31st. Because
23 in his letter, he said that Horton -- I don't want to
24 misquote him. What I remember was Horton -- Horton
25 will close -- no. Horton cannot be held in default

1 under the contract for failing to close on the
2 purchase of any townhouse lots until August 31st at
3 the earliest.

4 So, we went from the August 31st date.

5 Yeah. The November 10th -- I'm sorry. The August
6 10th, letter, 2006, was the default letter giving
7 them 60 days. When I got his reply saying that it
8 wasn't until August 31st that they were in default, I
9 just took his date of August 31st and waited 60 days.
10 And that's, hence, the reason for the November 10th,
11 2006 letter.

12 Q And did you send a notice and right to cure,
13 according to paragraph nine of the contract that we
14 marked as Exhibit No. 1, to trigger that notice to
15 cure period beginning August 31st?

16 A No, because I had already sent one August
17 10th.

18 Q But if they weren't in default yet, there
19 wouldn't be anything to cure at that point, would
20 there?

21 A Well, we thought they were default. But by
22 his statement, he thought he was in default on the
23 31st. So, we waited the 60 days. But he had already
24 received the default notice from us. We thought as
25 of August 10th, he was in default.

1 Q August 10th, you believed that D.R. Horton
2 was in default?

3 A Yeah. That -- remember, I think the client
4 had told me was that the conditions precedent had
5 been completed July 19th, 2006. Twenty days later,
6 it would have been August 10th. So, that's why we
7 sent the August 10th letter. I got the reply saying
8 the 31st. So, we just waited 60 days from the 31st.

9 Q And it goes back again -- I think you've
10 already answered. But if the conditions precedent
11 had really not been satisfied as of July 19th, that
12 the 20-day period would not start to run until
13 whenever those conditions precedent were, in fact,
14 satisfied. And if that was July 19th or August 2nd
15 or August 10th or still have not been satisfied,
16 whatever that date is that somebody eventually
17 determines, would be the date that the 20 days would
18 start to run?

19 A Yeah. I think that's going to be somebody
20 else's decision.

21 Q And then once that 20 days run, do you agree
22 that Wescott is required to give 60-days' written
23 notice of right to cure?

24 A Yeah. And that was the August 10th letter.
25 I don't think we needed to give another one on August

1 31st. I think we were just giving them the benefit
2 of the doubt relying on the August 31st date.

3 Q Even if the conditions precedent had not
4 been satisfied on July 19th?

5 A Yeah. I don't think we needed to. I really
6 don't.

7 Q You indicate in what we marked as Exhibit
8 No. 9, in the third paragraph, that Wescott provided
9 D.R. Horton with notice of right to cure on August
10 2nd of 2006. And I think that is referring to what
11 we marked as Exhibit 3 to your deposition?

12 A Okay.

13 Q Is that the letter you're referring to in
14 Exhibit 9?

15 A Yes.

16 Q And where, in that letter, did Wescott
17 provide D.R. Horton notice of right to cure?

18 A That came in the August 10th letter.

19 Q So, that's just a mistake in your November
20 10th letter?

21 A Well, the second letter -- well, actually,
22 the second letter does put them on notice. Sure
23 does. It's a right to cure letter, August 2nd.

24 Q Where does it indicate that they have 60
25 days in the August 2nd, 2006 letter?

1 A It doesn't. That came in the August 10th
2 letter.

3 Q That's what I am asking. Your letter dated
4 November 10th, 2006, says by letter dated August 2nd,
5 2006, Wescott provided D.R. Horton with notice and
6 right to cure as required by paragraph nine of the
7 contract.

8 A I gotcha. I think that was probably the
9 August 10th letter.

10 Q So, that should have said August 10th?

11 A I think so. Let me make sure of that
12 before.

13 Q Take your time.

14 A Well, actually paragraph nine doesn't say
15 that you have got to put in there that they have 60
16 days. It just says that you are to give them a
17 written notice of default under this contract. And
18 then I guess they shall have 60 days from receipt of
19 the notice to cure a default.

20 Q But the August 2nd letter doesn't indicate
21 that there is a default?

22 A Okay. It just says failure to close by
23 August 9th will be considered a default, which would
24 have been 20 days from July 19th.

25 Q Right. But there is -- at that point, even

1 if everything that Wescott believes is right, there
2 is not a default on August 2nd, 2006?

3 A No. I think what it's saying is on August
4 9th, you will be in default, so let's not dally.

5 Q Gotcha. Then, do you recall receiving a
6 response from D.R. Horton?

7 A Wasn't that Mr. Bagwell's letter?

8 Q No. To your letter dated November 10th,
9 2006, do you recall receiving a response from
10 Mr. Shetterly on behalf of D.R. Horton?

11 A Oh, I'm sure I did.

12 (Plaintiff's Exhibit No. 10 marked.)

13 Q I am going to show you what's been marked as
14 Exhibit No. 10. It's a letter dated November 16th,
15 2006, and I believe it references a response to your
16 letter that we marked as Exhibit No. 9.

17 A Yeah. I remember this letter. This is
18 where -- this is where Mike talks about the letter
19 from Bagwell being incorrect.

20 Q And you understand that D.R. Horton's
21 position was that Mr. Bagwell, like you, was just
22 relying upon your client's representation that those
23 conditions precedent had been satisfied?

24 A Well, that would be D.R. Horton's position
25 that they had been satisfied.

1 it? Why would you refuse to sign this amendment, or
2 why did Wescott refuse to sign this amendment?

3 A I don't know what part of this we would have
4 not liked. I remember sending him an e-mail that
5 said this isn't what we talked about.

6 Q I know. That's what I am trying to get at.
7 I can mark that if you want.

8 A I have a feeling it was 5d, because we kept
9 saying and he kept agreeing, it's done. It's done.
10 I mean, it's been compacted. You-all have got the
11 compaction tests. Wright Padgett's telling us we
12 don't need to go out there and do it again. We've
13 already done it. And you don't lose compaction.

14 Somebody needs to -- you-all need to take
15 their deposition, because that was discussed at the
16 time.

17 (Plaintiff's Exhibit No. 26 marked.)

18 Q I am going to show you what I have marked as
19 Exhibit 26, which at the top is an e-mail from Mike
20 Shetterly to you; but below that is an e-mail from
21 you dated January 30th of 2007 to Mike Shetterly that
22 says: This is not at all what we agreed to. Please
23 call me as soon as possible.

24 Do you remember sending that e-mail and
25 getting Mike's response?

1 A I don't know what this is about. Obviously,
2 it doesn't reference Exhibit No. 25. This is done on
3 the 30th.

4 Q Well, no. If you look down, Steve, on
5 Exhibit 26?

6 A Yes.

7 Q I think this is the same e-mail that we
8 marked as Exhibit 25, and then you responded on
9 Tuesday, January 30th, as reflected on Exhibit No. 26
10 and say: This is not at all what we agreed to.
11 Please call me as soon as possible.

12 A Yeah. I think that was probably talking
13 about paragraph 5d. Because I think he and I talked
14 about, and I think he and I agreed that compaction
15 has already been done. And then it's in there again.

16 Q Anything other than 5d that you think that
17 this is not at all what we agreed to?

18 A I don't know. I can't tell you, sitting
19 here right now. I really can't.

20 Q What would you refer to or rely upon to
21 refresh your recollection?

22 A There is not going to be anything that I can
23 go back to and look to my state of mind on January
24 26th or January 30th.

25 Q And the only thing that you can think that

1 it may relate to is 5d?

2 A Well, I mean, the only difference is 5d
3 between the two and the little bit of money here --
4 the \$23,000 or whatever. But other than that, I
5 think that the agreements are the same.

6 Q What agreements?

7 MR. HALDRUP: Off the record.

8 (A break was taken.)

9 Q Anything other than, right now -- and I am
10 going to walk through the rest of these e-mail
11 exchanges up to the end of January. But anything
12 other than 5d that you can think of that you're
13 referring to in Exhibit 26?

14 A I can't -- I think we had put in something
15 about, hey, either close on the 1st, or the deal's
16 over, too. And, you know, the problem is, I thought
17 Mike and I, when we hung up, I think the reason for
18 saying this just isn't what we agreed to is, is
19 because he and I came to an agreement on the
20 telephone. And the next thing I know, I am getting
21 something saying you got to go out there and do
22 compactions again. I'm just scratching my head. We
23 can't -- my thing was, we can't build something that
24 is already built.

25 Q And I think that -- and I'll mark these.

1 closing, and I had my suspicions because it wasn't
2 funded.

3 Q So, it was all kind of as one?

4 A I think it was all kind of one statement.

5 Q And then in response to that, you left the
6 room to go call Mike Shetterly?

7 A That's right. And I want to say that I
8 didn't get him the first time around, that it took me
9 a few minutes to get him.

10 Q And so you call. And what happened? What
11 was the conversation, that you recall?

12 A I said, Mike, are we not closing? And he
13 said, no.

14 Q And what happened next?

15 A I said, why not? And he said, we haven't
16 worked out all the details. You know, this -- he did
17 say this compaction issue is still an issue.

18 Q Did you ask what he meant by that?

19 A I think they wanted it retested. And we
20 said it doesn't need to be. I mean, the engineer
21 said it didn't need to be.

22 Q So --

23 A At that -- and I said to him, I didn't know
24 this was a deal breaker. And he said, why not. And
25 I said, you never told me it was. He said, I thought

1 Q And they didn't tell you that they went out
2 and found out what that would cost or that they were
3 willing to do that?

4 A You mean Horton?

5 Q No, Wescott.

6 A Oh, nobody said. At that point, we were
7 going to just sell the property to somebody else. We
8 consider this deal to be dead.

9 Q This telephone conference that you had with
10 Mike Shetterly on February 2nd, did he indicate to
11 you that that was his understanding of D.R. Horton's
12 requirement all along?

13 A He did.

14 Q He didn't say to you, I know this is the
15 first time that I have raised this as a requirement,
16 but it's something that we're requiring now?

17 A No. No. And that absolutely was not the
18 case.

19 Q He relayed to you that it's always been our
20 intent to require new compaction testing to show that
21 these pads meet the conditions precedent to the
22 contract?

23 A No doubt about it. We had talked about that
24 for 30 days.

25 Q So, it wasn't --

EXHIBIT "L"

Maureen Bowler

From: Shetterly, Mike M. [Mike.Shetterly@ogletreedeakins.com]
Sent: Wednesday, January 31, 2007 3:41 PM
Subject: Steve Smith
Westcott



Corporate will not waive the \$51,000 credits we discussed yesterday. They say that is theirs and they expect to receive the credit on the purchase price.

Also, they are adamant that 5d remain in the proposed amendment, so it will not be removed.

Let me know what Tommy wants to do.

Mike

Michael M. Shetterly | Ogletree Deakins | 300 North Main Street (29601) Post Office Box 2757, Greenville, SC 29602 | Telephone (864) 271-1300 | Facsimile (864) 235-4754 | mike.shetterly@odnss.com | www.ogletreedeakins.com

Unless expressly stated to the contrary herein, (a) nothing contained in this message was intended or written to be used, can be used, nor may be relied upon or used, by any taxpayer for the purpose of avoiding penalties that could be imposed upon the taxpayer under the Internal Revenue Code of 1986, as amended; and (b) any written statement contained herein relating to any federal tax transaction or issue may not be used by any individual or entity to, recommend or support the promotion or marketing of any such transaction or issue.

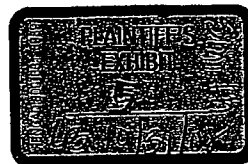
This transmission is intended by the sender and proper recipient(s) to be confidential, intended only for the proper recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that the dissemination, distribution or copying of this message is strictly prohibited. If you receive this message in error, or are not the proper recipient(s), please notify the sender at either the e-mail address or telephone number above and delete this e-mail from your computer. Receipt by anyone other than the proper recipient(s) is not a waiver of any attorney-client, work product, or other applicable privilege. Thank you.

EXHIBIT "M"

D·R·HORTON DHI
Listed
NYSE
America's Builder

August 11, 2006

VIA FACSIMILE TRANSMISSION
(Original by First-Class Mail)



Steven L. Smith, Esq.
Smith & Koontz
Post Office Box 40578
Charleston, SC 29423-0578

Re: Contract between Wescott Land Company, LLC ("Wescott") and D.R.
Horton, Inc. ("Horton") dated November 15, 2004 (the "Contract")

Dear Mr. Smith:

I received a copy of your letter to Brian Gardner dated August 10, 2006, and I am writing to respond on behalf of Horton.

The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

Furthermore, the Contract, as amended by that Amendment dated July 27, 2005, contemplates the purchase and sale of the townhouse lots in three (3) separate, quarterly takedowns. Accordingly, Horton will close on the purchase of thirty-seven (37) townhouse lots, or such similar number of lots that constitute complete townhouse buildings, on or before August 31, 2006. Horton will close on the purchase of a like number of townhouse lots on or before November 30, 2006. Horton will close on the purchase of the remaining townhouse lots on or before February 28, 2007.

For the sake of clarity, I propose that the parties execute a Second Amendment to the Contract that acknowledges that the townhouse lots are now substantially complete and that establishes the new takedown schedule. I will prepare a draft of the amendment and forward it to you under separate cover. Please also take notice that, effective immediately, Horton's addresses for delivery of notice are as follows:

Doug Brown, Division President
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5061
Phone: (843) 284-5000

With copy to:

O. Kenneth Bagwell, Jr.
General Counsel, Northeast Region
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5060
Phone: (843) 284-5000

Thank you for your attention, and please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

O. Kenneth Bagwell, Jr.
O. Kenneth Bagwell, Jr.

OKB/vll

Xc: Wescott Land Company, LLC (via facsimile and first-class mail) ✓

Larry Dodds, Jr., Esq. (via facsimile and first-class mail) ✓
Dodds & Hennessy

Doug Brown, President ✓
Coastal Carolinas Division
D.R. Horton, Inc.

Richard Shively, City Manager ✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Scott Varn, Project Manager ✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

EXHIBIT "N"

LAW OFFICES
SMITH & KOONTZ
PROFESSIONAL ASSOCIATION

RECEIVED
10-10-06

STEVEN L. SMITH
ssmith@scnlaw.com

7455 Cross County Road, Suite One
Post Office Box 40578
CHARLESTON, SOUTH CAROLINA
29423-0578

TELEPHONE
(843) 760-0220
FACSIMILE
(843) 552-2678

August 10, 2006



D.R. Horton, Inc.
Attn: Brian Gardner
503 Wanda Oak Blvd, Suite 200
Mt. Pleasant, SC 29464

Re: Closing Schedule for The Farm at Westcott Plantation - Phases 3D, 3E-1,
3E-2 and 3E-3

Dear Mr. Gardner:

On November 15, 2004, Westcott Land Company entered into a contract with D.R. Horton, Inc., to sale 193 lots in a subdivision known as "The Farm at Westcott". This contract was amended on June 9, 2005. the Amendment set forth a "Takedown Schedule" pursuant to which, Horton was to purchase the lots. All lots were to be closed on or before July 1, 2006. Pursuant to paragraph 15 of the original contract, a series of Conditions Precedent needed to be completed prior to closing. Pursuant to paragraph 2 of the Amendment, proof of completion was to be sent to Horton 20 days prior to closing.

By July 19, 2006, all Conditions Precedent documents and certifications were delivered to Horton. On August 2, 2006, a notice of completion was hand delivered to Horton, stating that all lots must be closed no later than August 9, 2006. This date was set pursuant to paragraphs 1 and 2 of the Amendment to Contract dated June 9, 2005.

As of the date of this letter, Horton has failed to close on the remaining 110 lots as required by contract. Therefore, pursuant to paragraphs 7a and 9, of the Contract of Sale, the Seller is hereby notifying the Purchaser that the Purchaser is in default of the terms of the Contract of Sale and Amendment to Contract of Sale for failure to close on the remaining lots. Pursuant to paragraph 9, Purchaser has 60 days from the receipt of this notice to cure this default. If Purchaser fails to cure this default within this time period, the Seller will exercise all rights it has under the term of the contract, including but not limited to terminating the contract and retaining all Earnest Money.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,


Steven L. Smith

SLS/kap

cc: Jonathan P. Giles
Ken Bagwell, Esq. ✓
Randy Birdwell
Doug J. Brown
Larry Dodds, Jr., Esq.

000481

EXHIBIT "O"



4401 Belle Oaks Drive, Suite 280
N. Charleston, SC 29405
Phone: (843) 576-6840
Fax: (843) 529-4605

November 6, 2006

VIA FAX 843/552-0083

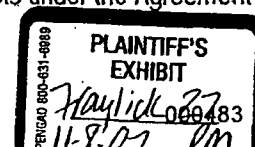
Mr. Tommy Hawkins
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, SC 29418

Re: Letter of Intent to purchase 110 developed lots (collectively the "Lots") located in The Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina ("Property")

Dear Mr. Tom Hawkins:

This letter sets forth the general terms and conditions upon which KB HOME SOUTH CAROLINA INC or its designee ("KB HOME"), would purchase the Lots from WESCOTT LAND COMPANY, LLC ("Seller"). This letter is subject to the drafting and execution of a mutually acceptable purchase and sale agreement ("Agreement"), which shall be prepared by KB HOME embodying, among others, the following terms:

1. **Property.** The "Property" means 110 townhome building Lots contained in Phase 3E of the Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina. All of the Lots are at least twenty feet in width and at least seventy-five feet in depth. The name of the current owner of the property is: Wescott Land Company, LLC.
2. **Purchase Price.** The "Purchase Price" shall be \$30,000.00 per padded Lot. The escalator will be 1.25 % per quarter.
3. **Closing.** The Lots will be purchased on a quarterly basis, in accordance with a lot takedown schedule to be agreed to by the parties in the Agreement. The initial closing of Lots shall occur 30 days after the last of the following occurs: (a) the end of the feasibility period; or (b) all of the contingencies as set forth in the paragraph of this letter of intent, titled "Contingencies" have been satisfied or waived by KB HOME in writing.
4. **Earnest Money.** Within 10 business days of the effective date of the Agreement, KB HOME shall deposit an earnest money bond issued by Safeco Insurance Company of America ("Safeco") (or another financial institution selected by KB HOME and reasonably acceptable to Seller) in the amount of \$50,000.00 with Nelson Mullins Riley & Scarborough, LLP who will act as escrow agent. Within 10 days following the end of the Feasibility Period, KB HOME will deposit additional Earnest Money in the amount of \$150,000.00. The Earnest Money is fully refundable prior to the expiration of the Feasibility Period. After the expiration of the Feasibility Period, all Earnest Money is non-refundable except for Seller's default or failure of a contingency under the Agreement. The Agreement will provide that the earnest money bond will stand as full-liquidated damages in the event KB HOME breaches its obligation to purchase lots under the Agreement for any reason.



5. **Feasibility Period.** KB HOME would have 60 days following the effective date of the Agreement as a feasibility period (the "Feasibility Period"). During this Feasibility Period, KB HOME will have the right, at KB HOME's sole discretion, to test and review the condition and suitability of the Property for KB HOME's intended use, including but not limited to development costs, condition of title, physical condition of the Property and any other items KB HOME considers necessary, and to obtain the approval of KB HOME's land committee for this transaction. KB HOME and its agents and representatives shall have the right to enter the Property to conduct such tests and reviews. Seller would deliver to KB HOME copies of all tests, surveys, plats, deed restrictions, HOA documents, title policies and construction plans (if any) related to the Property within 7 days following the effective date of the Agreement.
6. **Zoning.** The property is presently or will be rezoned in the future to a classification that will allow a total of 110 townhome residential units that will be allocated to KB Home.
7. **Site Plan.** We understand that the Property will be developed as depicted on the preliminary site plan ("Preliminary Site Plan") attached to this letter as Exhibit "A".
8. **Brokerage Fees.** The parties acknowledge that, except for the broker identified below, whose commission Seller is solely responsible for paying, that no real estate broker or agent is involved in this proposed transaction. The parties agree to defend and indemnify each other from any claims of commissions or brokerage fees arising from KB HOME's or Seller's respective dealings with any other real estate broker or agent.

Seller's Broker: Tim Fraylick
First Charleston Realty
1124 Sam Rittenberg Blvd, Suite 5
N Charleston,, South Carolina 29407
Phone: 843-452-7202
Fax: 843-766-3289

9. **Closing Costs.** KB Home and Seller agree to pay their normal and customary closing costs and escrow fees and agree to prorate all real estate taxes on a calendar year basis as of the date of Closing. Additionally, KB Home and Seller agree that they will be responsible for their own attorney's fees associated with this proposed transaction.
10. **Seller's Representations and Warranties.** Seller shall provide such normal and customary representations and warranties as KB HOME deems appropriate with respect to the Property, including but not limited to the quality of the work performed by Seller on the Property, the existence of any wetlands, endangered species or protected habitat, absence of hazardous or toxic materials, the existence of any condemnation or assessment district proceeding and any moratorium or governmental policies precluding or inhibiting the development of the Property.
11. **Contingencies.** Purchaser's obligations under the Agreement will be contingent upon each of the following matters occurring (collectively, the "Contingency Events").
 - a. all of Seller's warranties, representations and covenants contained in this Agreement shall be and remain true, correct and complete and fully performed as of the Effective Date and through the final Closing;
 - b. there shall have occurred no material adverse change in the physical, financial or legal conditions of the Property from the conditions existing prior to the expiration of the Feasibility Period;
 - c. Seller shall deliver good and marketable title to the Property to Purchaser and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title

insurance policy insuring good and marketable fee simple title to the Property with a liability limit in the amount of the Purchase Price at standard premium rates;

- d. Seller shall have delivered to Purchaser Lots meeting the Development Specifications (as defined herein)
- e. Additional Contingencies. Seller shall satisfy each of the following obligations by the indicated time:
 - (i) No later than 10 business days following the expiration of the Feasibility Period Seller shall execute and deliver to Purchaser a letter agreement in favor of Purchaser and in the form attached as Exhibit "D" hereto, duly executed by Seller's Lender, in which Seller's Lender agrees, among other things, in the event of a default by Seller under the Development Loan, to (A) provide written notice to Purchaser of such default, and (B) give Purchaser the right to purchase such loan.

If such conditions have not been timely satisfied, then Purchaser may terminate this Agreement by written Notice to Seller.

12. No Publicity. THE PARTIES UPON EXECUTION OF THIS LETTER OF INTENT WILL BE BOUND BY THE FOLLOWING 2 PARAGRAPHS WHICH WILL ALSO BE INCLUDED IN AND BE A PART OF THE AGREEMENT:

No Publicity.

- a. Seller (including all directors, officers, partners, employees, representatives, attorneys, and agents of Seller) shall not make any media release, public announcement, press release, public disclosure, or any other form of publicity in any manner or medium including, without limitation, newspaper, newsletter, magazine, or electronic communication (collectively, "Publicity") relating in any way to this Agreement, including, without limitation, regarding (i) the execution or existence of this Agreement, (ii) the transaction evidenced by this Agreement, (iii) the status of the transaction evidenced by this Agreement (including, without limitation, any termination of this Agreement or closing of the transaction, or portion thereof, evidenced by this Agreement), (iv) any matter related to or arising out of this Agreement, (v) any of the terms or provisions contained in this Agreement, and/or (vi) any other matter related to or arising from any of the foregoing, without the prior written consent of Purchaser, in its sole and absolute discretion.
- b. Seller shall submit in writing any Publicity desired or generated by Seller, to Purchaser, prior to release, and Seller must not release any such Publicity unless, prior to such release, Purchaser in its sole and absolute discretion has approved such Publicity in writing. Provided, however, if in the written opinion of Seller's counsel such disclosure is required by law, then upon as much prior written notice to Purchaser as is practical under the circumstances giving Purchaser an opportunity to seek an injunction or other equitable relief, Seller may disclose the information necessary to comply with the law. In the event of a breach or threatened breach of this no publicity paragraph, Purchaser shall be entitled to all rights, recourses, and remedies available to it under applicable law and/or in equity, including, without limitation, under the provisions of this Agreement. The foregoing shall not limit Seller's ability to pursue any and all governmental or quasi-governmental approvals that may be contemplated by this Agreement or that may be necessary in connection with the transaction contemplated by this Agreement, in Seller's reasonable discretion.

13. Exclusive. Seller shall not, so long as Seller and KB HOME are negotiating toward the execution of a definitive Agreement, but in any case for at least 30 days from the date of Seller's execution of this letter of intent, negotiate with or solicit or accept any offer from any other party for the sale of any or all of the Property or any other transaction inconsistent with the transaction proposed herein.

14. Assignment. The rights and interest of KB HOME in and to the Agreement may be assigned or transferred by KB HOME to any entity. The interest of Seller in the Agreement may not be assigned without the prior written consent of KB HOME, which consent shall not be unreasonably withheld.

Excluding the paragraphs of this letter of intent titled "No Publicity" and "Exclusive" (the provisions of which shall be binding upon the parties), this letter constitutes only an expression of intent regarding the terms and conditions on which KB HOME would purchase the Property and shall not be deemed to create a binding obligation between KB HOME and the Seller unless and until a definitive Agreement including the terms hereof, and any other terms acceptable to the parties, in their sole discretion, is executed by both parties.

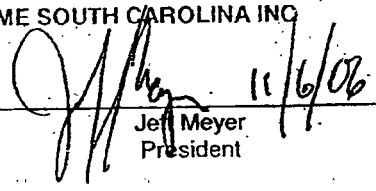
If the terms of this letter are acceptable to the Seller, then please insert the name of the owner of the Property into the signature block below, and execute one original in the indicated areas and return it to KB HOME via facsimile to (843) 529-4605. It would be helpful to us if you include a copy of Seller's title policy (issued at Seller's acquisition of the Property) along with the fully executed letter of intent.

KB HOME will cause an Agreement to be prepared and delivered to Seller as soon as reasonably possible after the date that a fully executed copy of this letter is received by KB HOME. If the parties are unable to enter into an Agreement acceptable to both parties within 30 days of the Seller's execution of this letter of intent, then the parties shall have no further obligation to each other except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity".

In the event we have not received a satisfactory response from you within 15 days of the date of this letter of intent, we shall assume that you have no further interest in completing a transaction with us and except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity", the terms of this letter are automatically withdrawn.

KB HOME SOUTH CAROLINA INC

By: _____

 11/6/06
Jeff Meyer
President

SELLER: WESCOTT LAND COMPANY, LLC

Signature

Print Name

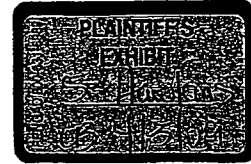
Its: _____

Date: _____

cc: Senior Regional Counsel

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 5

EXHIBIT "A"
Preliminary Site Plan



4401 Belle Oaks Drive, Suite 280
N. Charleston, SC 29405
Phone: (843) 576-6840
Fax: (843) 529-4605

November 29, 2006

VIA FAX 843/552-0083

Mr. Tommy Hawkins
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, SC 29418

Re: Letter of Intent to purchase 110 developed lots (collectively the "Lots") located in The Farm at Wescott subdivision (the "Subdivision"), located on Patriots Blvd. in Dorchester County, North Charleston, South Carolina ("Property")

Dear Mr. Hawkins:

This letter sets forth the general terms and conditions upon which KB HOME SOUTH CAROLINA INC or its designee ("KB HOME"), would purchase the Lots from Wescott Land Company, LLC ("Seller"). This letter is subject to the drafting and execution of a mutually acceptable purchase and sale agreement ("Agreement"), which shall be prepared by KB HOME embodying, among others, the following terms:

1. Property. The "Property" means 110 townhome building Lots contained in Phase 3E of the Farm at Wescott subdivision (the "Subdivision"), located on Patriots Blvd. in Dorchester County North Charleston, South Carolina. The width and depth of all of the Lots are as shown on final plat. The name of the current owner of the property is: Wescott Land Company, LLC.
2. Purchase Price. The "Purchase Price" shall be as follows:
 - A. \$30,000.00 per padded Lot for the first lot takedown of 37 lots which shall occur in accordance to the terms of paragraph 3 of this letter;
 - B. \$32,500.00 per padded Lot for the second lot takedown of 37 lots which shall occur on or before the 180th day following of the first lot takedown;
 - C. \$33,500.00 per padded Lot for the third takedown of 36 lots which shall occur on or before the first anniversary of the first lot takedown.
3. Closing. The Lots will be purchased on a six month takedown basis, in accordance with a lot takedown schedule described above. The initial closing of Lots shall occur 15 business days after the last of the following occurs: (a) the end of the feasibility period; or (b) all of the contingencies as set forth in the paragraph of this letter of intent, titled "Contingencies" have been satisfied or waived by KB HOME in writing.
4. Earnest Money. Within 10 business days of the effective date of the Agreement, KB HOME shall deposit an earnest money bond issued by Safeco Insurance Company of America ("Safeco") (or another financial institution selected by KB HOME and reasonably acceptable to Seller) in the amount of \$50,000.00 with Stephen Smith, LLP who will act as escrow agent. Within 5 business

days following the end of the Feasibility Period, KB HOME will deposit additional Earnest Money in the amount of \$150,000.00. The Earnest Money is fully refundable prior to the expiration of the Feasibility Period. After the expiration of the Feasibility Period, all Earnest Money is non-refundable except for Seller's default or failure of a contingency under the Agreement. The Agreement will provide that the earnest money bond will stand as full-liquidated damages in the event KB HOME breaches its obligation to purchase lots under the Agreement for any reason.

5. Feasibility Period. KB HOME would have 45 days following the effective date of the Agreement as a feasibility period (the "Feasibility Period"). During this Feasibility Period, KB HOME will have the right, at KB HOME's sole discretion, to test and review the condition and suitability of the Property for KB HOME's intended use, including but not limited to development costs, condition of title, physical condition of the Property and any other items KB HOME considers necessary, and to obtain the approval of KB HOME's land committee for this transaction. KB HOME and its agents and representatives shall have the right to enter the Property to conduct such tests and reviews. Seller would deliver to KB HOME copies of all tests, surveys, plats, deed restrictions, title policies and construction plans (if any) related to the Property within 7 days following the effective date of the Agreement.
6. Zoning. The property is presently zoned for a total of 110 townhome residential units that will be allocated to KB Home.
7. Site Plan. We understand that the Property has been developed as depicted on the preliminary site plan ("Preliminary Site Plan") attached to this letter as Exhibit "A".
8. Brokerage Fees. The parties acknowledge that, except for the broker identified below, whose commission Seller is solely responsible for paying, that no real estate broker or agent is involved in this proposed transaction. The parties agree to defend and indemnify each other from any claims of commissions or brokerage fees arising from KB HOME's or Seller's respective dealings with any other real estate broker or agent.

Seller's Broker: Tim Fraylick
First Charleston Realty
1124 Sam Rittenberg Blvd, Suite 5
N Charleston,, South Carolina 29407
Phone: 452-7202
Fax: 766-3289]

9. Closing Costs. KB Home and Seller agree to pay their normal and customary closing costs and escrow fees and agree to prorate all real estate taxes on a calendar year basis as of the date of Closing. Additionally, KB Home and Seller agree that they will be responsible for their own attorney's fees associated with this proposed transaction.
10. Seller's Representations and Warranties. Seller shall provide such normal and customary representations and warranties as KB HOME deems appropriate with respect to the Property, including but not limited to the quality of the work performed by Seller on the Property, the existence of any wetlands, endangered species or protected habitat, absence of hazardous or toxic materials, the existence of any condemnation or assessment district proceeding and any moratorium or governmental policies precluding or inhibiting the development of the Property.

11. Contingencies. Purchaser's obligations under the Agreement will be contingent upon each of the following matters occurring (collectively, the "Contingency Events").

- a. all of Seller's warranties, representations and covenants contained in this Agreement shall be and remain true, correct and complete and fully performed as of the Effective Date and through the final Closing;
- b. there shall have occurred no material adverse change in the physical, financial or legal conditions of the Property from the conditions existing prior to the expiration of the Feasibility Period;
- c. Seller shall deliver good and marketable title to the Property to Purchaser and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title insurance policy insuring good and marketable fee simple title to the Property with a liability limit in the amount of the Purchase Price at standard premium rates;

If such conditions have not been timely satisfied, then Purchaser may terminate this Agreement by written Notice to Seller.]

12. No Publicity. THE PARTIES UPON EXECUTION OF THIS LETTER OF INTENT WILL BE BOUND BY THE FOLLOWING 2 PARAGRAPHS WHICH WILL ALSO BE INCLUDED IN AND BE A PART OF THE AGREEMENT:

No Publicity.

- a. Seller (including all directors, officers, partners, employees, representatives, attorneys, and agents of Seller) shall not make any media release, public announcement, press release, public disclosure, or any other form of publicity in any manner or medium including, without limitation, newspaper, newsletter, magazine, or electronic communication (collectively, "Publicity") relating in any way to this Agreement, including, without limitation, regarding (i) the execution or existence of this Agreement, (ii) the transaction evidenced by this Agreement, (iii) the status of the transaction evidenced by this Agreement (including, without limitation, any termination of this Agreement or closing of the transaction, or portion thereof, evidenced by this Agreement), (iv) any matter related to or arising out of this Agreement, (v) any of the terms or provisions contained in this Agreement, and/or (vi) any other matter related to or arising from any of the foregoing, without the prior written consent of Purchaser, in its sole and absolute discretion.
- b. Seller shall submit in writing any Publicity desired or generated by Seller, to Purchaser, prior to release, and Seller must not release any such Publicity unless, prior to such release, Purchaser in its sole and absolute discretion has approved such Publicity in writing. Provided, however, if in the written opinion of Seller's counsel such disclosure is required by law, then upon as much prior written notice to Purchaser as is practical under the circumstances giving Purchaser an opportunity to seek an injunction or other equitable relief, Seller may disclose the information necessary to comply with the law. In the event of a breach or threatened breach of this no publicity paragraph, Purchaser shall be entitled to all rights, recourses, and remedies available to it under applicable law and/or in equity, including, without limitation, under the provisions of this Agreement. The foregoing shall not limit Seller's ability to pursue any and all governmental or quasi-governmental approvals that may be contemplated by this Agreement or that may be

necessary in connection with the transaction contemplated by this Agreement, in Seller's reasonable discretion.

13. **Exclusive.** Seller shall not, so long as Seller and KB HOME are negotiating toward the execution of a definitive Agreement, but in any case for at least [15] days from the date of Seller's execution of this letter of intent, negotiate with or solicit or accept any offer from any other party for the sale of any or all of the Property or any other transaction inconsistent with the transaction proposed herein.

14. **Assignment.** The rights and interest of KB HOME in and to the Agreement may be assigned or transferred by KB HOME to any entity. The interest of Seller in the Agreement may not be assigned without the prior written consent of KB HOME, which consent shall not be unreasonably withheld.

Excluding the paragraphs of this letter of intent titled "No Publicity" and "Exclusive" (the provisions of which shall be binding upon the parties), this letter constitutes only an expression of intent regarding the terms and conditions on which KB HOME would purchase the Property and shall not be deemed to create a binding obligation between KB HOME and the Seller unless and until a definitive Agreement including the terms hereof, and any other terms acceptable to the parties, in their sole discretion, is executed by both parties.

If the terms of this letter are acceptable to the Seller, then please insert the name of the owner of the Property into the signature block below, and execute one original in the indicated areas and return it to KB HOME via facsimile to (843) 529-4605. It would be helpful to us if you include a copy of Seller's title policy (issued at Seller's acquisition of the Property) along with the fully executed letter of intent.

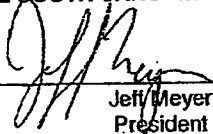
KB HOME will cause an Agreement to be prepared and delivered to Seller as soon as reasonably possible after the date that a fully executed copy of this letter is received by KB HOME. If the parties are unable to enter into an Agreement acceptable to both parties within 30 days of the Seller's execution of this letter of intent, then the parties shall have no further obligation to each other except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity".

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In the event we have not received a satisfactory response from you within 15 days of the date of this letter of intent, we shall assume that you have no further interest in completing a transaction with us and except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity", the terms of this letter are automatically withdrawn.

KB HOME SOUTH CAROLINA INC

By: _____


Jeff Meyer
President

SELLER: WESCOTT LAND COMPANY, LLC

Signature

Print Name

Its: _____

Date: _____

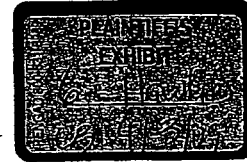
cc: Senior Regional Counsel

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EXHIBIT "A"
Preliminary Site Plan



Standard Form Lot Purchase Agreement



THIS AGREEMENT is between KB HOME SOUTH CAROLINA INC., a Delaware corporation ("Purchaser"), and Tommy R. Hawkins, a South Carolina resident ("Seller").

WITNESSETH:

WHEREAS, Seller desires to develop and sell certain property it owns, or will own, and Purchaser desires to purchase that property, all upon the terms and conditions contained in this Agreement,

NOW THEREFORE, for and in consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Property.** The "Property" means 110 townhome building Lots (as defined herein) contained in Phase 3E of the Farm at Wescott subdivision (the "Subdivision"), located on Patriots Blvd. in Dorchester County, South Carolina, as depicted on that certain Final Plat recorded at Plat Book L, Page 15 of the Dorchester County, South Carolina records, which plat is set forth on Exhibit "A" hereto. The "Governing Jurisdiction" means Dorchester County, South Carolina. Subject to the terms and conditions set forth herein, Seller agrees to sell, and Purchaser agrees to purchase, the Property.

2. **Effective Date.** The "Effective Date" means the later of the dates that this Agreement is signed by Purchaser or Seller.

3. **Lot.** For purposes of this Agreement, a "Lot" (each, a "Lot", and collectively, "Lots") is a parcel of developed and subdivided land that is developed in accordance with the final plat as recorded and attached hereto as Exhibit "A" titled, "Final Plat".

4. **Purchase Price.** The "Purchase Price" shall be the amount per Lot set forth on Exhibit "C" hereto (the "Project Schedule"). At each Closing Purchaser shall pay the Purchase Price by delivery to the lender holding the first mortgage on the Property ("Lender") of a letter of credit (each a "Purchase Price Letter of Credit") issued by the Issuer (defined below), and in a form reasonably acceptable to Seller and Lender, with a term of 13 months and in the face amount equal to the Purchase Price due at each Closing. In addition, Purchaser shall pay to Seller the Seller's actual interest costs, not to exceed 8.5% per annum, on funds equal to the outstanding face amount of any Purchase Price Letter of Credit until paid. The face amount of such letters of credit shall also be subject to adjustments, prorations and credits as herein provided. Within 10 days of the completion of physical construction on any Lot, Purchaser may deposit with Lender cash equal to such Lot Purchase Price, plus cash equal to Seller's actual interest costs attributable to such Lot Purchase Price, not to exceed 8.5% per annum. The face amount of the Purchase Price Letter of Credit shall be reduced by the amount of the cash Lot Purchase Price payment received by Lender. Purchaser may substitute cash for any Purchase Price Letter of Credit at any time during its term. Upon receipt of such cash, Lender shall return the Purchase Price Letter of Credit to Purchaser.

5. **Earnest Money.**

- a. Within 10 business days of the Effective Date, Purchaser shall deposit with Nelson, Mullins, Riley & Scarborough, LLP ("Escrow Agent"), a Letter of Credit issued by Bank of America, N. A., or another financial institution selected by Purchaser and reasonably acceptable to Seller ("Issuer"), in the

amount of \$50,000, as an earnest money deposit (the "LOC"; the LOC, the Additional Earnest Money (as hereinafter defined), any cash replacement thereof, any additions thereto and any proceeds thereof, together with all earnings thereon, shall be referred to herein as the "Earnest Money"). Escrow Agent shall hold the Earnest Money pursuant to Exhibit "D" hereto (the "Escrow Conditions"). The LOC (or any additional Letter of Credit, if applicable) shall be payable upon demand of Seller by presentation of an affidavit based upon the personal knowledge of an officer of Seller that recites that Purchaser is in default under this Agreement, that notice of such default has been given to Purchaser as required by the "Notices" paragraph of this Agreement, and that Purchaser has not cured the default within the time period permitted by this Agreement. If Escrow Agent is obligated to pay all or any portion of the Earnest Money to Seller from the LOC (or any additional Letter of Credit, if applicable), then Escrow Agent shall first give Purchaser 10 business days Notice of Escrow Agent's intention to draw on the LOC (or any additional Letter of Credit, if applicable), and if Purchaser fails to deliver to Escrow Agent funds in the amount of such proposed drawing, then Escrow Agent shall draw on the LOC (or any additional Letter of Credit, if applicable), paying such funds as Escrow Agent is required to pay to Seller hereunder and returning the balance of the Earnest Money to Purchaser. Purchaser shall have the right at any time to substitute cash for the LOC (or any additional Letter of Credit, if applicable), in which event Escrow Agent shall return the LOC (or any additional Letter of Credit, if applicable) to Purchaser.

- b. If the Feasibility Period expires without Purchaser having exercised its right to terminate this Agreement, then Purchaser shall deposit with Escrow Agent, no later than 10 business days after the expiration of the Feasibility Period, a Letter of Credit issued by Issuer in the amount of \$100,000, as an additional earnest money deposit (the "Additional Earnest Money"). The Additional Earnest Money shall be payable upon demand of Seller by presentation of an affidavit based upon the personal knowledge of an officer of Seller that recites that Purchaser is in default under this Agreement, that notice of such default has been given to Purchaser as required by the "Notices" paragraph of this Agreement, and that Purchaser has not cured the default within the time period permitted by this Agreement.
- c. The Earnest Money shall be returned to Purchaser as follows: Upon the Closing of Lots at the Initial Closing, including Purchaser depositing with Lender a Purchase Price Letter of Credit with a face amount equal to the Purchase Price due at the Initial Closing, the Additional Earnest Money LOC shall be reduced by \$50,000. Upon the second Closing, including Purchaser depositing with Lender a Purchase Price Letter of Credit with a face amount equal to the Purchase Price due at the second Closing, the Additional Earnest Money shall be returned to Purchaser. Upon the third Closing, including Purchaser depositing with Lender a Purchase Price Letter of Credit with a face amount equal to the Purchase Price due at the third Closing, the initial Earnest Money LOC in the amount of \$50,000 shall be returned to Purchaser.

6. Contingencies.

a. Contingency Events. Purchaser's obligations under this Agreement are contingent upon each of the following matters occurring (collectively, the "Contingency Events"). Should any of the Contingency Events not be satisfied or waived in writing by Purchaser prior to December 31, 2007, then Purchaser may terminate this Agreement by giving written Notice to Seller.

- i. all of Seller's warranties, representations and covenants contained in this Agreement shall be and remain true, correct and complete and fully performed as of the Effective Date and through the final Closing;

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- ii. there shall have occurred no material adverse change in the physical, financial or legal conditions of the Property from the conditions existing prior to the expiration of the Feasibility Period;
- iii. Seller shall deliver good and marketable title to the Property to Purchaser and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title insurance policy insuring good and marketable fee simple title to the Property with a liability limit in the amount of the Purchase Price at standard premium rates;
- iv. Seller shall have delivered to Purchaser Lots meeting the as built drawings (as defined herein);
- v. Seller is not in default under this Agreement;
- vi. Seller shall have paid all sewer and water impact fees to the Governing Jurisdiction.

7. **Delivery of Information.** Seller shall deliver to Purchaser copies of all materials relating to the Property in Seller's possession within 7 days of the Effective Date.

8. **Feasibility Period.** Purchaser and its agents, consultants and contractors shall have from the Effective Date until 5:00 P.M. Eastern Time on the 45th day thereafter as a feasibility period (the "Feasibility Period"), and until Closing if this Agreement is not terminated as provided herein, in which to enter upon the Property and to inspect and perform such tests and studies deemed necessary or appropriate by Purchaser. On or before the end of the Feasibility Period, Purchaser may provide Notice to Seller and Escrow Agent of Purchaser's intention to proceed with the transaction contemplated by this Agreement. If for any reason, in Purchaser's sole and absolute discretion, Purchaser does not timely provide such Notice to Seller, then this Agreement shall automatically terminate and the Earnest Money shall be returned to Purchaser. Seller shall cooperate with all parties performing such inspections and with Purchaser if Purchaser seeks updates or reliance letters from Seller's consultants. Purchaser shall indemnify and hold Seller harmless against all claims of liens on the Property arising from Purchaser's inspection of the Property, which obligation shall survive all Closings or any termination of this Agreement. If this Agreement is not terminated on or before the expiration of the Feasibility Period, then the Earnest Money shall be non-refundable except in the event of a default by Seller hereunder or the failure to occur of any of the Contingency Events.

9. **Closing and Possession.** Consummation of the purchase of Lots (each, a "Closing", and collectively, the "Closings") shall take place in accordance with Exhibit "C" hereto (the "Project Schedule"). Purchaser may purchase Lots on a faster schedule than required above, and Seller shall deliver Lots to Purchaser as needed. In the event Purchaser purchases Lots ahead of schedule, Purchaser may apply such Lots against the number of Lots Purchaser is required to purchase at subsequent Closings. Purchaser shall notify Seller which Lots it will purchase, and the time of Closing, at least 48 hours prior to each Closing. All Closings shall take place at the office of Purchaser's attorney. Seller shall deliver possession of the applicable Lots at Closing. However, no Closing shall be held at any time if Seller is delinquent in the performance of any of Seller's obligations hereunder. Seller for purposes of this paragraph shall be considered delinquent if Seller has received a notice of default from Purchaser. Purchaser shall not be held in default if Purchaser fails to purchase Lots pursuant to the Project schedule after giving notice to Seller of Seller's default. The Initial Closing shall occur no later than fifteen (15) days following the expiration of the Feasibility Period. Notwithstanding the foregoing, if the Initial Closing would otherwise occur within 15 days prior to any fiscal quarter-end of Purchaser (February 28/29, May 31, August 31 or November 30), then the Initial Closing shall be extended until the second business day in the next calendar month. Each Closing following the Initial Closing shall be referred to sometimes as a "Lot Takedown".

10. **Closing Costs and Prorations.** Seller shall pay the state transfer tax, all recording costs for the deed and satisfaction of any liens on the Property, Seller's attorneys' fees and all expenses incurred by Seller related to each Closing. Purchaser shall pay Purchaser's attorneys' fees, the cost of any title search and survey and the cost for preparation and issuance of an owner's title policy. Ad valorem taxes on all the Property for the tax year 2006 shall be paid by Purchaser at the Initial Closing based on the latest assessment available, but only up to \$17,500. Taxes for 2006 above such amount are the responsibility of Seller and Purchaser shall receive a credit against the Lot Purchase Price at the Initial Closing for the amount of 2006 ad valorem taxes for the Property in excess of \$17,500 not yet paid. ~~Ad valorem taxes on all the Property for the tax years 2007 shall be the responsibility of Purchaser, but only up to \$93,500 (\$850 x 110 Lots). Taxes for 2007 above such amount are the responsibility of the Seller and Purchaser shall receive a credit against the Lot Purchase Price at Closing for the amount of 2007 ad valorem taxes for the Property in excess of \$93,500 not yet paid.~~ Seller shall be solely responsible for any deferred taxes. This paragraph shall survive all Closings.

11. **Conveyance of Title.** At each Closing, Seller shall convey good and marketable fee simple title to the Lots being purchased pursuant to a recordable Warranty Deed. "Good and marketable title" shall mean title that is insurable by the title insurance company designated by Purchaser (the "Title Company") under a standard ALTA owner's form at standard rates, free and clear of all liens, encumbrances and other exceptions to title and rights of others (including, without limitation, oral or written leases and other occupancy agreements) except (i) as shown on Exhibit "F" hereto, (ii) the Covenants and (iii) ad valorem taxes not yet due and payable (collectively, the "Permitted Exceptions"). Purchaser shall have until each Closing to examine title to the Property and to give written notice to Seller of any objections that Purchaser may have, other than the Permitted Exceptions. Seller shall have until Closing to cure all such objections, at Seller's sole cost. If Seller does not cure such objections prior to Closing, then Purchaser may, in addition to any other right Purchaser may have, (a) take title to the Property despite the existence of the uncured title objections, (b) exercise Purchaser's rights under the "Seller's Default" paragraph or (c) apply the proceeds of sale to cure said title objections. Purchaser may, prior to Closing, obtain at its expense an ALTA/ASCM boundary survey of the Property. Should any survey reveal matters objectionable to Purchaser, Seller and Purchaser shall have the same rights and obligations with respect thereto as provided in this Agreement regarding objections to title. At each Closing, Seller shall execute an Owner's Affidavit and other affidavits, certificates and documents reasonably required by Purchaser or the Title Company to deliver title and complete the Closing as required by this Agreement.

12. **Subdivision Plans.**

- a. The final recorded plat for the Lots and all amenities is attached as Exhibit "A" hereto (the "Final Plat").
- b. Seller has graded the site in accordance with the soil reports and the final grading and development plans prepared by Seller's licensed engineer (the "Grading Plan").

13. **Development Specifications.** Seller has developed and agrees to deliver the Subdivision, the Lots and the Property at Seller's sole cost so that they each meets all applicable laws, regulations, ordinances, restrictions, orders and zoning conditions, and the development specifications ("Development Specifications") attached hereto as Exhibit "B". Seller also agrees to the following:

- a. Not later than 7 days after the Effective Date, Seller shall deliver to Purchaser licensed soil engineer's letters certifying compaction levels, to the extent in Seller's possession.
- b. In addition to the hard copies of the Construction Drawings a digital graphics file containing the following data shall be submitted to Purchaser in a .dwg:

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i. As built drawings of water, sewer, storm drain and building pads

ii. SCE&G proposed plans for power distribution and street lighting

c. Seller has completed the following: (i) clearing; (ii) grading; (iii) curbing; (iv) paving; (v) storm drainage, retention and detention facilities and other storm drainage systems, including payment of all off-site fees and charges with respect thereto, if any; (vi) sanitary sewer; (vii) public water source and distribution system with adequate capacity to serve a townhome dwelling unit on each Lot;

d. Seller has developed, or prior to the Initial Closing will develop, the Subdivision and caused each Lot to be served by underground electric lines sufficient to service each Lot, installed in a utility easement adjacent to the Lot line, with all applicable fees for electric service and installation paid. Seller shall use commercially reasonable efforts to facilitate Purchaser's installation of additional utilities but Seller shall not be required to incur any costs in this regard. In addition, any rebates received by Seller from any utility provider to the Subdivision shall promptly be paid to Purchaser.

e. Seller has installed, to the Governing Jurisdiction's requirements, all water lines and sewer mains, including laterals at Seller's sole cost and expense, and shall furnish Purchaser with as-built sewer and water layouts.

f. Seller shall convey, at the Closing any portion of the Property not depicted as a Lot on each final plat to the Homeowners Association (or to Purchaser at Purchaser's sole election) in accordance with the terms and conditions set forth in "Conveyance of Title" paragraph.

14. **Pre-Closing Lot Inspection.** Purchaser may perform a visual inspection of the Lot(s) and prepare a list of all items not in compliance with the Development Specifications. Seller shall correct all items as described on the list within 15 days after the inspection and prior to the Closing. Seller's failure to timely correct all such items shall constitute a default by Seller under this Agreement. In such event, in addition to all rights and remedies Purchaser may have under the "Seller's Default" paragraph, Purchaser may at Purchaser's option: (i) correct the items and receive a credit against the Purchase Price for Purchaser's expenses plus 10% or (ii) complete the Closing and allow Seller to complete the items within 30 days following the Closing.

15. **Moratoriums or Governmental Delays.** In the event any local, state or federal regulatory authority having authority over the Subdivision or the Lots imposes a moratorium on the issuance of building permits, septic system permits, sewer taps, water taps, certificates of occupancy, then the Project Schedule shall, at Purchaser's election, be extended by the time period that such moratorium exists. Seller shall prepay and shall be reimbursed by Purchaser at Closing for any required entitlements if said entitlements are made available prior to Closing. If the entitlements are not available to Seller on or before the 90th day following the announcement of a moratorium (without regard to the commencement date of the moratorium), then Purchaser shall have the right to terminate this Agreement by written Notice to Seller on or before the 30th day following the running of said 90 day period.

16. **Model Homes.** Seller shall cooperate with Purchaser to obtain "model permits" to start construction of the model homes prior to the recording of the final Subdivision plat. Seller shall allow Purchaser to use any mutually agreed upon vacant lots near or adjacent to the model Lots for paved or concrete parking without requiring

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Purchaser to close on those lots. Purchaser shall maintain the lots used for parking and if this Agreement is terminated then Purchaser shall remove any improvements or debris located on the lots used for parking. Purchaser's obligation to remove improvements and debris shall survive any termination of this Agreement.

17. **Construction Trailer.** Seller shall allow Purchaser to use a vacant lot in the Subdivision for Purchaser's construction trailer without requiring Purchaser to close on the lot. The lot to be used for the construction trailer shall be subject to Seller's approval, which approval shall not be unreasonably withheld or delayed.

18. **Sales Information Trailer.** Seller shall allow Purchaser to use a vacant lot in the Subdivision for Purchaser's sales trailer, without requiring Purchaser to close on such lot. The lot to be used for the sales information trailer shall be subject to Seller's approval, which approval shall not be unreasonably withheld or delayed.

19. **Entrance Feature.** The "Entrance Feature" shall consist of an entrance monument, signage, landscaping, irrigation, and lighting to be designed and installed by Purchaser. The design of the Entrance Feature is subject to Seller's written approval, which shall not be unreasonably withheld or delayed. Seller shall convey the land upon which the Entrance Feature is to be installed to Purchaser or the HOA (at Purchaser's election) at the Initial Closing.

20. **FHA/VA Approval.** Purchaser may exclude from this Agreement any Lot that cannot be accepted for approval by either FHA or VA.

21. **Protective Covenants.** The Subdivision does not have a mandatory homeowners association or a set of protective covenants, conditions and restrictions ("Covenants"). Seller agrees to permit Purchaser, at Purchaser's expense, to prepare and record, subject to Seller's approval, not to be unreasonably withheld or delayed, a set of Covenants encumbering the Subdivision.

22. **Storm Water.** Purchaser acknowledges and agrees that Purchaser is solely responsible for storm water runoff management in connection with any Lot once Purchaser acquires any Lot under this Agreement. Seller received a land disturbance permit from the Office of Coastal Resources Management ("OCRM") for the development of the Subdivision. Upon completion of the Subdivision OCRM contacted the South Carolina Department of Health and Environmental Control ("DHEC"), which agency inspected the Subdivision and issued an operational permit for the Subdivision. The Subdivision infrastructure has been dedicated to the County of Dorchester and the Final Plat of the Subdivision has been recorded. Seller represents that it has not receive any notices of violations from OCRM or DHEC regarding storm water compliance in connection with the development of the Subdivision. Seller covenants not to conduct any land-disturbing and construction activities on the Property from the Effective Date through the date Purchaser no longer owns any Lots in the Subdivision.

23. **Tree Ordinance.** If the Subdivision is subject to a tree preservation plan, tree replacement plan or similar program ("Tree Ordinance"), then Purchaser shall comply with the Tree Ordinance. Trees that are required to be preserved or replaced on the Property in a location other than on a Lot shall be Purchaser responsibility. Purchaser agrees to be responsible for the planting of one 2-inch caliper replacement tree per Lot, if required by a Tree Ordinance.

24. **Condemnation and Casualty.** If prior to Closing, all or any portion of the Property is condemned or taken, or threatened to be condemned or taken, by any authority, or any portion of the Property suffers a casualty loss, Seller shall give Purchaser immediate Notice thereof with a complete description of all relevant information and complete copies of all relevant documentation. Within 30 days of such Notice, Purchaser may elect to either: (i)

terminate this Agreement; or (ii) collect all awards and proceeds from any condemnation or insurance policy and keep this Agreement in full force and effect, in which case Seller shall promptly execute all documents required by Purchaser to assign Seller's rights therein to Purchaser.

25. Seller's Warranties. Seller represents, warrants and covenants to Purchaser that, as of the Effective Date, continuing through Closing, that:

a. Seller has good and marketable fee simple title to the Property, free and clear of all liens, encumbrances and other matters (other than the Permitted Exceptions). There are no parties other than Seller with any interest in the Property (marital, homestead, option, right of first refusal, leasehold or otherwise). No other signatures are required to make this Agreement fully enforceable by Purchaser. Seller is in sole and exclusive possession of the Property and no person or entity claims any right of possession to all or any portion thereof;

b. The execution and delivery of this Agreement by Seller and the execution and delivery of the deed and such other documents as are necessary or desirable to effectuate the transaction contemplated by this Agreement: (i) are within Seller's capacity and all requisite action has been taken to make this Agreement valid and binding on Seller in accordance with its terms; (ii) does not, and at Closing will not (a) result in a breach of or default under any indenture, agreement, instrument or obligation to which the Seller is a party or which affects all or any portion of the Property, or (b) to Seller's knowledge, constitute a violation of any law, order, ruling, ordinance, rule, regulation or governmental requirement to which the Seller is a party or which affects all or a portion of the Property. The person executing this Agreement, on behalf of Seller, has been duly authorized to act on behalf of and to bind Seller, and this Agreement represents a valid and binding obligation of Seller;

c. No portion of the building pad of a Lot is or shall be located within a flood plain, flood prone area, buffer wetlands, jurisdictional waters or special flood hazard area as indicated by any map or plat issued or controlled by FEMA, the Federal Insurance Administration, or any other federal, state or local agency (collectively referred to as "Flood Plain"). If any Lot is shown on the final Subdivision plat as being located in a Flood Plain, then the dimensions of the building pad for that Lot must also be depicted on the final Subdivision plat and no portion of the building pad for that Lot shall be located within the Flood Plain;

d. There are no impact fees, taxes, levies, assessments or special fees of any kind (other than normal ad valorem property taxes) imposed by any governmental authority or other third party that would be payable by Purchaser in connection with its use of the Property;

e. No commitments have been made to any governmental authority, utility company, school board, church, religious body, homeowner's association, or other organization, group, or individual that would impose an obligation upon Purchaser to construct any improvements, to make any contribution of money, to dedicate any land or to maintain any land or improvements;

f. All assessments against the Property are shown in the official records of the Governing Jurisdiction; no site or area improvements have been constructed or installed by any public authority, the cost of which may be assessed in whole or in part against any part of the Property; the Property is not subject to the imposition of impact or development fees; and Seller has not been notified of any possible future improvements that might create an assessment against any part of the Property;

g. There is no pending, and Seller has no notice or knowledge of: any threatened taking or condemnation of the Property or any portion thereof; or any action, litigation or proceeding by any organization, person or governmental agency affecting the Property or Seller with the exception of a lis pendens filed by DR Horton that is set to expire on 12/24/2006.

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h. Seller has no notice or knowledge of any violation of law, order, ruling, ordinance, rule, order or regulation with respect to Seller or the Property, and Seller has developed the Subdivision, the Lots and the Property so that they each meets all applicable laws, regulations, ordinances, restrictions, orders and zoning conditions;

i. During the time Seller has owned the Property, and to the best of Seller's knowledge with regard to the time prior to Seller's ownership of the Property: (i) none of the Property has been excavated; (ii) no landfill was deposited on or taken from the Property; (iii) no construction or other debris (including, without limitation, livestock, other organic materials, strippings, rocks, stumps or concrete) has been buried upon the Property; (iv) the Property has not contained a bury or borrow pit; and (v) the Property has not contained a cattle-dipping vat;

j. The Property has not been, and is not being, assessed or taxed under any agricultural, special use, open space, "Conservation Use", "Current Use", "Green Acres" or similar valuation or program, and if the Property has been so assessed or taxed, then Seller has paid all applicable taxes associated with such change in use;

k. Seller has filed all federal, state and local tax returns as required by law with respect to Seller and the Property;

l. The Property has full and free access to and from public streets and/or roads;

m. There are no attachments, executions, assignments for the benefit of creditors or voluntary or involuntary proceedings in bankruptcy or under any applicable debtor relief laws or any other litigation contemplated by or pending or threatened against Seller or the Property;

n. The Property contains no threatened or endangered species or endangered or protected habitats or items of archaeological significance as defined by applicable state and federal laws;

o. There are no cemeteries, grave sites or burial sites located on or immediately adjacent to the Property;

p. There are no known geological formations or conditions that might affect the use or development of the Property;

q. There are no signs, billboards, cell towers or leases for same located on or promised in connection with the Property;

r. There are no historically or archeologically significant artifacts located on or immediately adjacent to the Property that might affect the use or development of the Property or that would require any type of preservation, excavation or mitigation;

s. The Lots will be usable as Lots upon which a single family residence can be constructed and used for residential purposes without extraordinary expense for footings, foundation, slab, water and sewer ;

t. There are no wetlands or state jurisdictional waters located upon any Lot;

u. There are no zoning or land use stipulations or conditions affecting the Property and the Lots; and

v. The information and materials furnished and to be furnished to Purchaser, and Seller's representations and warranties made herein or in connection herewith, are true, complete and accurate and do not omit to include any material information necessary to make the same true or not misleading.

Seller shall not allow or cause any action to be taken that will cause any of the foregoing representations or warranties to be untrue or incorrect at Closing, or fail to take any action that may be required to keep such representations and warranties true and correct at Closing. Seller shall restate the foregoing representations and warranties to Purchaser at Closing, but failure to so restate shall not obviate the survival thereof. Seller shall indemnify and hold Purchaser harmless from and against any and all liabilities, losses, costs, damages and expenses (including attorneys' fees and expenses and costs of litigation) incurred by Purchaser as a result of the untruth, incorrectness or incompleteness when made and through Closing of any representation or warranty made herein or in connection herewith. This paragraph shall survive Closing or any termination of this Agreement.

26. **No Broker.** Purchaser and Seller each warrant and represent to the other that (i) neither of them has employed a real estate broker, agent or finder in connection with this transaction, and (ii) that no brokers', agents', finders' fees, commissions or other similar fees are due or will be due in connection with this Agreement or this transaction, and Purchaser and Seller each agree to indemnify and hold the other harmless from and against all liabilities, losses, costs, damages and expenses (including attorneys' fees and expenses and costs of litigation) that the other party may suffer or incur because of any claim by a broker, agent or finder claiming by, through or under such indemnifying party, whether or not meritorious, for any compensation with respect to this Agreement or Closing. This paragraph shall survive Closing or any termination of this Agreement.

27. **Default.**

a. Purchaser's Default. If Purchaser defaults in its obligation to purchase the Property, Sellers' sole and exclusive remedy shall be to terminate this Agreement, whereupon Seller shall receive payment of the Earnest Money as Seller's full liquidated damages as a result of such default. The parties hereby agree that (i) ascertaining the actual damages in the event of such a default is difficult, (ii) it is impossible more precisely to estimate the damages to be suffered by Seller upon Purchaser's default, (iii) such payment of Earnest Money is intended not as a penalty, but as full liquidated damages, and (iv) the amount of the Earnest Money held from time to time during the term of this Agreement constitutes a good faith estimate of the potential damages arising from defaults at those times. If Purchaser defaults in the performance of any covenant contained in this Agreement other than its obligation to purchase the Property, Sellers' sole and exclusive remedy shall be to terminate this Agreement.

i. b. Seller's Default. If Seller defaults in the performance of any covenant contained in this Agreement, Purchaser's sole and exclusive remedy shall be either (i) to terminate this Agreement, receive the return of all Earnest Money, and obtain reimbursement for Purchaser's out of pocket expenses incurred in connection with this Agreement, or (ii) to seek specific performance of this Agreement.

c. Notice and Cure Rights. In the event of a default under any covenant contained in this Agreement, the non-defaulting party shall give the defaulting party Notice of such default, specifying in reasonable detail the nature of the default, and the defaulting party shall have 20 days in which to cure said default.

28. **Notices.** All notices required or permitted to be given hereunder ("Notice") shall be in writing and shall be deemed given when (a) hand delivered, receipt required (b) delivered via certified first class mail, return receipt requested, (c) delivered via Federal Express, UPS or other nationally recognized overnight courier service, receipt required, or (d) transmitted via facsimile with confirmation of transmission by the transmitting equipment. Notices

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need not be provided to Escrow Agent unless such Notice requests action by Escrow Agent. All Notices shall be addressed as follows:

Purchaser: Jeff Meyer
President
KB HOME South Carolina Inc.
4401 Belle Oaks Drive, Suite 280
N. Charleston, SC 29405
Phone: (843) 576-6840 Fax: (843) 529-4605

With a copy to: Senior Regional Counsel
Southeast Region
KB HOME
280 Interstate North Circle, Suite 600
Atlanta, GA 30339
Phone: (678) 255-4188 Fax: (770) 933-4429

Seller: Mr. Tommy R. Hawkins

7150 Bryhawke Circle
N Charleston, SC 29418
Phone: (843) 552-0037
Fax: (843) 552-0083

With a copy to: Smith & Koontz, P.A.
7455 Cross County Road
Suite One
N Charleston, SC 29418
Phone: (843) 760-0220
Fax: (843) 552-2678

Escrow Agent: Nelson, Mullins, Riley & Scarborough, LLP
Liberty Center, 6th Floor
151 Meeting Street
Charleston, South Carolina 29401-2239
Attention: William Bobo, Jr.
Phone: (843) 720-4328
Fax: (843) 720-4328

29. **Covenants Pending Closing.** From and after the Effective Date through Closing, Seller shall (i) not voluntarily convey or encumber any portion of the Property or any rights therein, nor enter into any conveyance, security document, option, right of first refusal, easement, lease or other agreement granting to any person or entity any rights with respect to the Property, or any interest therein, (ii) operate and maintain the Property in a good and workmanlike manner at least as well as Seller has operated and maintained it prior to the Effective Date, (iii) within 3 business days after Seller's receipt thereof, give Notice to Purchaser of any litigation, arbitration or administrative proceeding concerning or affecting the Property, together with copies of all relevant documents, (iv) comply with all requirements of all laws, orders, rulings, ordinances, rules, orders and regulations of any governmental authority having jurisdiction over Seller or the Property or the use or construction thereof, and (v) maintain, at its expense,

insurance policies providing coverages in at least the amounts and against the risks covered by the insurance policies maintained by Seller as of the Effective Date.

30. **Standard Provisions.**

a. Seller shall allow Purchaser to rename the Subdivision to a name that is mutually acceptable to Purchaser and Seller.

b. Purchaser shall have the right to locate marketing and directional signage at the Subdivision entrance and other such locations throughout the Property and on any property owned by Seller within a 3 mile radius of the Subdivision. Seller acknowledges the importance to Purchaser of protecting its brand, including trademarks, service marks and other images. All printed and electronic materials, advertising copy, scripts, billboards and monument and other signage (collectively, "Marketing Materials") developed and/or used by Purchaser may (but shall not be required to) utilize Purchaser's then-standard or specially-designed trademarks, service marks and designs, including colors, fonts and other design characteristics, or such other design characteristics as Purchaser shall desire. Seller agrees that any Covenants or amendments thereto recorded after the Effective Date shall not conflict with the agreements set forth in this paragraph. In the event of a conflict between the Covenants and this paragraph, this paragraph shall control

c. Seller shall maintain the Subdivision, including all Lots not yet purchased by Purchaser, in a first-class manner, free of trash, garbage, refuse and construction debris. In the event that Seller fails to maintain the Subdivision in such manner, then Purchaser shall notify Seller by phone and Seller at Seller's election, shall: (i) correct such deficiency within 24 hours; or (ii) direct Purchaser to remedy the deficiency in which case Seller shall reimburse Purchaser for Purchaser's actual expenses incurred correcting such deficiency, plus 10%. Seller shall reimburse Purchaser for such expenses within 15 days of the presentation of an invoice to Seller by Purchaser. Purchaser shall be responsible to repair any damage to the infrastructure of the Subdivision caused by Purchaser, its agents and its subcontractors.

d. This Agreement shall be interpreted in accordance with the laws of the state in which the Property is located.

e. Time is of the essence in this Agreement.

f. This Agreement constitutes the sole and entire agreement of the parties and is binding upon and shall inure to the benefit of Seller and Purchaser, their respective heirs, successors, legal representatives and permitted assigns. The rights and obligations of Purchaser under this Agreement may be assigned by Purchaser to any entity. The rights and obligations of Seller under this Agreement may not be assigned. If Seller consists of more than one person or entity (i) each reference to Seller herein shall be deemed to refer to each person or entity constituting Seller, both individually and in the aggregate, and (ii) each person or entity constituting Seller shall be jointly and severally liable for all liabilities and obligations of Seller hereunder. All prior discussions, negotiations and agreements are merged herein and have no further force or effect. This Agreement may not be modified or amended except by an Agreement in writing signed by Purchaser and Seller. This Agreement may be executed in separate counterparts, and such counterparts shall constitute one and the same document.

g. All representations and warranties contained in this Agreement or given in connection herewith, together with all covenants expressly surviving Closing, shall survive Closing and delivery of the deed and other documents delivered at Closing and shall not be merged with delivery thereof. The Closing attorney is directed

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to provide contract survival language in the Closing documentation, but failure to include such language shall not obviate such survival.

h. The term "business day" shall mean Monday through Friday, excluding days on which federally-chartered or banks chartered by the state in which the Property is located are closed for business. If the day for any action under this Agreement falls on a day other than a business day, the day for the action shall automatically be extended until the next business day.

i. Any approval or determination made by Purchaser under this Agreement shall be in Purchaser's sole and absolute discretion, and any approval hereunder shall only be effective if given in writing prior to the approved action being taken.

j. If any provision of this Agreement shall be declared invalid or unenforceable by laws applicable thereto, or unenforceable as to certain parties, then the performance of such provision shall be excused by the parties hereto and the remaining provisions of this Agreement shall remain in full force and effect.

k. The titles, captions and paragraph headings are inserted for convenience only and are in no way intended to interpret, define or limit the scope or content of this Agreement or any provision hereof. This Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

l. PURCHASER AND SELLER EACH AGREE TO WAIVE A TRIAL BY JURY IN ANY DISPUTE ARISING OUT OF THIS AGREEMENT.

m. Any failure or delay of Purchaser or Seller to enforce any term of this Agreement shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be in writing and given pursuant to a Notice. Any such waiver by Purchaser or Seller shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

n. Upon the termination of this Agreement pursuant to its terms, the Earnest Money shall be (i) refunded to Purchaser (less \$100, which shall be paid to Seller as independent contract consideration), or (ii) paid to Seller if required under the "Purchaser Default" paragraph. In either case Purchaser and Seller shall thereafter have no further rights, obligations or liabilities hereunder other than those expressly surviving termination.

o. In the event of any litigation between Purchaser and Seller regarding this Agreement, the losing party shall promptly pay the prevailing party's attorneys' fees and expenses and costs of litigation.

31. Hazardous Materials.

a. The term "Hazardous Material" as used herein shall mean any hazardous or toxic substances, materials, chemicals, or wastes in any form and in any concentration that is or becomes, prior to Closing, regulated by the United States or any state or local government authority having jurisdiction over the Property (including any present order or agreement imposing liability or standards concerning any such substances, materials, chemicals, or wastes and any future such order or agreement that becomes effective prior to the Closing), and includes without limitation: any "hazardous substance," as that term is defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 United States Code sections 9601-9675); any "hazardous waste," as that term is defined in the Resource Conservation and Recovery Act of 1976 (RCRA) (42 United States Code sections 6901-6992k); petroleum products; volatile organic compounds; radioactive materials; asbestos and lead paint, in any form or condition; and substances or compounds

containing PCBs. The term "Environmental Law" as used herein shall mean any federal, state or local law, ordinance or regulation, or any order, demand or guidance document of any governmental agency, relating to Hazardous Materials.

b. Clean-up. If Purchaser's environmental inspections of the Property reveal the existence of any Hazardous Material on, in or under the Property, then Seller may at Seller's option elect, at Seller's sole expense, to complete the clean-up of the same prior to Closing and in accordance with all applicable governmental standards and Purchaser's reasonable standards. If such clean-up is not completed, and written certification thereof by all applicable governmental authorities is not received by Purchaser, prior to Closing, then Purchaser may either terminate this Agreement and receive a refund of the Earnest Money or may close this transaction and take possession of the Property in its as-is condition.

c. Representations, Warranties and Covenants. Seller hereby represents, warrants and covenants to Purchaser as follows (all of which shall survive Closing and any investigation or knowledge of Purchaser prior to Closing):

i. Seller has not and, to the best of Seller's knowledge, no third party has used, generated, transported, discharged, released, manufactured, stored or disposed any Hazardous Material from, into, at, on, under or about the Property in violation of any Environmental Law. To the best of Seller's knowledge, (a) the Property is not in violation, nor has been or is currently under investigation for violation of any Environmental Law; (b) there has been no migration of any Hazardous Material from, into, at, on, under or about the Property in violation of any Environmental Law; and (c) there is not now, nor has there ever been on or in the Property underground storage tanks or surface or below-grade impoundments used to store, treat or handle Hazardous Materials or debris or refuse buried in, on or under the Property.

ii. Seller shall defend (using counsel acceptable to Purchaser), indemnify and hold harmless Purchaser and Purchaser's officers, directors, employees, agents, shareholders, members, managers, attorneys and their respective representatives and successors in interest (collectively, the "Indemnitee") from any liability, loss, cost, damage or expense, including, without limitation, court costs, expert witness fees and attorneys' fees, that Indemnitee may suffer or incur as a result of any claim, demand, action, cost or judgment made or obtained by any individual, partnership, corporation, limited liability company, entity, governmental agency or person which arises out of or results from the presence or existence of Hazardous Materials above, below or on the Property to the extent that such Hazardous Materials are or were located in such locations prior to Closing.

32. **No Publicity.** Seller (including all directors, officers, partners, members, managers, employees, representatives, attorneys and agents of Seller) shall not make any media release, public announcement, press release, public disclosure or any other form of publicity in any manner or medium including, without limitation, newspaper, newsletter, magazine or electronic communication (collectively, "Publicity") relating in any way to this Agreement, including, without limitation, regarding (i) the execution or existence of this Agreement, (ii) this transaction, (iii) the status of this transaction (including, without limitation, any termination of this Agreement or closing of the transaction, or portion thereof, evidenced by this Agreement), (iv) any matter related to or arising out of this Agreement, (v) any of the terms or provisions contained in this Agreement, and/or (vi) any other matter related to or arising from any of the foregoing, without the prior written consent of Purchaser.

Seller shall submit in writing any Publicity desired or generated by Seller, to Purchaser, prior to release, and Seller must not release any such Publicity unless, prior to such release, Purchaser has approved such Publicity in writing. Provided, however, if in the written opinion of Seller's counsel such disclosure is required by law, then upon as much prior written Notice to Purchaser as is practical under the circumstances giving Purchaser an opportunity to seek an injunction or other equitable relief, Seller may disclose the information necessary to comply with the law. In the event of a breach or threatened breach of this no publicity paragraph, Purchaser shall be entitled to all rights,

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recourses and remedies available to it under applicable law or in equity, including, without limitation, under the provisions of this Agreement. The foregoing shall not limit Seller's ability to pursue any and all governmental or quasi-governmental approvals that may be contemplated by this Agreement or that may be necessary in connection with this transaction, in Seller's reasonable discretion.

33. **Memorandum of Agreement.** In the event that Purchaser does not terminate this Agreement during the Feasibility Period; then at any time after the expiration of the Feasibility Period, Purchaser may record the Memorandum of Land Purchase Agreement attached hereto as Exhibit "I".

34. **Offer.** This Agreement shall constitute an offer by Purchaser to Seller to purchase the Property. This offer is open for acceptance by Seller until 5:00 p.m. Eastern Time on March 9, 2007 (or any later date designated by Purchaser), by which time an unaltered original counterpart of this Agreement, duly executed by Seller, must have been actually received by Purchaser, without which this Agreement shall be automatically withdrawn and have no further force and effect.

[SIGNATURES ON FOLLOWING PAGE]

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IN WITNESS WHEREOF, the parties hereto have set their respective hands and affixed their seals the day and year indicated.

Seller:

Tommy R. Hawkins

Purchaser:

KB HOME SOUTH CAROLINA INC.

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Print Name: _____

Title: _____

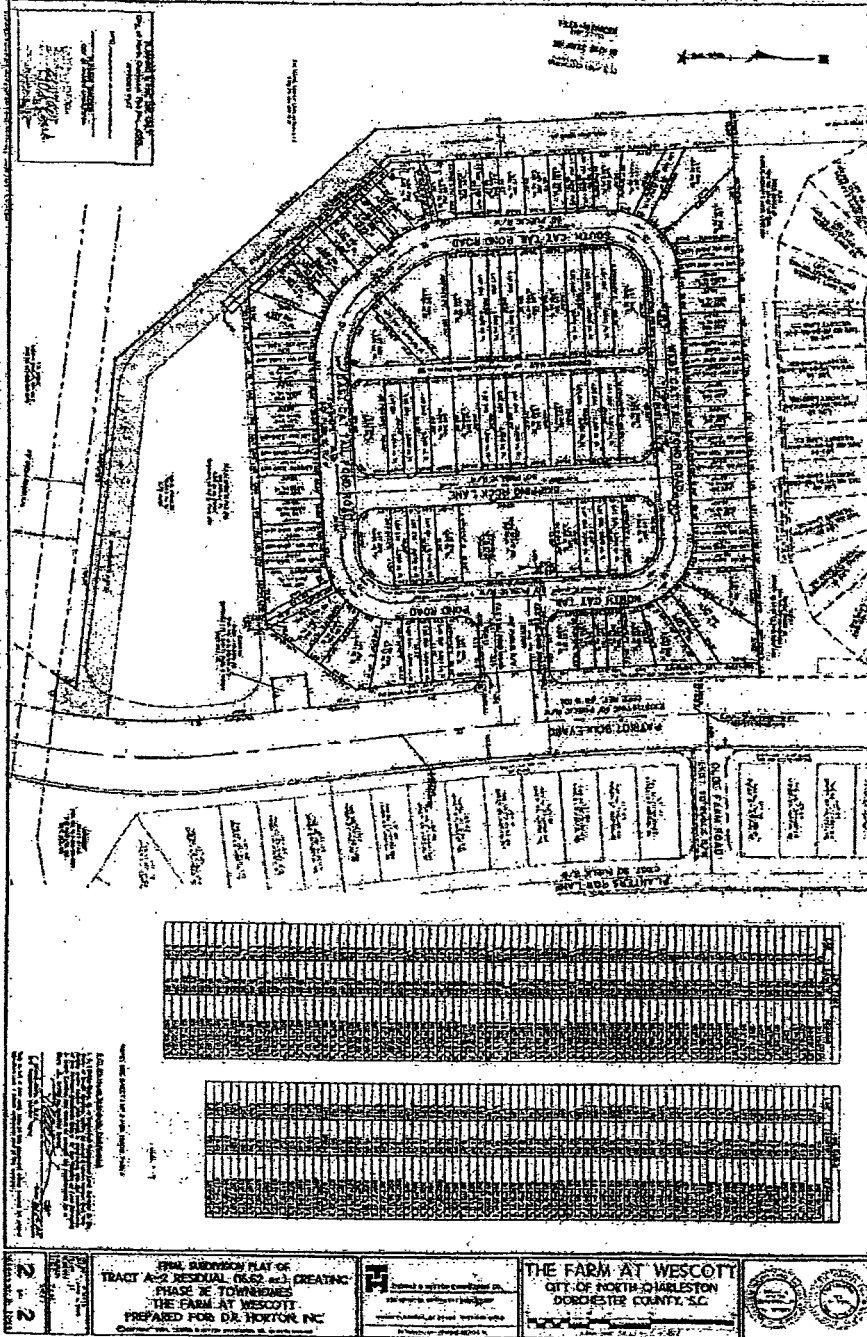
Date: _____

DIVISION: SOUTH CAROLINA
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Exhibit "A"
The Property

Those certain tracts or parcels of land described on that certain Final Plat, recorded at Plat Book L,
Page 15, of the Dorchester County, South Carolina records.

PROPERTY: PHASE 3E (TOWNHOME LOTS) OF THE FARM AT WESCOTT



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Exhibit "B"

Seller's Initials _____

Purchaser's Initials _____

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Exhibit "B"

1. The build-able area of each lot plus the required slopes must be completely cleared. Seller shall not bury construction or other debris (including, without limitation, organic materials, shippings, rocks, stumps or concrete) or establish bury or borrow pits under any portion of the Building Pad. All debris must be properly disposed. No burying or erection of beams shall be allowed on the lots or right-of-way without expressed written permission with the details as to the location, composition, depth, cover, etc. are first agreed upon.
2. The Seller shall provide the Purchaser with lots with all soils within Building Pads meeting or exceeding a minimum designed bearing capacity of 2,000 PSF or greater. Seller shall provide Purchaser with test reports two weeks prior to closing from a South Carolina licensed professional geotechnical engineer certifying pad compaction on each full lot of ninety-five percent (95%) maximum dry density obtained in general accordance with the standard dry proctor method and having a bearing capacity of 2,000 PSF or greater. Documentation of adequate field testing of all on lots and a report from a South Carolina licensed professional geotechnical engineer certifying soils within the Building Pad as having a bearing capacity of 2,000 PSF or greater shall also be provided two weeks prior to the closing.
3. No portion of the Building Pad or a Lot shall be located within a flood plain, buffer wetlands, jurisdictional waters or special flood hazard area as indicated by any map or plan issued or controlled by FEMA, the Federal Insurance Administration, or any other federal, state or local agency (collectively referred to as "Flood Plain").
4. All streets and utilities including storm sewers and retention/detention have been completed to County/City standards and dedicated to the County/City.
5. The minimum required improvements include developer required erosion control, clearing, grading, storm sewer, sanitary sewer, water, curbing, paving.
6. Catch basins shall be located so that they do not interfere with the driveway for that lot.
7. Seller is responsible for the silt fencing that relates to the development of the Subdivision, but not home construction.
8. Seller or HOA must maintain all temporary detention ponds per the County/City standards until all lots are closed.
9. Stub-outs for all sanitary sewer laterals shall be constructed as per as-builts.

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10. Seller has installed "roll back" or "valley" curb (not "L-back") in the development.
11. Seller has developed the Subdivision so that it met all applicable governmental regulations and the requirements of this Agreement. Seller, at its sole cost and expense (including furnishing any required maintenance bond or deposit) shall timely cause all roads, sanitary and storm sewer facilities, water lines and drainage easements in the Subdivision to be dedicated to the applicable governmental authority prior to the closing of the first Lot, and thereafter timely accepted by that authority.
12. Water and Sewer As-Built: Seller shall install all water lines and sewer mains, including laterals, at its expense and shall furnish Purchaser with municipality approved as-built sewer and water layouts.
13. The corners of all Lots shall have property corner pins.
14. Seller has complied with all applicable laws, ordinances, regulations and restrictions relating to the development of the Lots.
15. Seller will notify Purchaser of any limiting ordinances, covenants, restrictions, or other property details which would positively or negatively impact the development or value of the subject property.

Exhibit "C"
Project Schedule Phase 1

[illegible]

Type of Closing	Number of Lots	Purchase Price	Lot Size	Closing Date on or before
Initial Closing	60	\$33,000	Per plat	15 days following the end of the Feasibility Period
Lot Takedown	30	\$33,750	Per plat	6 months after the Initial Closing
Lot Takedown	20	\$33,000	Per plat	13 months after the Initial Closing
Total Lots To Be Purchased	110			

Exhibit "D"
Escrow Conditions

1. If Closing takes place under this Agreement, then Escrow Agent shall deliver and pay over the Earnest Money as directed in this Agreement. If this Agreement is terminated in accordance with the terms hereof, then Escrow Agent shall deliver the Earnest Money to Purchaser upon Notice to Escrow Agent.

2. Upon receipt of any written demand from either Purchaser or Seller hereto claiming Earnest Money, Escrow Agent shall promptly give Notice with a copy of the demanding party's demand to the non-demanding party. Unless the non-demanding party delivers Notice to Escrow Agent objecting to such disbursement within 15 days of such party's receipt of Escrow Agent's Notice, Escrow Agent shall deliver the Earnest Money to the party demanding the same and Escrow Agent shall be fully released and discharged from any further obligations hereunder. In the event the non-demanding party timely files an objection, Escrow Agent shall hold the Earnest Money.

3. Escrow Agent is acting as a stakeholder only with respect to the Earnest Money. If there is any dispute as to whether Escrow Agent is obligated to deliver the Earnest Money or as to whom the Earnest Money is to be delivered, Escrow Agent shall refuse to make any delivery, and shall continue to hold the Earnest Money until receipt by Escrow Agent of an authorization in writing, signed by Seller and Purchaser, directing the delivery of the Earnest Money. In the absence of such authorization, Escrow Agent shall hold the Earnest Money until a final determination of the rights of the parties in an appropriate judicial proceeding. If such written authorization is not given, or a proceeding for such determination is not begun, within 30 days of the last day for a Closing, then Escrow Agent may commence a proceeding to deposit the Earnest Money in a court of competent jurisdiction pending such determination. The party determined not to be entitled to the Earnest Money shall reimburse Escrow Agent for all costs and expenses of such proceeding, including, without limitation, reasonable attorneys' fees and expenses, incurred by Escrow Agent. Upon delivery of the Earnest Money in any of the manners herein provided, Escrow Agent shall have no further liability or obligation hereunder.

4. Purchaser's Tax ID No. is: 20-5390218.

5. In the event of a conflict between the terms of this Exhibit "D" and the terms of the main text of this Agreement, the terms of the main text shall control.

Escrow Agent executes this Exhibit "D" for the purpose of agreeing to comply with this Exhibit "D" and receiving the benefits pursuant to this Exhibit "D". Escrow Agent's failure to execute this Exhibit "D" shall not otherwise affect the validity of this Agreement. Escrow Agent may execute this Agreement after the time Earnest Money is deposited.

Executed by Escrow Agent as of the ____ day of _____, 20____.

Escrow Agent:

NELSON, MULLINS, RILEY & SCARBOROUGH, LLP

By: _____
Print Name: _____
Title: _____
Date: _____

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Exhibit "E"
Lender Letter

[Date]

Senior Regional Counsel
Southeast Region
KB HOME
280 Interstate North Circle, Suite 600
Atlanta, GA 30339

Re: Loan (the "Loan") to [Name of Developer/Seller] ("Borrower") from [Name of Lender] ("Lender") secured by
[Name of Project] (the "Property"),

Dear Counsel:

In connection with the Loan, Lender recognizes the source of a portion of Borrower's equity infusion in the Property is the Earnest Money tendered by KB HOME SOUTH CAROLINA INC. ("KB") pursuant to that certain Standard Form Lot Purchase Agreement between KB and Borrower, having an Effective Date of [Effective Date of Agreement] (the "Purchase Agreement"). In consideration of the benefit of same to Lender, Lender agrees that it will be bound by Section 4, Purchase Price, of the Agreement with regard to possession of the Purchase Price Letters of Credit. Furthermore, Lender agrees that, after any default by Borrower under the Loan, together with acceleration by Lender of the outstanding balance of the Loan and demand for payment of same by Lender upon Borrower, Lender shall give KB contemporaneous written notice of same and permit KB to purchase the Loan (together with all collateral documents securing the Loan) on a non-recourse, AS-IS basis for an amount equal to the total outstanding principal balance and all accrued interest and late charges and unreimbursed actual attorneys' fees and costs incurred by Lender in connection with the Loan, attempts to collect same and its purchase by KB, but only if such amount is tendered to Lender within 30 days of such notice. Such notice to KB will specify, in reasonable detail, the exact amount of the above items to be paid by KB in connection with such purchase. Lender further agrees that, in the event that Lender takes title to the Property (whether by foreclosure, deed in lieu or otherwise), Lender agrees to recognize and attorn to KB under the Purchase Agreement, and not to disturb KB's rights thereunder. Upon any such attornment, the Purchase Agreement shall continue in full force and effect in accordance with its terms as a direct agreement between Purchaser and Lender.

Nothing herein shall prohibit Lender from pursuing, concurrently with the giving of such 30 day notice, any and all remedies and recourse on the Loan and against the Property upon the occurrence of a default under the Loan, provided that any such recourse or remedy is not inconsistent with KB's rights hereunder and provided that neither foreclosure nor deed in lieu thereof are completed prior to the running of such 30 day period.

This letter is not assignable by KB without the prior written consent of Lender. KB agrees that this letter or a likeness of it shall not be recorded in the real estate records of the County in which the Property is located.

Lender intends to receive an assignment from Borrower of a collateral interest in the Purchase Agreement as collateral for the Loan, and KB consents to same, provided KB receives a copy of the assignment documents relating to the Purchase Agreement within 30 days of the assignment.

All notices required or permitted to be given hereunder ("Notice") shall be in writing and shall be deemed given when (a) hand delivered, receipt required (b) delivered via certified first class mail, return receipt requested, (c) delivered via Federal Express, UPS or other nationally recognized overnight courier service, receipt required, or

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(d) transmitted via facsimile provided a copy is sent the next day by method (a), (b) or (c). All Notices shall be addressed as follows (or such other addresses or numbers that the parties may supply to the other parties by written Notice):

KB: Senior Regional Counsel
Southeast Region
KB HOME
280 Interstate North Circle, Suite 600
Atlanta, GA 30339
Phone: (678) 255-4188 Fax: (770) 933-4429

Please indicate your acceptance to these terms by signing below. This letter may be executed in separate counterparts. This letter shall be fully executed when each party whose signatures are required has signed at least one counterpart, even though no one counterpart contains the signatures of all the parties to this letter. Further, the consent of Borrower to these matters is indicated by Borrower's execution below.

Sincerely,

[Name of Lender]

By: _____

Print Name: _____

Title: _____

Date: _____

Consented to by Borrower:

Tommy R. Hawkins

By: _____
Print Name: _____
Title: _____
Date: _____

Agreed to by KB:

KB HOME SOUTH CAROLINA INC.

By: _____
Print Name: _____
Title: _____
Date: _____

DIVISION: SOUTH CAROLINA
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Exhibit "F"
Permitted Exceptions

None.

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Exhibit "G"

Intentionally Deleted

Exhibit "H"
Zoning Stipulations

None

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Exhibit "I"
Memorandum of Agreement
Following 3 Pages

INSTRUCTIONS: PLEASE EXECUTE THE FOLLOWING MEMORANDUM.

Seller's Initials _____

Purchaser's Initials _____

Upon recording return to:

Senior Regional Counsel, Southeast Region- KB HOME-280 Interstate North Circle, Suite 600-Atlanta, GA 30339

MEMORANDUM OF LOT PURCHASE AGREEMENT

THIS MEMORANDUM OF LOT PURCHASE AGREEMENT, is made and entered into as of this ____ day of _____, 20____ between Tommy R. Hawkins, a South Carolina resident (hereinafter referred to as "Seller"), and **KB HOME SOUTH CAROLINA INC.**, a Delaware corporation (hereinafter referred to as "Purchaser") to place in the _____ County, South Carolina ROD Office, this instrument for the purpose of putting the public on notice of inquiry concerning the terms of that certain STANDARD FORM LOT PURCHASE AGREEMENT, having an effective date of _____, 20____ (the "Agreement") wherein Seller has agreed to sell and Purchaser has agreed to purchase the subdivided residential building lots developed by Seller on the property described in Exhibit "A" attached hereto and by this reference incorporated herein ("Property"). This Memorandum of Lot Purchase Agreement shall automatically expire on January 31, 2011, and shall be of no force or effect after that date. The addresses of the Seller and Purchaser for notice are as set forth below:

PURCHASER:

Senior Regional Counsel
Southeast Region
KB HOME
280 Interstate North Circle, Suite 600
Atlanta, GA 30339
Phone: (678) 255-4188
Fax: (770) 933-4429

SELLER:

Mr. Tommy Hawkins
7150 Bryhawke Circle
N Charleston, SC 29418
Phone: (843) 552-0037
Fax: (843) 552-0083

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties herein have set their hands and seals hereunto,
as of the day and year first above written.

WITNESSES

SELLER:

Tommy R. Hawkins By: _____

Print Name: _____

Its: _____

The State of _____
County of _____

Pursuant to South Carolina Code §30-5-30(C), I the undersigned notary public, do hereby
certify that Tommy R. Hawkins, herein personally appeared before me this day and
acknowledged the due execution of the foregoing instrument in the presence of the witnesses
whose signatures appear above. Witness my hand and seal the _____ day of _____
_____, 2006.

Notary Public [SEAL]

My Commission Expires: _____

WITNESSES

PURCHASER:

KB HOME SOUTH CAROLINA INC.

By: _____

Print Name: _____

Its: _____

The State of _____
County of _____

Pursuant to South Carolina Code §30-5-30(C), I the undersigned notary public, do hereby
certify that **KB HOME SOUTH CAROLINA INC.**, by its officer, herein personally appeared
before me this day and acknowledged the due execution of the foregoing instrument in the
presence of the witnesses whose signatures appear above. Witness my hand and seal the _____
_____ day of _____, 2006.

Notary Public [SEAL]

My Commission Expires: _____

EXHIBIT A

PROPERTY DESCRIPTION

(Attach Recorded Plat)

Exhibit "A"

Those certain tracts or parcels of land described on that certain Final Plat, recorded at Plat Book L, Page 15, of the Dorchester County, South Carolina records.



DRAFT

STATE OF SOUTH CAROLINA)
) REAL ESTATE PURCHASE AGREEMENT
COUNTY OF DORCHESTER)

THIS AGREEMENT made as of the date this Agreement has been duly executed by Seller and delivered to Purchaser (the "Effective Date"), by and between Jessco Homes, Inc.(hereinafter referred to as "Purchaser"), and Tommy R. Hawkins (hereafter referred to as "Seller").

WITNESSETH:

1. Sale. In consideration of the mutual covenants and agreements hereinafter set forth, the refundable payment of the sum of ~~TWENTY-FIVE FIFTY THOUSAND (\$25,000.00)~~ (\$50,000.00) (the "Earnest Money") in escrow as more fully set forth at Paragraph 4 herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Seller hereby agrees to sell, and Purchaser hereby agrees to purchase, upon the terms and conditions hereinafter set forth, (i) that certain parcels of real property located in the County of Dorchester and in the County of Berkeley, State of South Carolina, containing approximately 173+/- acres (as determined by a boundary survey to be conducted by the Purchaser) 110 Townhome Lots and more particularly described in EXHIBIT A, attached hereto and made a part hereof, together with all easements, rights-of-way, appurtenances and other rights and benefits belonging to, running with or otherwise related thereto (such real property and appurtenant benefits being referred to herein collectively as the "Property").

2. Purchase Price. The total purchase price (the "Purchase Price") for the Property shall be THIRTY-FOUR FIVE THOUSAND and 00/100 (\$34,000.00) DOLLARS (\$35,000.00), per ~~in Site~~ lot payable as follows (see EXHIBIT B for lot closing schedule:

- (a) The sum of TWENTY-FIVE THOUSAND and 00/100 (\$25,000.00) DOLLARS has been paid to J. Stanley Claypoole, Attorney, in escrow as Earnest Money and shall be paid to Seller at Closing (as defined in paragraph 9 hereof) by certified check or wire transfer.
- (b) The remaining portion of the Purchase Price shall be paid by wire transfer or certified check at closing.

3. Conditions to Closing. The following conditions shall be satisfied on or before the Closing Date (as defined in paragraph 9), and Seller shall duly perform all obligations required to be performed by him to satisfy each condition, or the Purchaser shall have no further obligations or responsibilities under this Agreement; and this Agreement shall be, at the option of

Purchaser, null and void. Purchaser may waive any and all of these conditions in whole or in part without prior notice; provided, however, that no such waiver of a condition shall constitute a waiver by Purchaser of any of its other rights or remedies at law or equity if Seller shall be in default under this Agreement:

(a) Seller shall have performed and complied with all conditions contained in this Agreement to be performed by Seller.

~~(b) Purchaser shall have secured financing suitable to its needs to fund the construction of 42 town house units~~

(c) The Property shall not have been condemned.

4. **Earnest Money.**

(a) The Earnest Money (as defined herein) shall be held by J. Stanley Claypool, Attorney (the "**Escrow Agent**") in an FDIC insured non-interest bearing money market account. At the Final Closing, the Escrow Agent shall pay the Earnest Money to Seller. The Earnest Money shall be credited against the Purchase Price to be paid at Closing. In the event this Agreement is breached by either party, the remedies of each party are set forth at Paragraph 11 herein.

(b) Upon receipt of a letter from Purchaser and acknowledged by Seller indicating that this Agreement has been terminated by Purchaser pursuant to the terms of this Agreement, Escrow Agent shall release the Earnest Money. Upon Final Closing, Escrow Agent is authorized to release the Earnest Money to Seller. Except as otherwise expressly provided in this Paragraph 4, Escrow Agent shall make payments and otherwise act only upon written instructions signed by both Purchaser and Seller.

5. **Inspection.** Purchaser shall have ~~thirty (30)~~ **fifteen days (15)** days from the date of execution by both parties of this Agreement to undertake certain necessary inspections and studies related to the Property (the "**Inspection Period**"). Seller agrees to provide Purchaser and its agents, employees and representatives full access to the Property and to cooperate with Purchaser in connection with such inspection and review. After the expiration of the Inspection Period, the Earnest Money shall become non-refundable, except in the event of a default by Seller as such term is defined herein. Purchaser shall have the right, in its sole discretion, to terminate this Agreement at any time during the Inspection Period. If Purchaser elects to terminate the Agreement as provided herein, Purchaser shall deliver to Seller all studies and reports obtained from Seller, as well as all studies and reports prepared for Purchaser, during the Inspection Period, and this Agreement shall thereafter be null and void. If Purchaser shall terminate this Agreement on or before the initial Inspection Period expiration date, Escrow Agent shall thereupon return all the Earnest Money to Purchaser.

6. **Survey.** ~~Purchaser may will deliver to Seller a survey in form for recording and acceptable in form and substance to Seller and showing the exact dimensions of the Property;~~

including the dimensions and location of all improvements, easements, appurtenant benefits, utilities, adjoining streets and abutting owners. The survey shall be finalized in a form suitable for recording and Seller shall cause such survey to be approved by local regulatory agency, and copy of the recorded plat of the Property, and the Property shall be conveyed according to the survey.

7. **Representations, Warranties and Covenants of Seller.** In order to induce Purchaser to enter into this Agreement, Seller hereby makes the following representations, warranties and covenants to and with Purchaser, each of which shall be true as of, and shall survive the Closing:

(a) **Absence of Undisclosed Liabilities.** Except to the extent specifically disclosed in the Exhibits and Schedules attached hereto and in agreements which have been delivered to Purchaser, Seller is not aware of any liabilities or obligations of any nature whatsoever, whether absolute, accrued, contingent or otherwise that affect the Property.

(b) **Litigation.** Seller is not aware of any actions, suits or proceedings pending or threatened before any court, agency, governmental authority or arbitrator related to the Property, which could, if successful, have an adverse effect on the condition or value of the Property.

(c) **Adverse Conditions.** Except as specifically disclosed in this Agreement, or in the Exhibits and Schedules hereto, Seller does not know of any facts or circumstances which could have a material adverse effect on the condition or value of the Property.

(d) **Conduct of Sellers.** Between the Effective Date and the Closing, Seller will conduct and manage the Property diligently and prudently and will use his best efforts to preserve the Property. The Seller shall not enter into any contract or commitment or engage in any transaction affecting the Property which will survive the Closing, or affecting any representation or warranty in this Agreement without the prior written consent of the Purchaser.

(e) **Materialmen's Liens.** As of the date of the Closing, Seller will have fully paid all laborers and materialmen for prior improvements to the Property, or the applicable lien period with respect to such work or improvements has expired.

(f) **Title.** Seller shall convey good and marketable fee simple title to the Property by a general warranty deed free and clear of all options, rights of first refusal, liens. Purchaser shall cause a title examination of the public records for Charleston County during the Inspection Period and shall notify the Seller of any title exceptions that are unacceptable to the Purchaser.

8. **Toxic Waste.** Seller represents that he has not (to the best of his knowledge) deposited any toxic wastes or other hazardous materials on the Property to be purchased. Seller further represents that she has received no notice from any governmental body or other agency or

person indicating that there are toxic wastes or hazardous materials on the Property.

9. **Closing Matters.**

9.1. **The Closing Date.** The date (the "Closing Date"), time and place of closing ("Closing") shall be specified by notice from Purchaser to Seller. The Closing Date shall be on or by the 30th day following the expiration of the Inspection Period, as may be extended, established by mutual agreement of the parties. Closing shall be no later than April 27, 2007.

9.2. **Prorations.** Real estate taxes, utility charges, and all other items of income or expense shall be adjusted and prorated as of the Initial Closing Date. If actual taxes, charges, or other items of income and expense are unknown at the closing date, estimates shall be made and subsequent proration adjustments shall be made based upon the actual taxes which are paid or received. The parties shall execute a proration agreement to this effect at Closing. Any additional taxes resulting from the quarterly takedown of the Property will become the responsibility of and paid by the Purchaser.

9.3. **Closing Costs.** Except as specified herein, each party shall pay for its own standard closing costs. Accordingly, Seller shall pay for recording and filing fees, deed preparation, releases of mortgages and Seller's attorney fees. The Purchaser shall pay for its inspections and its attorney fees, title examination charges, roll back taxes (if any) and title insurance.

9.4. **Seller's Obligations at the Closing.** At the Closing, Seller shall deliver to Purchaser the following documents:

(a) **Deed.** A General Warranty Deed (the "Deed") in recordable form executed by Sellers conveying the Property and the improvements located thereon to Purchaser, subject only to the Permitted Exceptions.

(b) **Evidence of Authority.** Copy of such documents as may be acceptable to the Title Company, so as to evidence the authority of the person signing the Deed and other documents to be executed by Seller at the Closing and the power and authority of Seller to convey the Property to Purchaser in accordance with this Agreement.

(c) **Foreign Person.** An affidavit of Seller certifying that Seller is not a "foreign person" as defined in the Federal Foreign Investment in Real Property Tax Act of 1980, and the 1984 Tax Reform Act, as amended.

(d) **Withholding Affidavit.** A South Carolina Withholding Affidavit indicating whether or not Seller is a resident of the State of South Carolina.

(e) Owner's Affidavit. An executed affidavit and/or other documents reasonable acceptable to Seller and the Title Company issuing the Owner's Policy and/or Lender's Title Policy without exception for possible lien claims of mechanics, laborers and materialmen.

(f) Closing Statement. An executed Closing Statement.

(g) Title Company Documents. Such other certifications and confirmations as may be reasonably required by the Title Company to insure over any liens or encumbrances affecting the Property, and the standard exceptions contained in an ALTA Owner's Policy of title insurance (except the survey exception);

(h) Certificate. A certificate from Seller certifying that the representations and warranties set forth in this Agreement are still true and correct as of Closing.

(i) Other Documentation. Such other documents as may be reasonable and necessary to consummate and close the purchase and sale contemplated herein pursuant to the terms and provisions of this Agreement.

10. Notices. All notices, demands and requests given or made in connection with this Agreement shall be made in a writing signed by the party serving the same, and hand delivered, sent by facsimile transmission, or deposited in the registered or certified United States mail, return receipt requested, postage prepaid, and (a) if intended for Purchaser shall be addressed to:

Mr. Jeff Stahl
Jessco Homes, Inc
106 Growden Ln
Ladson, SC 29456

With a copy to:

Stanley Claypool
2155 Northpark Ln.
North Charleston, SC
29406

and (b) if intended for Seller shall be addressed to:

Mr. Tommy R. Hawkins
7150 Bryhawke Circle
North Charleston, SC 29418
Phone: 843-552-0037
Fax: 843-552-0083

With a copy to:

Smith & Koontz, P.A.
7455 Cross County Road, Suite One
North Charleston, SC 29418
Phone: 843-760-0220
Fax: 843-552-2678

Any such notice sent or delivered according to this Section 10 shall be effective upon actual receipt thereof, including by facsimile transmission, or three (3) days after mailing, whichever is earlier.

11. Contract Remedies.

(a) Default by Seller. In the event of a breach by Seller of any of the terms hereof and provided Purchaser is not in default, Purchaser shall have the option to:

- (i) Terminate this Agreement and have the Earnest Money refunded.
- (ii) To enforce the terms of this Agreement in a suit for specific performance.

(b) Default by Purchaser. In the event Purchaser fails to close the transactions contemplated hereby due to reasons not caused by a breach by Seller, and so long as Seller is not also in breach of this Agreement and all conditions precedent have occurred, Escrow Agent shall pay the Earnest Money to Seller, as full liquidated damages, and neither Purchaser nor Seller shall have any further rights hereunder and Seller shall have the option to:

- (i) Terminate this Agreement and retain the Earnest Money as full liquidated damages.
- (ii) To enforce the terms of this Agreement in a suit for specific performance.

12. Brokers. ~~Seller shall be responsible for paying a real estate commission of Two point five (2.5%) percent of the Purchase Price to Premier Real Estate, LLC., which shall become due and payable at Closing.~~ Seller and Purchaser represent to each other that neither party has retained the services of any other real estate broker to represent their respective interests in connection with the sale of the Property.

13. Eminent Domain. If, prior to the Closing Date, the Property or any portion thereof shall be taken by any governmental authority under its power of eminent domain, the Purchaser shall have the option, upon notice given to the Seller not later than ten (10) business days following such taking:

- (a) To take title to the Property on the Closing Date, in which event the Seller

shall assign his rights in the condemnation award to the Purchaser (or the Purchaser shall receive the condemnation award from the Seller if he has already been paid before the Closing Date and only in the event that the Purchaser closes on the Property on the Closing Date); or

(b) To terminate this Agreement, in which event the Earnest Money shall be refunded to Purchaser, and this Agreement shall immediately be null and void, and neither party have any further loss, cost, damage, right, or remedy against the other.

14. **Partial Invalidity.** If any term or provision of this Agreement shall to any extent be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement or the application of such invalid term or provision to other persons or circumstances shall not be affected thereby.

15. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina.

16. **Entire Agreement.** This Agreement represents the entire agreement between the parties hereto, and neither Purchaser nor Seller, or any agent representing either, has made any statement, promise or agreement, verbally or otherwise, in addition to or in conflict with the terms of this Agreement. Any representation or agreement made during the negotiations is hereby merged into this Agreement and if not set forth herein, is hereby waived.

17. **Captions.** The paragraph captions of this Agreement have been inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Agreement.

18. **Modifications.** This Agreement may be modified only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

19. **Survival of Representations and Warranties.** All representations, warranties, covenants and agreements contained in this Agreement, and all documents and agreements incorporated therein and herein, shall be true at and as of the time of the Closing as though such representations, warranties, covenants and agreements were made at and as of such time, and all such representations, warranties, covenants and agreements shall survive the Closing.

20. **Assignment.** This Agreement, together with all rights hereunder, may be assigned by Purchaser with Seller's consent, which consent shall not be unreasonably withheld, provided Purchaser shall not be relieved of any liability hereunder.

21. **Successors and Assigns.** This Agreement is binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

22. **Warranty of Authority.** The individuals actually executing this Agreement personally represent and warrant that they have the necessary power and authority to execute this Agreement on behalf of the party they represent, and that their signatures are sufficient to make this Agreement the binding and enforceable obligation of such party.

23. **Enforcement of Agreement.** In the event either party is required to commence legal proceedings to enforce the terms of this Agreement, then the prevailing party shall be entitled to collect from the other party all costs and expenses, including reasonable attorney fees, incurred in the enforcement of this Agreement.

24. **Additional Terms.**

- (a) The Seller shall deliver to the Purchaser lots configured at ~~Twenty-two feet (22')~~ of frontage by ~~forty-five feet (45')~~ in depth, as per the recorded plat attached hereto as "Exhibit A".
- (b) The Seller shall cooperate with and assist the purchaser in securing the Right of the Purchaser and it's Survivors to have use of the Community Amenity Center and all rights that are associated with The Farm at Wescott.

IN WITNESS WHEREOF, the parties have hereto set their respective hands and seals as of the date and year set forth below.

WITNESS:

PURCHASER:

Jeff Stahl

By: _____

Acceptance Date _____

WITNESS:

SELLER:

Tommy R. Hawkins

By: _____

Its: _____

Acceptance Date: _____

ESCROW AGENT:

J. Stanley Claypool

By: _____

Acceptance Date: _____

EXHIBIT B

Closing Schedule

DATE	LOT NUMBERS	# of LOTS	COST/LOT	TOTAL
April 27, 2007		42	\$35,000.00	\$1,470,000.00
October 27, 2007		12	\$35,000.00	\$ 420,000.00
January 25, 2008		12	\$35,000.00	\$ 420,000.00
April 24, 2008		12	\$35,000.00	\$ 420,000.00
July 24, 2008		12	\$35,000.00	\$ 420,000.00
October 23, 2008		12	\$35,000.00	\$ 420,000.00
January 21, 2008		<u>8</u>	\$35,000.00	<u>\$ 280,000.00</u>
TOTAL		110		\$3,850,000.00

EXHIBIT “P”

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

D.R. HORTON, INC.

Plaintiff,

vs.

WESCOTT LAND COMPANY, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2006-CP-18- 1981

LIS PENDENS

Cheryl Hoffman
CLERK OF COURT
DORCHESTER COUNTY

CERTIFIED COPY
2006 DEC -4 PM 3:29

NOTICE IS HEREBY GIVEN that an action will be commenced within the next twenty (20) days in this Court upon the Complaint of the above-named Plaintiff against the above-named Defendant to enforce its contract to purchase the following-described real property situated in Dorchester County, South Carolina. That portion of property identified as:

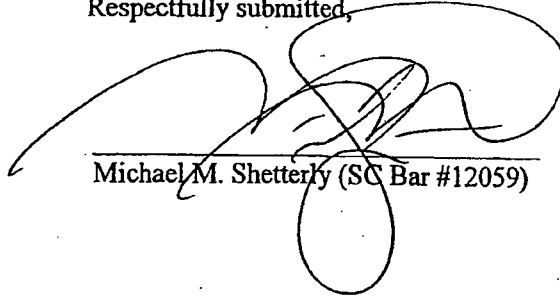
ALL that certain piece, parcel, or tract of land together with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres as designated on plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deed's Office for Dorchester County in Plat Cabinet L at Page 15 on June 22, 2006. Said tract having such size, shape, dimensions, buttings, and boundaries as will be referenced to said plat more fully appear.

BEING a portion of that property conveyed to Wescott Land Company, LLC by herein by deed of Tommy R. Hawkins, dated June 30, 2005, and recorded in the ROD Office of Dorchester County in Book 4795 at page 232 on July 6, 2005.

Said portion being a part of TMS No. 163-000-000-006.

Dated this 1st day of December, 2006.

Respectfully submitted,



Michael M. Shetterly (SC Bar #12059)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754

Attorneys for Plaintiff,
D. R. Horton, Inc.

4544935.1

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

CIVIL ACTION NO. ²⁰⁰⁷2006-CP-18-257

D.R. HORTON, INC.)

Plaintiff,)

LIS PENDENS

vs.)

WESCOTT LAND COMPANY, LLC,)

Defendant.)

CERTIFIED COPY
2007 FEB 13 PM 3:23
Clerk of Court
DORCHESTER COUNTY

NOTICE IS HEREBY GIVEN that an action will be commenced within the next twenty (20) days in this Court upon the Complaint of the above-named Plaintiff against the above-named Defendant to enforce its contract to purchase the following-described real property situated in Dorchester County, South Carolina. That portion of property identified as:

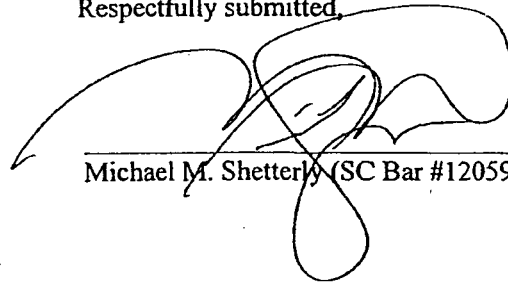
ALL that certain piece, parcel, or tract of land together with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres as designated on plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III E TOWNHOMES THE FARM AT WESCOTT PREPARED FOR D.R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006, and recorded in the Register of Deed's Office for Dorchester County in Plat Cabinet L at Page 15 on June 22, 2006. Said tract having such size, shape, dimensions, buttings, and boundaries as will be referenced to said plat more fully appear.

BEING a portion of that property conveyed to Wescott Land Company, LLC by herein by deed of Tommy R. Hawkins, dated June 30, 2005, and recorded in the ROD Office of Dorchester County in Book 4795 at page 232 on July 6, 2005.

Said portion being a part of TMS No: 163-000-000-009.

Dated this 12th day of February, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael M. Shetterly", written over a horizontal line.

Michael M. Shetterly (SC Bar #12059)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754

Attorneys for Plaintiff,
D. R. Horton, Inc.

4651854.1

EXHIBIT "Q"

BK 5763PG060

FILED-RECORDED
RMC / ROD

TITLE NOT EXAMINED

RETURN TO: 2006 DEC 21 PM 4:18

MARGARET L. BAILEY
DORCHESTER COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, THAT WESTCOTT LAND COMPANY, LLC in the State aforesaid for and in consideration of the sum of FIVE AND NO/100 (\$5.00) DOLLARS and THE SATISFACTION AND CANCELLATION OF THE BELOW DESCRIBED DEBT, to it in hand paid at and before the sealing of these presents by TOMMY R. HAWKINS in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said TOMMY R. HAWKINS, his heirs and assigns forever, the following described real property, to-wit:

ALL that certain piece, parcel or tract of land, situate, lying and being in the County of Dorchester, State of South Carolina, containing 16.62 acres, more or less, as designated on a plat entitled "FINAL SUBDIVISION PLAT OF TRACT A-2 RESIDENTIAL (16.62 AC.) CREATING PHASE III TOWNHOMES THE FARM AT WESCOTT PREPARED FORD R. HORTON, INC." prepared by Thomas & Hutton Engineering Co., dated April 6, 2006 and recorded on June 22, 2006 in the Office of the Register of Deeds for Dorchester County in Plat Cabinet L page 16. Said tract having such size, shape, dimensions, buildings, and boundaries as will by reference to said plat more fully appear.

This being a portion of the property conveyed to the Grantor herein by deed of Tommy R. Hawkins, dated June 30, 2005 and recorded July 6, 2005 in the ROD Office for Dorchester County in Book 4795 at page 232

TMS: Portion of TMS-165-00-00-000 SEE ATTACHED

The Grantee herein, by the acceptance of this deed, and the consideration noted specifically agrees to the full cancellation of all debts, obligations, costs, and charges secured by that certain \$723,655.00 purchase money Promissory Note executed by Grantor in favor of the Grantee herein, Said Promissory Note has an approximate unpaid principal balance of \$373,655.00 as of the date hereof.

Address of Grantee: 1034 Live Oak Avenue, Pimlico
Moncks Corner, South Carolina 29461

DORCHESTER COUNTY
9/10/06
385.00
13.00

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said TOMMY R. HAWKINS, his Heirs and Assigns forever.

AND, WESTCOTT LAND COMPANY, LLC does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the Premises unto the said TOMMY R. HAWKINS, his Heirs and Assigns, against it and its Successors

TIM FRAYLICK
7150 BAYHAWKE CIRCLE
NORTH CHARLESTON, SC 29418



000542

BK 5763PG061

TMS	Lot	Phase	Acres
171-04-07-001	HOA Open Space #16	3E	4.50
171-04-07-002	256	3E	0.09
171-04-07-003	257	3E	0.05
171-04-07-004	258	3E	0.04
171-04-07-005	259	3E	0.05
171-04-07-006	260	3E	0.09
171-04-07-007	261	3E	0.14
171-04-07-008	262	3E	0.05
171-04-07-009	263	3E	0.13
171-04-07-010	264	3E	0.12
171-04-07-011	265	3E	0.06
171-04-07-012	266	3E	0.04
171-04-07-013	267	3E	0.06
171-04-07-014	268	3E	0.07
171-04-07-015	269	3E	0.07
171-04-07-016	270	3E	0.05
171-04-07-017	271	3E	0.04
171-04-07-018	272	3E	0.01
171-04-07-019	273	3E	0.07
171-04-07-020	274	3E	0.07
171-04-07-021	275	3E	0.05
171-04-07-022	276	3E	0.04
171-04-07-023	277	3E	0.06
171-04-07-024	278	3E	0.12
171-04-07-025	279	3E	0.11
171-04-07-026	280	3E	0.05
171-04-07-027	281	3E	0.08
171-04-07-028	282	3E	0.08
171-04-07-029	283	3E	0.05
171-04-07-030	284	3E	0.04
171-04-07-031	285	3E	0.05
171-04-07-032	286	3E	0.12
171-04-07-033	287	3E	0.09
171-04-07-034	288	3E	0.05
171-04-07-035	289	3E	0.04
171-04-07-036	290	3E	0.05
171-04-07-037	291	3E	0.07
171-04-07-038	292	3E	0.07
171-04-07-039	293	3E	0.05
171-04-07-040	294	3E	0.04
171-04-07-041	295	3E	0.05
171-04-07-042	296	3E	0.08
171-04-07-043	297	3E	0.09
171-04-07-044	298	3E	0.06

000543

BK 5763PG062

171-04-07-045	299	3E	0.18
171-04-07-046	300	3E	0.16
171-04-07-047	301	3E	0.08
171-04-07-048	302	3E	0.04
171-04-07-049	303	3E	0.06
171-04-07-050	304	3E	0.07
171-04-07-051	305	3E	0.07
171-04-07-052	306	3E	0.06
171-04-07-053	307	3E	0.04
171-04-07-054	308	3E	0.06
171-04-07-055	309	3E	0.07
171-04-07-056	310	3E	0.07
171-04-07-057	311	3E	0.06
171-04-07-058	312	3E	0.01
171-04-07-059	313	3E	0.05
171-04-07-060	314	3E	0.07
171-04-07-061	315	3E	0.07
171-04-07-062	316	3E	0.06
171-04-07-063	317	3E	0.04
171-04-07-064	318	3E	0.06
171-04-07-065	319	3E	0.13
171-04-07-066	320	3E	0.18
171-04-07-067	321	3E	0.07
171-04-07-068	322	3E	0.09
171-04-07-069	323	3E	0.08
171-04-07-070	324	3E	0.06
171-04-07-071	325	3E	0.04
171-04-07-072	326	3E	0.06
171-04-07-073	327	3E	0.09
171-04-07-074	HOA Open Space #13	3E	.14
171-04-07-075	328	3E	0.11
171-04-07-076	329	3E	0.06
171-04-07-077	330	3E	0.06
171-04-07-078	331	3E	0.06
171-04-07-079	332	3E	0.10
171-04-07-080	HOA Open Space #15	3E	.36
171-04-07-081	333	3E	0.10
171-04-07-082	334	3E	0.06
171-04-07-083	335	3E	0.05
171-04-07-084	336	3E	0.06
171-04-07-085	337	3E	0.11
171-04-07-086	338	3E	0.16
171-04-07-087	339	3E	0.08
171-04-07-088	340	3E	0.06
171-04-07-089	341	3E	0.08

000544

BK 5763PG063

171-04-07-090	342	3E	0.12
171-04-07-091	343	3E	0.12
171-04-07-092	344	3E	0.08
171-04-07-093	345	3E	0.08
171-04-07-094	346	3E	0.08
171-04-07-095	347	3E	0.12
171-04-07-096	348	3E	0.12
171-04-07-097	349	3E	0.08
171-04-07-098	350	3E	0.08
171-04-07-099	351	3E	0.08
171-04-07-100	352	3E	0.15
171-04-07-101	HOA Crossroad Way	3E	.21
171-04-07-102	353	3E	0.12
171-04-07-103	354	3E	0.07
171-04-07-104	355	3E	0.20
171-04-07-105	356	3E	0.14
171-04-07-106	357	3E	0.09
171-04-07-107	358	3E	0.07
171-04-07-108	359	3E	0.09
171-04-07-109	360	3E	0.13
171-04-07-110	361	3E	0.13
171-04-07-111	362	3E	0.08
171-04-07-112	363	3E	0.07
171-04-07-113	364	3E	0.09
171-04-07-114	365	3E	0.17

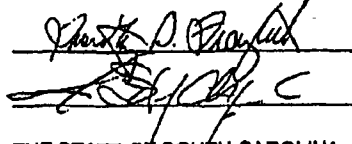
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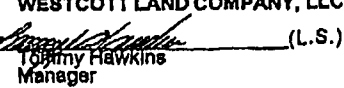
BK 5763PG064

and Assigns, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, WESTCOTT LAND COMPANY, LLC by its Manager Tommy R. Hawkins has signed and set his hand and seal and affixed the seal of the limited liability company this 21 day of December, in the year of our Lord two thousand six and in the two hundred and thirty third year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF



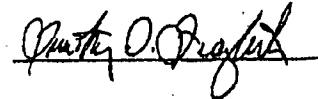
WESTCOTT LAND COMPANY, LLC
 (L.S.)
Tommy Hawkins
Manager

THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY.

PERSONALLY appeared before me the below deponent, and made oath that
(s)he saw the within named WESTCOTT LAND COMPANY, LLC by its Manager Tommy
R. Hawkins sign, seal and as his act and deed, deliver the within written Deed, and that
(s)he with the other subscribing witness witnessed the execution thereof.

SWORN to before me, this 21st
day of December, 2006.

 (SEAL)
Notary Public of South Carolina
My Commission Expires: 03-12-2014



BK 5763PG065

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property located at The Farm at Wescott, bearing Dorchester County Tax Map Number 163-00-00-006, was transferred by WESCOTT LAND COMPANY, LLC to TOMMY R. HAWKINS on the 21st day of December, 2006.

3. Check one of the following: THE DEED IS:

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ☐ EXEMPT from the deed recording fee because:

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.

- (a) ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of ~~\$5,000~~ 123,655.00
(b) ☐ The fee is computed on the fair market value of the realty which is \$ _____.
(c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____.

5. Check YES ☐ or NO ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is \$ 373,655.00.

6. The DEED Recording Fee is computed as follows:

123,655.00

- (a) ~~\$5,000~~ the amount listed in item 4 above
(b) 373,655.00 the amount listed in item 5 above
(c) ~~\$5,000~~ Subtract 6(b) from 6(a) and place result.

350,000.00

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: the purchaser(s) of the property.

8. Check if Property other than Real Property is being transferred on this Deed.

- (a) ☐ Mobile Home (b) ☐ Other

000547

BK 5763PG066

9. Deed of Distribution - Attorney's Affidavit: Estate of
deceased Case Number Personally appeared before me the undersigned
attorney who being duly sworn, certifies that (s)he is licensed to practice law in the State of South
Carolina; that (s)he has prepared the Deed of Distribution for the Personal Rep. in the Estate of
 deceased and that the grantee(s) therein are correct and conform to the
estate file for the above named decedent.

10. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent
affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand
dollars or imprisoned not more than one year, or both.

Tommy R. Hawkins
TOMMY R. HAWKINS

SWORN to before me this 21
day of December, 2008

 (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA
Commission expires: 03.12.2011

EXHIBIT "R"

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2007-CP-18-337

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1

DEFENDANT'S ANSWERS TO
PLAINTIFF'S INTERROGATORIES

INTERROGATORIES

1. Give the names and addresses of persons known to the party or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: No written or recorded statements have been taken from any of the following witnesses. The Defendant reserves the right to call any witness named by the Plaintiff in its discovery responses.

- **Tommy Hawkins**
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, South Carolina 29418
- **Tim Fraylick**
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, South Carolina 29418
- **Cliff Rickard**
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, South Carolina 29418
- **John M. Daniels a/k/a Jack Daniels**
Formerly of D.R. Horton, Inc., now with Ryland Homes
- **Jonathan Giles**
D.R. Horton, Inc.

Wando Park Blvd., Suite 200
Mt. Pleasant, South Carolina 29464

- J.C. Bishop
D.R. Horton, Inc.
Wando Park Blvd., Suite 200
Mt. Pleasant, South Carolina 29464
- Kevin Shoemake
Of Thomas & Hutton Engineering
- Larry Dodds
Dodds & Hennessy, LLP
973 Houston Northcutt Blvd., Suite 101
Mt. Pleasant, South Carolina 29464
- Michael Shetterly
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
P.O. Box 2757
Greenville, South Carolina 29602
- Mitchell M. Flannery
D.R. Horton, Inc.
Wando Park Blvd., Suite 200
Mt. Pleasant, South Carolina 29464

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the counterclaims or defenses in the case.

ANSWER: *See Responses to Request for Production.*

3. State with particularity the nature, amounts, and sources of all damages, costs, benefits, expenses and/or other amounts or relief for which you seek recovery in this action or you allege you have incurred as a result of any of the incidents, acts, or omissions referred to in the amended answer and counter-claims or in your answers to these Interrogatories. Please itemize each element of damages you are seeking, including but not limited to, real property damage, diminution in value, personal property damage, compensatory damages, loss of use damage, damages for personal injury; punitive damages; for costs; for fees; and for all other such relief. State the amount of damages you contend with respect to each element of damages; explain for

each element how those damages were calculated; and, describe each document which you claim support your alleged damage.

ANSWER: TBD

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to Defendant's claims, and set forth the number or numbers of the policies involved, the amount or amounts of liability coverage provided in each policy, and the applicable deductible for each policy.

ANSWER: None.

5. List the names and addresses of any and all individuals whom Defendant intends to use as an expert witness at the trial of the case. For each person identified, state whether the witness has provided or will in the future provide to Defendant a written report or document of any kind concerning the witness' investigation, findings, or conclusions in connection with this matter.

ANSWER: N/A

6. For each person identified in the preceding interrogatory, provide a summary of the person's qualifications as an expert.

ANSWER: N/A

7. For each person identified in response to Interrogatory 5, provide a summary of such person's anticipated testimony.

ANSWER: N/A

8. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts

known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

- Tommy Hawkins – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- Tim Fraylick – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- Cliff Rickard – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- John M. Daniels a/k/a Jack Daniels – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- Jonathan Giles – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- J.C. Bishop – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- Mitchell M. Flannery – will testify as to his personal knowledge of the facts, events, and circumstances surrounding the agreement(s) entered into by the parties.
- Kevin Shoemake – will testify as to his personal knowledge of the facts, events, and circumstances surrounding his involvement in the matter at hand as an engineer on the project.
- Larry Dodds – will testify as to his personal knowledge of the facts, events, and circumstances surrounding his involvement as Plaintiff's closing attorney for the matter at hand.
- Michael Shetterly – will testify as to his personal knowledge of the facts, events, and circumstances surround his involvement as Plaintiff's attorney for the matter at hand.

9. Identify each and every person or entity that now is or has been an owner, officer, or director of Defendant, and for each such person specify the nature of that person's ownership interest or position with Defendant:

ANSWER: Tommy Hawkins, 75% ownership/partner; Tim Fraylick, 12.5% ownership/partner; Cliff Rickard 12.5% ownership/partner.

10. Set forth the date of formation of Defendant.

ANSWER: November 5, 2004.

11. Set forth the means by which Defendant was initially capitalized. In answering this interrogatory, identify all capital contributions, investments, and loans by amount and source.

ANSWER: The land which is the subject matter of the above captioned matter was transferred to Defendant by Tommy Hawkins; a development loan for One Million Five Hundred Thousand and No/100 (\$1,500,000.00) Dollars was then secured by Defendant with said land as collateral.

12. State whether Defendant is a going business concern. Specifically, is the Defendant still in the business of land development? If so, identify all assets "held and liabilities owed by Defendant and the values thereof.

ANSWER: Defendant was formed solely for the development of Phases 3A, 3D, and 3E of the Farm at Wescott for D.R. Horton. No other development business is ongoing nor anticipated by Defendant. Hawkins foreclosed on note for land. Defendant has no assets. Defendant's liabilities include: Four Hundred Thousand and No/100 (\$400,000.00) Dollars plus interest to Tommy Hawkins for the land, and Thirty Thousand and No/100 (\$30,000.00) Dollars to Thomas & Hutton.

13. If Wescott is no longer a going business concern, set forth in detail the present ownership of all assets formerly held and liabilities owed by Wescott. If any assets have been transferred or sold, or if efforts are presently being made to transfer or sell any assets, set forth in detail the disposition of all such assets to include the identity of each transferee and the consideration received for each asset sold or transferred.

ANSWER: See Answer to Interrogatory 12.

14. Identify each and every person which Defendant contends had authority to enter into an agreement of any kind with Plaintiff on behalf of the Defendant.

ANSWER: Tommy Hawkins

15. Identify each and every document or correspondence which Defendant contends constitutes Plaintiffs refusal to close on the property.

ANSWER: See Responses to Request for Production.

16. Identify each and every document or correspondence which Defendant contends constitutes Defendant request to Plaintiff to cure the alleged breach of contract.

ANSWER: See Responses to Request for Production.

17. Identify all witnesses Defendant believes, or who actually did, witness any occurrence that forms the basis or bases for your allegation that Plaintiff refused to close on the property.

ANSWER: Tommy Hawkins, Tim Fraylick, Steve Smith, Larry Dodds, Mitchell Flannery, Michael Shetterly

18. Identify all actions or non-actions Defendant believes form the basis or bases for your allegation that Plaintiffs representations to Defendant regarding the "take down" were false.

ANSWER: Plaintiff's nonperformance of the agreement

19. Identify all actions or non-actions Defendant believes form the basis or bases for your allegation that Plaintiff intended Defendant to rely upon Plaintiffs alleged false representation.

ANSWER: Plaintiff's nonperformance of the agreement

20. Identify all actions and non-actions evidencing that Defendant complied with all condition precedents and terms of the contract. Please include the date in which such condition precedent and/or terms of the contract was performed by Defendant.

ANSWER: See Responses to Request for Production.

21. Identify all actions or non-actions Defendant believes form the basis or bases that establish deceptive acts or practices.

ANSWER: Plaintiff's nonperformance of the agreement

22. Identify all actions or non-actions Defendant believes form the basis or bases that establish an unfair method of competition.

ANSWER: Plaintiff's nonperformance of the agreement, filing of Lis Pendens

23. Identify all actions or non-actions Defendant believes impact the public interest of South Carolina and has the potential for repetition.

ANSWER: Plaintiff's nonperformance of the agreement

24. Identify all licenses, permits, or certifications held at any time by Defendant or by one or more of its principals in any way related to the business of Defendant. For each such license, permit, or certification, set forth whether it is in good standing, and if not, the reason(s) why not.

ANSWER: Real Estate license

25. Identify each and every employee or agent of D.R. Horton with whom Defendant had any communication whatsoever concerning the Property at any time.

ANSWER: Brian Gardner, Doug Brown, Jonathan Giles, Jack Daniels, J.C. Bishop, Scott Varn, Mitchell Flannery, Richard _____, Amanda _____,

(SIGNATURE BLOCK ON NEXT PAGE)

SMITH & KOONTZ, P.A.

Zachary J. Closser

Steven L. Smith

Zachary J. Closser

7455 Cross County Road, Suite One

Post Office Box 40578

Charleston, South Carolina 29423

843.760.0220

843.552.2678 (facsimile)

Attorneys for the Defendant

Charleston, South Carolina

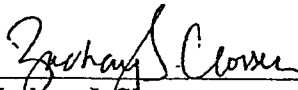
August 10, 2007

06-579

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Defendant's Answers to Plaintiff's Interrogatories was served by mailing or hand delivery on the following:

Michael M. Shetterly
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
P.O. Box 2757
Greenville, SC 29602


Zachary J. Closser

Charleston, South Carolina
August 10, 2007
06-579

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
C/A: 2007-CP-18-337

D.R. HORTON, INC.,)
)
Plaintiff,)

-vs-)

WESCOTT LAND COMPANY,)
LLC,)

Defendant.)

THOMAS R. HAWKINS and)
WESCOTT LAND COMPANY,)
LLC,)

Counter-Claimants,)

-vs-)

D.R. HORTON, INC.,)

Counter-Claim Defendant.)

CERTIFIED COPY
2009 MAY 15 AM 11:02
Clerk of Court
DORCHESTER COUNTY

**COUNTER-CLAIMANTS' SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Counter-Claimants, Wescott Land Company, LLC (hereinafter "Wescott") and Thomas R. Hawkins (hereinafter "Hawkins"), submit the following to supplement the Memorandum in Opposition to Plaintiff's Motion for Summary Judgment previously submitted to the Court by Wescott's former counsel. With regard to Counter-Claimants' Counter-Claims for breach of contract and violations of the South Carolina Trade Practices Act, Counter-Claimants rely upon the arguments of their former counsel, Steven Smith (hereinafter "Smith"), set forth in its original Memorandum in Opposition. Counter-Claimants would add, however, that they have recently discovered new evidence

that would tend to prove that Horton's misconduct is not only capable of repetition, but that it is part of an ongoing pattern of egregious behavior. First, Horton was sued by Wescott Development, LLC and other entities unrelated to Counter-Claimants in 2001 for actions that were nearly identical to those that form the bases for the Counter-Claims before this Court. Specifically, Horton was accused of breaching a contract to purchase developed property and filing *Lis Pendens* to prevent the owner from selling to third parties. Secondly, Chris Phillips, a Virginia-based developer is expected to testify that he was treated in much the same way by Horton and that a Horton executive admitted to him that they were actually refusing to close on the property because the company was "over-assetted." Because Wescott has recently abandoned its cause of action for fraud, it requests that the Court disregard portion of Wescott's original Memorandum in Opposition that deals solely with that cause of action. Additionally, Wescott has recently filed Amended Counter-Claims upon which Plaintiff intends to move for summary judgment. As such, all recently added causes of action are addressed herein.

FACTUAL BACKGROUND

Wescott's previously submitted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment contains an overview of the factual background of this case and therefore need not be repeated herein. However, Wescott submits the following to supplement the factual background portion of its previous Memorandum based on documents that have been exchanged throughout the course of this litigation as well as deposition testimony taken from various witnesses.

The Second Amendment to the parties' Contract of Sale, attached hereto as Exhibit 2, contemplated closing phases 3A, 3D, 3E-1, 3E-2 and 3E-3 of the Project in a

series of takedowns. Phases 3A and 3D closed before any dispute arose between the parties. The Amended Contract states that 3E-1 shall close "on or before the later of January 1, 2006 or upon final plat approval and recordation..."

Phase 3E-2 was to close "on or before the later of April 1, 2006 or upon final plat approval and recordation..." Finally, 3E-3 was to close "on or before the later of July 1, 2006 or upon final plat approval and recordation..." Phase 3E has been referred to by the parties throughout their dealings as the "townhouse lots." The plat showing Phase 3E was prepared by third parties on behalf of D.R. Horton (hereinafter "Horton"). The plat was submitted to the City of North Charleston for preliminary approval reflecting Phase 3E as a single phase, not as a series of three separate takedowns. Therefore, in order for Phase 3E to close as a series of takedowns, as contemplated by the Amendment to the parties' Contract, Horton would have to purchase the property prior to final plat approval and recordation and final plat approval and recordation could be achieved only after all components of Phase 3E had been developed by Wescott. What's more, a number of the conditions precedent to the closing of portions of Phase 3E could be satisfied only when the entire phase passed various inspections by the City, DHEC and other governmental agencies. Once again, Horton was well aware that if it was to close Phase 3E in a series of takedowns, it would have to close on 3E-1 and 3E-2 prior to the satisfaction of certain conditions precedent. As it happened, July 1, 2006, the date for the closing of the final takedown, passed with none of the takedowns having closed.

On August 2, 2006, counsel for Wescott wrote to Horton to inform them that all conditions precedent to the closing of Phase 3E had been completed and that the final plat had been approved and recorded by the City of North Charleston on July 19, 2006.

Smith's letter is attached hereto as Exhibit 3. Smith went on to say, "[A]s all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006, will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004." The timetable set forth by Smith is reflective of Paragraph 2 of the Amendment to the parties' Contract, which gave Horton twenty (20) days to confirm that all conditions precedent had in fact been satisfied from the date that Horton received notice from Wescott that the conditions had been satisfied. This 20 day due diligence period was confirmed by Ken Bagwell (hereinafter "Bagwell"), regional counsel for Horton, at page 24 of his deposition. In fact, it was Bagwell who responded to Smith's August 2, 2006 letter with a letter dated August 11, 2006, attached hereto as Exhibit 5. Bagwell's letter states:

The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

Bagwell went on to say, however, that it is Horton's position that the amended Contract contemplated the purchase and sale of the townhouse lots in three (3) separate takedowns. Bagwell then proposed a second amendment to the Contract that acknowledges that the

townhouse lots are now substantially complete and that establishes the new takedown schedule.

"Substantial Completion" is a defined term within the parties' Contract that essentially means that Horton has received proof and acknowledges that all conditions precedent have been met.

Wescott was not interested in entering into another, which would cause further delays in the closing of Phase 3E, and declined Bagwell's offer to enter into one.

Horton grew more insistent that the parties enter into a Second Amended Contract setting forth new takedown dates. This is reflected in e-mail communications between Mitchell Flannery (hereinafter "Flannery"), one of the principals of Horton's Charleston office, and Tim Fraylick (hereinafter "Fraylick"), one of the owners of Wescott Land, LLC. Exhibit 6, attached hereto, is a September 13, 2006 e-mail from Flannery to Fraylick stating that 36 units had been funded for the first takedown and that they were willing to close on only that takedown within two weeks. Attached to that e-mail was a proposed Second Amended Contract. Numbered paragraph 1 to the proposed Second Amendment states: "[t]he Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract." Nowhere in this proposed Second Amendment is any indication that Horton was dissatisfied with the condition of Phase 3E or that it was taking the position that any conditions precedent had not been satisfied.

Exhibit 7 attached hereto is another e-mail from Flannery to Fraylick, dated September 18, 2006. In this e-mail, Flannery reiterates that Horton had funded the purchase of 36 units, which could be purchased in short order, and that the parties would need to enter into a Second Amendment to the Contract to dictate the timetable for the closing of subsequent takedowns. The same proposed Second Amendment is attached to this e-mail, again making no mention of Wescott's failure to satisfy any conditions precedent. What's more, this e-mail from Flannery contains an implied threat, stating, "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." In his deposition, Flannery testified regarding his references to funding for 36 lots stating, "I don't know whether that was a, you know, whether I was trying to get them to work with me or whether there was really money. I really don't know. I don't remember." (Deposition of Flannery, Page 40, lines 15-18.)

On October 16, 2006, Michael Shetterly (hereinafter "Shetterly"), outside counsel for Horton, wrote to Smith, a copy of which is attached hereto as Exhibit 8. In this letter, nearly 90 days after the date that Wescott submitted proof of the satisfaction of all of the conditions precedent, and nearly 75 days after the date that Horton's in-house counsel contended that such proof was submitted, Shetterly took the position that certain conditions precedent still had not been satisfied as of mid-October. Specifically, Shetterly stated that Paragraph 15, subparts (i) and (j) had not been accomplished at all. Shetterly explained, "[C]ontrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any 'sign-off' from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been

installed on the site. Until these items are complete, the conditions precedent have not been completed."

In addition to this being the first mention of Wescott's alleged failure to satisfy certain conditions precedent, this letter misstates the requirements set forth in Paragraph 15 of the parties' Contract. Contrary to Shetterly's assertion, Paragraph 15, subpart (i) simply states, "[T]he Lot(s) shall be cleared of any trash, construction materials, debris, brush, partially constructed buildings, materials and all rights of way have been graded, seeded and strawed as may be required by any applicable governmental authority." It makes no mention of erosion control or sign-offs from any particular governmental entity. Even if Shetterly's conditions were part of the contract, at the very least a factual issue exists as to whether Wescott had taken all necessary and reasonable steps to control erosion, maintain clean jobsites, and stay within the good graces of all governmental entities overseeing the Project, including DHEC.

In direct contravention to Shetterly's assertion that street lights were required to have been installed, Paragraph 15(j) requires merely "[C]ontracts by Seller for the installation of street lights and street signs as required by any appropriate governmental authority and such contracts shall in no way place any financial burden upon Purchaser." In reality, Wescott did not have any authority to install street lights on what were to become publicly dedicated streets. That authority lay solely with SCE&G, and all necessary contracts and approvals have been obtained such that SCE&G could install street lights very soon thereafter. Shetterly's letter goes on to say, however, that Horton proposes that the parties execute a Second Amendment to the contract excusing

Wescott's alleged failure to satisfy these conditions and setting forth a new takedown schedule.

Over the course of the ensuing weeks, Shetterly and Smith began to negotiate the terms of a new deal between the parties. Horton even appeared to acquiesce to the idea of closing all of 3E at once. However, Wescott was adamant that it would not enter into a Second Amendment to the parties' Contract except at the closing table, out of fear that Horton would use a new Amendment to insert further delays into the process. In the meantime, Wescott received a written offer from KB Home, a national builder comparable to Horton, to purchase Phase 3E at \$30,000 per lot-- \$5,000 more per lot than the price under the Horton Contract. A copy of this written offer is attached hereto as Exhibit 15.

A meeting was held on December 21, 2006 at Smith's office, wherein the parties attempted to hammer out the details of this last-ditch effort to make their deal work. At this meeting Horton reiterated its concerns about erosion control on the site, abandoned its complaint about street lights, and for the first time raised the issue that it was concerned about the compaction of the building pads at Phase 3E. Flannery sent an e-mail to Fraylick memorializing the topics discussed at that meeting on December 27, 2006, which is attached hereto as Exhibit 16.

The closing of all of Phase 3E was scheduled to take place at the office of Larry Dodds (hereinafter "Dodds"), another of Horton's lawyers, on February 2, 2007. Leading up to that closing, lawyers for both parties attempted to hammer out the final details of the Second Amendment to the parties' Contract, which was to be ratified at the closing table. As of late January 2007, the only remaining obstacle to the closing was Horton's

insistence that Wescott re-do compaction tests on the building pads to certify that they were compacted to 2,000 PSF. Wescott contended that they had long since submitted proof of compaction and that the pads were in substantially the same condition as they were then.

Ironically, if the building pads had fallen out of compaction, it was only the result of Horton's own delays. Flannery himself testified, "[A]nd we had concerns, you know, being that fall, we had concerns that those pads were deteriorating and, you know, basically fell out of compliance on conditions precedent to closing." (Deposition of Mitchell Flannery, Page 6, Lines 6 - 9.) Of course, had Horton closed on Phase 3E months earlier as they were required to do under the Contract, this would not have been a concern at all.

Representatives of Wescott came to the offices of Dodds on February 2nd at the appointed time to attend the closing. Dodds himself had prepared all necessary closing documents and was awaiting funds from Horton to hit his trust account. However, Horton sent no representatives to the closing. According to Shetterly, Smith called him from Dodds' office on February 2nd to inquire as to why no one was there from Horton. Shetterly explained to Smith that he had not received final confirmation that Wescott was willing to redo the compaction tests and that that was a deal breaker for Horton. That was the last of the parties' attempts to close on the deal, and immediately thereafter Horton filed its first *Lis Pendens* against the property, preventing Wescott from selling it to any third parties.

Looking back at the timeline, Horton gave numerous and varied reasons for not closing on the sale. First, it insisted that under the contract it was entitled to purchase

takedown 3E-1 and purchase the subsequent two takedowns at later dates. Months later and well after their period of due diligence had expired, Horton claimed that neither satisfactory erosion controls nor street lights were in place but still focused on the argument that the property should be closed in a series of takedowns. Thereafter, Horton finally relented and agreed to close on the entire property at once but, approximately one month before the scheduled closing, raised questions regarding the compaction of the lots—making that their new primary focus and their ultimate reason for not coming to the closing scheduled at their own attorney's office.

Wescott has always contended that Horton's myriad reasons for delaying closing on Phase 3E were pretextual and that the only real reason for its delay was that it had determined that its financial interests were best served by not closing. Phase 3E consisted of 110 townhome lots. Horton was pre-selling townhomes to consumers as the development began to take shape. Based on the Pre-Sale Contracts that Horton has produced through discovery, only 19 of 110 lots had pre-sold. To purchase more than Phase 3E-1 at one time would shift the carrying costs of the property to Horton. The following excerpt is taken from the deposition of Mitchell Flannery:

Q. ... Why was it important to Horton to close this deal in a series of takedowns?

A. Well, I mean, I think it's — That's why we negotiated the deal, to take at this time down in phases, because it's easier. It's easier economically [sic] to take down the phases....

Deposition of Mitchell Flannery, Page 22, Lines 20 – 25.

* * *

THE WITNESS ... I think we probably had a feel good from the top that, you know, if we had these sales that we could buy this property.

Q. Okay.

A. I mean, that typically - it's just a phone call to the CEO and say, 'Listen, we've got this funded, or got 'em sold.' And, typically, typically, when we got 'em sold, we can buy 'em.

Deposition of Mitchell Flannery, Page 44, Lines 17 - 25.

Bagwell admitted much the same thing:

A. So, we were trying to protect all of our investment, this property, our contract rights, buy the lots, and wrap it up as quickly as we could. But we didn't feel like we needed to take down one hundred and ten lots and sit on them while we're trying to sell them.

When we had been trying to buy the lots all along. That's, we're not land developers, we're not land speculators, we're home builders, and so that's not our risk.

Deposition of Ken Bagwell, Page 32, Lines 15 - 23.

The gravamen of Wescott's tort claims in this case is that Horton believes that its own liability for nonperformance under the Contract was forfeiture of its earnest money, used various pretexts to string the transaction out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Horton added insult to injury by filing *Lis Pendens*, preventing Wescott from selling the property to anyone else.

LEGAL ARGUMENT

Wescott's arguments in support of its Counter-Claims for breach of contract, unfair trade practices, and slander of title are addressed in its initial Memorandum in Opposition and therefore are not addressed here as well.

SUMMARY JUDGMENT STANDARD

... [I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co., Inc. 361 S.C. 326, 673 S.E.2nd 801 (2009).

ABUSE OF PROCESS

Wescott, through its counsel Steve Smith, notified Horton that it was in default on the parties' Contract on August 2nd and again on August 10, 2006. Horton failed to cure its default and close on the purchase of Phase 3E, and Wescott rescinded the contract. Even though the parties continued to negotiate in an attempt to put their deal back together, Wescott refused to sign a new Contract with Horton except at the closing table in order to be consistent in its position that the parties no longer had any contractual obligations to each other. Despite Wescott's valid rescission of the contract, Horton filed a *Lis Pendens* against the property. As Horton concedes in its Memorandum in Support of Summary Judgment, a *Lis Pendens* is valid only if suit is filed within twenty (20) days of the filing of the *Lis Pendens*. The initial *Lis Pendens* Horton filed was allowed to expire on its own. However, by the time it expired, damage had already been done. Namely, KB Homes had made a written offer to purchase the property that Wescott could not ratify because of the cloud Horton had placed on the title to the property. The following dialogue is taken from the deposition testimony of Hawkins, the majority owner of Wescott:

Q. Did you have any written contracts that the *lis pendens* interfered with, or you're just talking about prospective?

A. Everything I had. I mean, whatever contracts I got, the lis pendens would have interfered with it.

Q. No. Those were prospective contracts, right?

A. Yeah, but you can't pursue a contract when something is in this condition. I mean, I would have mislead somebody by saying I got a piece of property I can sell them and sit down and try to negotiate a contract to its finality and then, at the end, find out I can't sell it to them.

Q. But you didn't have any contracts with somebody signed and then D.R. Horton did something that prevented you from -

A. The only reason we didn't have signed ones was because we didn't want to go through with them with this thing upside-down and then this mess that we was in. If it wasn't for that, surely we would have had contracts. This piece of property would have been built out a long time ago by somebody else most likely.

Deposition of Thomas Hawkins, Page 208, Lines 2 - 25.

The essential elements of abuse of process as the tort has developed have been stated to be: first an ulterior purpose and second a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act of threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Huggins v. Winn Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2nd 693, 694 (1962), quoting *Prosser* Section 100 at 668-69 (2nd Ed. 1955).

In this instance, Horton cannot claim that it carried the process out to its authorized conclusion because it allowed the *Lis Pendens* to die on the vine. What's more, Horton's lack of specific knowledge of KB Homes' offer does not excuse their conduct. They knew that Wescott had every right to walk away from the parties' Contract at that point, but Horton was not satisfied with that reality. Instead, it misused a *Lis Pendens* to tie up the property while it continued to browbeat Wescott into accepting Horton's new terms. Indeed, this is the very course of action that was threatened by Flannery in his e-mail to Fraylick of September 18, 2006, saying "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." This is precisely the same conduct that was addressed in Broadmoor Apts. Of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2nd 9 (1991). In that case, our Supreme Court held that filing a *Lis Pendens* even when followed by a Summons and Complaint, could constitute abuse of process when done without justification and for the purpose of preventing third parties from purchasing the subject property.

MALICIOUS PROSECUTION

With regard to malicious prosecution, Horton merely takes the position that Wescott's claims are not ripe. Horton is correct that one of the elements of that tort is the termination of legal proceedings in favor of the Plaintiff-- in this case, the Counter-Claimant Wescott. However, Horton cites no authority for the proposition that a claim for malicious prosecution cannot be heard simultaneously with other claims. This argument is applicable only to the Counter-Claims that have recently been brought by Hawkins, individually, based on his current ownership of the subject property. Horton now argues that because it has not initiated any action against Hawkins individually,

Hawkins cannot prevail on a claim of malicious prosecution. Hawkins' claim for malicious prosecution is a direct result of the *Lis Pendens* that is currently filed against the subject property. It is disingenuous of Horton to now take the position that Hawkins is completely free to do with the property what he wishes despite the *Lis Pendens* even though the pending litigation, among other things, demands strict performance of the expired Contract between Horton and Wescott. The fact that Hawkins is not named individually on the *Lis Pendens* is of no consequence.

The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, i.e., the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2nd 881, 889 (S.C. Ct. App. 2002), quoting 51 Am. Jur. 2d *Lis Pendens* §2 (2000).

"The filing of a *Lis Pendens* allows a claimant to protect their ownership interest in the property that is the subject of litigation." *Id.* Undoubtedly, had Hawkins attempted to convey the subject property to any third parties during the pendency of this case, Horton would have sought to set aside Wescott's conveyance to Hawkins. Additionally, Hawkins was absolutely correct in his above-quoted deposition testimony in saying that no reasonable arms-length third party would purchase property that is the subject of a *Lis Pendens* and/or pending litigation.

With regard to Horton's argument that Wescott's claim for malicious prosecution is not ripe, Wescott would respectfully submit that Horton is not referring to the civil proceeding that underpins Wescott's malicious prosecution claim—namely, the filing of

the original *Lis Pendens*, which expired under its own terms. In fact, the very case that Horton cites as grounds for its summary judgment motion as to Wescott's cause of action for slander of title, Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2nd 881 (S.C. Ct. App. 2002), states, "[T]he jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution." *Id.* at 31, 897. As such, the fact that neither Wescott nor Hawkins have yet prevailed against Horton in the present action has absolutely no bearing on the rightness of either of their claims for malicious prosecution based on the first *Lis Pendens*.

BREACH OF CONTRACT
ACCOMPANIED BY A FRAUDULENT ACT

Horton attempts to blur the line between fraud and Breach of Contract Accompanied by a Fraudulent Act by citing to case law that deals with the requirements for proving common law fraud. While both the requirements for pleading and proving a claim for fraud are quite stringent in South Carolina, the bar is set lower for Breach of Contract Accompanied by a Fraudulent Act.

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2nd 502, 503-04 (Ct. App. 1985) summarizes the three elements of breach of contract with fraudulent intent as follows:

- (1) *A breach of contract* In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement. . . .
- (2) *Fraudulent intent relating to the breaching of the contract and not merely to its making.* . . . Fraudulent intent is normally proved by circumstances surrounding the breach. . . .
- (3) *A fraudulent act accompanying the breach.* . . . The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

Where these three elements are not present, there is no claim. *See, e.g., Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 465 S.E.2d 84 (1995) (no breach); *Minter v. GOCT, Inc.*, ___ S.C. ___, 473 S.E.2d 67 (Ct. App. 1996) (no *independent* fraudulent act); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 459 S.E.2d 851 (Ct. App. 1995) (no showing of intent to defraud), *aff'd as to different issue*, ___ S.C., 481 S.E.2d 706 (1997); *South Carolina Nat'l Bank v. Southern Polymers, Inc.*, 313 S.C. 246, 437 S.E.2d 148 (Ct. App. 1993) (no breach); *Foxfire Village Inc. v. Black & Veatch*, 304 S.C. 366, 404 S.E.2d 912 (Ct. App. 1991), *cert. denied* (1991) (no fraudulent or dishonest intent). The fraudulent act referred to in the third element

... is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. "...[F]raud, in this sense, assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence."

Harper v. Ethridge & Fann, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986) (citation omitted; quoting *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E.2d 189 (1921)); *see, e.g., Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993). Since the fraudulent act element is different than the conduct encompassed in fraud, it can be an abuse of discretion to allow a party to amend a complaint which includes a fraud claim to also include a claim for breach of contract with fraudulent intent. *See, e.g., Ball v. Canadian Am. Express*, 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994), *cert. denied* (1994).

'Since a breach of contract is an element of the cause of action, an action for breach of contract accompanied by fraudulent act is an action *ex contractu*, not *ex delicto* . . . ; however it partakes of elements of both contract and tort.' *Peeples v. Orkin Exterm. Co.*, 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964). Thus, the right to bring the claim is dependent upon the right to maintain the contract action. *Ateyeh v. Volkswagen of Florence, Inc.*, 288 S.C. 101, 341 S.E.2d 378 (1986); *see, e.g., Wilson Group Inc. v. Quroum Health Resources, Inc.*, 880 F. Supp. 416 (D.S.C. 1995) (contract statute of limitations applicable). A separate action for fraud may be brought for the fraudulent act. *Id.* A separate claim may also be brought for the breach of contract. *Perry v. Green, supra*. Given these overlaps, the plaintiff must elect one cause of action; however, the timing of the election depends upon the circumstances. *See, e.g., Perry v. Green, supra* (claim for breach of contract and for breach of contract with fraudulent interest); *Riddle v. Pitts*, 283 S.C. 387, 324 S.E.2d 59 (1984). For general references to election, *see supra* note 1.

If a breach of contract is accompanied by fraudulent intent and accompanied by a fraudulent act, then punitive damages may be recovered. See, e.g., *Ateyeh v. Volkswagen of Florence, Inc.*, *supra*; *Peoples v. Orkin Exterm. Co.*, *supra*; *Moody v. Stem*, 214 S.C. 45, 51 S.E.2d 163 (1948); *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 (1942); *Holland v. Spartanburg Herald-Jones Co.*, 166 S.C. 454, 165 S.E. 203 (1932); *Givens v. North Augusta Elec. & Improvement Co.*, 91 S.C. 417, 74 S.E. 1067 (1912); *Prince v. State Mutual Life Ins. Co.*, 77 S.C. 187, 57 S.E. 766 (1907); *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987); *Floyd v. Country Squire Mobile Homes*, *supra*.

F.P. Hubbard & R.R. Felix, The South Carolina Law of Torts, Ch. 5 §A footnote 22 (2d ed. 1997).

In Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2nd 606 (2002), our Supreme Court held that viewing the evidence in the light most favorable to the Plaintiff, there was a question of fact as to whether the reasons given by the Defendant for terminating the Plaintiff's employment were pretextual. The Court went on to hold that if the Plaintiff could prove that she was fired for reasons other than the pretextual reasons given, she could recover for Breach of Contract Accompanied by a Fraudulent Act. In other words, breaching a contract under false pretenses is enough to support this cause of action.

Wescott has put forth facts sufficient to support recovery for this cause of action, ranging from Horton's shifting reasons for refusing to close on Phase 3E of the property, its reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contracts, as well as Flannery's written threat to tie up the property if Horton did not get its way. What's more, Wescott would assert that the filing of its successive *Lis Pendens* for the purpose of preventing third parties from acquiring the property and forcing Wescott to bend to Horton's will is in itself a

fraudulent act accompanying Horton's breach of the parties' Second Amended Contract.

Clearly Horton's conduct went beyond merely breaching the Contract.

TORTIOUS INTERFERENCE
WITH PROSPECTIVE ECONOMIC ADVANTAGE

To recover on a cause of action for intentional interference with prospective contractual relations, we hold that plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff.

Crandall Corporation v. Navistar International Transportation Corp., 302 S.C. 265, 395 S.E.2nd 179, 180 (1990).

Horton argues that because Wescott and Hawkins decided not to accept offers from third parties to purchase the subject property, that Horton is somehow immune from liability for this cause of action. However, Hawkins' deposition testimony, which is cited above, explains that both he and Wescott declined to ratify numerous offers to purchase the subject property out of concern that Horton's *Lis Pendens* would prevent those deals from going forward. Furthermore, Horton's argument that its lack of knowledge about specific offers from third parties to purchase the property precludes them from being held liable for tortious interference with prospective contractual relations. There is no case law in South Carolina that inserts this element into the tort. If Horton acted in bad faith by filing a *Lis Pendens* to "tie up the property" as Flannery threatened to do, it was with full knowledge that their actions would prevent Wescott, and subsequently Hawkins, from selling the subject property to third parties. Wescott would seek to prove that this was a tactic designed to bully Wescott into coming back to the negotiating table and selling Horton the property under terms dictated by Horton.

CONCLUSION

Summary judgment in favor of Horton is inappropriate as to each of Defendant's Counter-Claims. As demonstrated, questions of fact exist as to each cause of action alleged by Counter-Claimants. In fact, the Counter-Claimants would assert that the evidence clearly demonstrates that Horton engaged in a pattern of misconduct designed to force Wescott to closing on the subject property under Horton's own terms—namely, that the property would be sold only piecemeal despite the plain language of the Contract which allowed for a single closing on the entire tract.

As plainly demonstrated by the testimony of Horton's own representatives, their motive for engaging in this conduct was to avoid buying any portion of the property until they had pre-sold enough lots to avoid incurring any carrying costs thereby leaving the burden of carrying the property on the shoulders of Wescott.

BARNWELL WHALEY PATTERSON & HELMS, LLC

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ATTORNEYS FOR COUNTER-CLAIMANTS

May 14, 2009

Charleston, South Carolina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via e-mail and U.S. Mail this 14th day of May 2009 to counsel of record as follows:

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Elmore & Wall, PA
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Charleston, SC 29402
145 King Street, Suite 302
Charleston, SC 29401
e-mail: neil.haldrup@elmorewall.com

Attorneys for Plaintiff

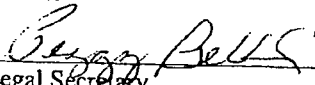

Legal Secretary

Exhibit 2

000580

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

AMENDMENT TO CONTRACT OF SALE
Effective November 15, 2004

WHEREAS, By CONTRACT OF SALE effective November 15, 2004, WESCOTT LAND COMPANY, LLC, as Seller, and D.R. HORTON, INC., as Purchaser, agreed to buy and sell the premises known generally as one hundred ninety three (193) lots in The Farm at Wescott subdivision in Dorchester County, South Carolina.

WHEREAS, under the terms of said Contract of Sale, Seller agreed to develop certain property in The Farm at Wescott Plantation to deliver the lots to Purchaser and Purchaser agreed to purchase said lots within a certain time schedule, and

WHEREAS, the parties have agreed to amend Contract of Sale to further specify the duties and responsibilities of the Parties as to the development of the property and the time period for Seller to deliver the lots and the time period for Purchaser to purchase the said lots as set forth below.

NOW THEREFORE, for and in consideration of the premises, the sum of Ten and no/100 (\$10.00) Dollars in hand paid to each party hereto to the other and other good and valuable consideration, the receipt and the sufficiency of which are hereby acknowledged by the parties hereto, the Seller and Purchaser do hereby amend the CONTRACT OF SALE effective November 15, 2004 and do mutually covenant and agree as follows:

1. Pursuant to paragraph 3a and 3b in CONTRACT OF SALE effective November 15, 2004 and notes in Exhibit "B" attached thereto, Purchaser and Seller agree to amend the Exhibit B "Takedown Schedule" to provide that Purchaser shall purchase and seller shall sell the properties as follows:
 - a. Phase 3A (45 lots) on or before the later of July 1, 2005 or upon final plat approval and recordation. 45 lots @ \$32,000/lot = \$1,440,000.00
 - b. Phase 3D (38 lots) on or before the later of October 1, 2005 or upon final plat approval and recordation. 38 lots @ \$32,000/lot = \$1,216,000.00
 - c. Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation 37 lots @ \$25,500/lot = \$943,500.00
 - d. Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation 23 lots @ \$25,500/lot = \$586,500.00 and 14 lots @ \$24,500/lot = \$343,000.00
 - e. Phase 3E-3 (36 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation. 36 lots @ \$24,500/lot = \$882,000.00
2. Purchaser and Seller agree to amend Paragraph 15 by adding the sentence: "Seller agrees to provide the Condition Precedent document and certifications set forth in Paragraph 15 to Purchaser twenty (20) days prior to the scheduled closing date in order to give Purchaser sufficient time to verify all such documentation, inspect the property to be purchased, conduct final title examinations and prepare for closing."

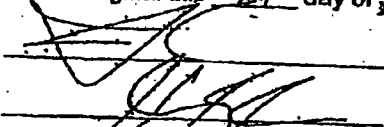
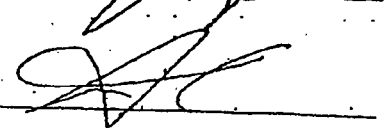
3. As a condition of development of the property and final plat and subdivision approval, the City of North Charleston may require a completion bond for certain uncompleted items. Purchaser has agreed to post such bond for the uncompleted items and, except for the items noted below, Seller has agreed to reimburse Purchaser for the cost of such bond.
4. As a condition of development of the property, the City of North Charleston has required that certain trees be planted along the rights-of-way of the property and that sidewalks be installed throughout the subdivision. The parties agree that the Purchaser shall bear the cost of the tree planting and sidewalk construction, and ~~this work is outside the scope of work of the Seller and shall not be part of Seller's contract~~ ^{PAR} Purchaser agrees to provide to the City of North Charleston its bond to insure the completion of the tree planting and the sidewalk installation. The parties agree that it is in the best interest of development of the property that the tree planting and sidewalk construction be delayed until construction of the detached single family houses and the multifamily townhouses be completed. Purchaser agrees to provide to the City of North Charleston its bond to insure the completion of the tree planting and the sidewalk installation.

CORPORATE APPROVAL OF CONTRACT BY OFFICE OF PURCHASER

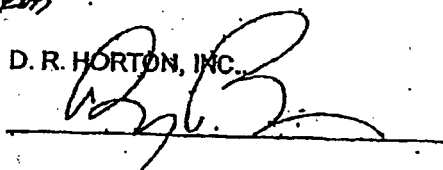
NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THIS AMENDMENT TO CONTRACT OF SALE Effective November 15, 2004 SHALL NOT BE A VALID AND ENFORCEABLE OBLIGATION OF PURCHASER UNLESS EXECUTED BY EITHER ONE OF DONALD R. HORTON, DONALD. J. TOMNITZ OR BRIAN GARDNER, EACH AN OFFICER OF PURCHASER WITHIN THIRTY DAYS OF THE DATE HEREOF.

In all other respects such CONTRACT OF SALE effective November 15, 2004 shall remain in full force and effect.

In Witness Whereof, the parties have executed this AMENDMENT TO CONTRACT OF SALE Effective November 15, 2004 in multiple copies each of which shall be deemed to be an original this 27 day of July, 2005. ²⁰⁰⁷


D. R. HORTON, INC.



WESCOTT LAND COMPANY, LLC.


Tommy R. Hawkins,
Member

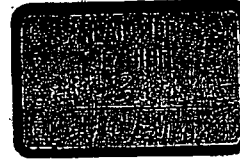
Exhibit 3

000583

LAW OFFICES
SMITH & KOONTZ
PROFESSIONAL ASSOCIATION

Steven L. Smith
ssmith@scnlaw.com

7455 CROSS COUNTY ROAD, SUITE ONE
POST OFFICE BOX 40578
CHARLESTON, SOUTH CAROLINA
29423-0578



TELEPHONE
843-760-0220
FACSIMILE
843-552-2878

August 2, 2006

D.R. Horton, Inc.
Attn: Doug J. Brown
503 Wanda Oak Boulevard
Suite 200
Mt. Pleasant, SC 29464

Re: Closing Schedule for The Farm at Westcott Plantation - Phases 3D, 3E-1, 3E-2
and 3E-3

Dear Mr. Brown:

At this time, we are requesting that the closing on the above-referenced properties take place no later than August 9, 2006. All conditions precedent to the closing, as set out in Paragraph 15 of the Amendment to the Contract of Sale, have now been satisfied, and proof thereof was provided to the seller on July 19, 2006.

As all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006 will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004.

Please let me know when we can plan for the closing, and please feel free to give me a call should any further information be required.

Sincerely,

Steven L. Smith

SLS/kak



000584

Exhibit 5

000585

D.R. HORTON DHI
LISTED
NYSE
America's Builder

August 11, 2006

VIA FACSIMILE TRANSMISSION
(Original by First-Class Mail)



Steven L. Smith, Esq.
Smith & Koontz
Post Office Box 40578
Charleston, SC 29423-0578

Re: Contract between Wescott Land Company, LLC ("Wescott") and D.R.
Horton, Inc. ("Horton") dated November 15, 2004 (the "Contract")

Dear Mr. Smith:

I received a copy of your letter to Brian Gardner dated August 10, 2006, and I am writing to respond on behalf of Horton.

The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

Furthermore, the Contract, as amended by that Amendment dated July 27, 2005, contemplates the purchase and sale of the townhouse lots in three (3) separate, quarterly takedowns. Accordingly, Horton will close on the purchase of thirty-seven (37) townhouse lots, or such similar number of lots that constitute complete townhouse buildings, on or before August 31, 2006. Horton will close on the purchase of a like number of townhouse lots on or before November 30, 2006. Horton will close on the purchase of the remaining townhouse lots on or before February 28, 2007.

For the sake of clarity, I propose that the parties execute a Second Amendment to the Contract that acknowledges that the townhouse lots are now substantially complete and that establishes the new takedown schedule. I will prepare a draft of the amendment and forward it to you under separate cover. Please also take notice that, effective immediately, Horton's addresses for delivery of notice are as follows:

503 Wando Park Blvd. • Suite 200 • Mt. Pleasant, SC 29464 • (843) 284-5000 • Fax (843) 284-5010

000586

Doug Brown, Division President
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5061
Phone: (843) 284-5000

With copy to:

O. Kenneth Bagwell, Jr.
General Counsel, Northeast Region
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5060
Phone: (843) 284-5000

Thank you for your attention, and please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

O. Kenneth Bagwell, Jr.
O. Kenneth Bagwell, Jr.

OKB/vll

Xc: Wescott Land Company, LLC (via facsimile and first-class mail)✓

Larry Dodds, Jr., Esq. (via facsimile and first-class mail)✓
Dodds & Hennessy

Doug Brown, President ✓
Coastal Carolinas Division
D.R. Horton, Inc.

Richard Shively, City Manager ✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Scott Varn, Project Manager ✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Exhibit 6

000588

Sarah Mock

From:

Mitchell M Flannery
Wednesday, September 13, 2006 1:59 PM
tdtraylick@knology.net

Subject:

Farm @ Wescott

Attachments:

SECOND AMENDMENT TO LAND PURCHASE CONTRACT proposed by Bagweel
8-21-06.doc

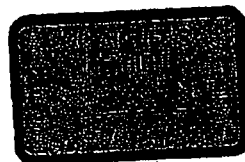
Importance:

High

Tim,

Thanks for your time. As I mentioned before we have 36 units funded for takedown 1 and will agree to take 40 units down the 2nd phase and 36 the last phase. I do not want to have to send this \$\$ back and ask for it again at a later date but if we can not close in the next 2 weeks I will be forced to send it back. I am going to propose to my Division President that we possibly shrink the takedowns to 2 months apart rather than 3 months apart with the first closing immediately. We both are pretty adamant about how we view the contract so it will not benefit either party if we start butting heads. I will get back with you shortly.

Mitchell



SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made August 21, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (37 townhouse lots) shall occur on or before September 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (37 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (36 townhouse lots) shall occur on or before March 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

Title: _____

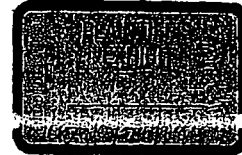
Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Exhibit 7

Sarah Mock

From: Mitchell M Flannery
To: Monday, September 18, 2006 9:38 AM
Cc: tdfaylick@knology.net
Subject: Taylor, Gray, Larry Dodds
Attachments: 2nd Amendment - Modified for Takedown Schedule
2nd Amendment 9-18-06 - Modified by Flannery.pdf
Importance: High



Tim,

As I mentioned last week we have 36 units funded and I need to either close on this in the next few weeks or I'll have to send the money back to corporate and that isn't always a good thing. As we discussed both groups do not see eye to eye as the contract stands and if we don't amicably try to move forward we are going to get into something we both don't want to deal with. To give a little I am proposing to shrink the takedown over 2 months rather than 3 and basically if we can close now you are really only 4 months out of this phase being completely taken down. If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal. I have not run this by corporate but I have run our numbers and shrinking to two months may work. Please call me today to discuss what direction you all would like to take so we can prepare the closing. Thanks

Mitchell M. Flannery
Land Acquisition Manager
Coastal Carolina Division
Hilton Head / Savannah / Charleston / Myrtle Beach / Wilmington
D.R. Horton
America's Builder
Direct Line Myrtle Beach: 843-652-2309
Direct Line Charleston: 843-284-5034
Cellular: 843-318-1253
E-Fax: 469-522-8236

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made September 18, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (36 townhouse lots) shall occur on or before October 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (40 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (34 townhouse lots) shall occur on or before February 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Exhibit 8

**Ogletree
Deakins**
ATTORNEYS AT LAW
mike.shetterly@odnss.com

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

The Ogletree Building
300 North Main Street
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: 864.271.1300
Facsimile: 864.235.4754
www.ogletreedeakins.com

October 16, 2006

Via Facsimile (843.552.2678)

Steve Smith, Esquire
Smith Collins Newton & Koontz P.A.
PO Box 40578
N. Charleston, SC 29423-0578

Re: Westcott/D.R. Horton

Dear Steve:

In follow-up to our conversation of Wednesday, October 11, 2006, your client has not complied with the Conditions Precedent requirements of the contract set forth in the contract, or as amended.

Paragraph 15, subparts (i) and (j), have not been accomplished at all. Contrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any "sign-off" from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been installed on the site. Until these items are complete, the conditions precedent have not been completed.

Until all conditions precedent have been met, and written notice and substantiating documentation of that fact have been received, Westcott is not compliant with the contract requirements and no closing can be scheduled.

Under the contract, D.R. Horton has the right to extend closing deadlines as it deems fit to allow Westcott more time to complete the requirements, go ahead and close and force Westcott to complete the conditions precedent after the closing, or alternatively, it can elect its remedies under the contract. The contract clearly gives D.R. Horton to elect which course it chooses to take.

What D.R. Horton has offered, and what I am authorized to offer again, is to forgive the remaining conditions precedents that have not been done, or been done poorly, in exchange for a reasonable take-down schedule. D.R. Horton proposes to modify the contract to forgive the remaining requirements under the conditions precedent, which D.R. Horton will then assume as its own obligations, and take down the lots in three phases - (1/3 before the end of October; 1/3

Steve Smith, Esquire
October 16, 2006
Page 2

Ogletree
Deakins
ATTORNEYS AT LAW

before the end of December; 1/3 before the end of February). We believe our proposal is in the best interest of both parties.

Please let me know your client's decision.

With kindest regards, I am

Very truly yours,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Michael M. Shetterly

MMS:clr

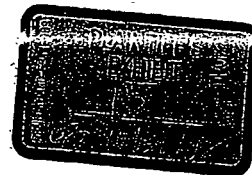
4454421.1

000598

Exhibit 15



4401 Belle Oaks Drive, Suite 280
N. Charleston, SC 29405
Phone: (843) 576-6840
Fax: (843) 529-4605



November 6, 2006

VIA FAX 843/552-0083

Mr. Tommy Hawkins
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, SC 29418

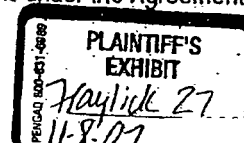
Re: Letter of Intent to purchase 110 developed lots (collectively the "Lots") located in The Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina ("Property")

Dear Mr. Tom Hawkins:

This letter sets forth the general terms and conditions upon which KB HOME SOUTH CAROLINA INC or its designee ("KB HOME"), would purchase the Lots from WESCOTT LAND COMPANY, LLC ("Seller"). This letter is subject to the drafting and execution of a mutually acceptable purchase and sale agreement ("Agreement"), which shall be prepared by KB HOME embodying, among others, the following terms:

1. **Property.** The "Property" means 110 townhome building Lots contained in Phase 3E of the Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina. All of the Lots are at least twenty feet in width and at least seventy-five feet in depth. The name of the current owner of the property is: Wescott Land Company, LLC.
2. **Purchase Price.** The "Purchase Price" shall be \$30,000.00 per padded Lot. The escalator will be 1.25 % per quarter.
3. **Closing.** The Lots will be purchased on a quarterly basis, in accordance with a lot takedown schedule to be agreed to by the parties in the Agreement. The initial closing of Lots shall occur 30 days after the last of the following occurs: (a) the end of the feasibility period; or (b) all of the contingencies as set forth in the paragraph of this letter of intent, titled "Contingencies" have been satisfied or waived by KB HOME in writing.
4. **Earnest Money.** Within 10 business days of the effective date of the Agreement, KB HOME shall deposit an earnest money bond issued by Safeco Insurance Company of America ("Safeco") (or another financial institution selected by KB HOME and reasonably acceptable to Seller) in the amount of \$50,000.00 with Nelson Mullins Riley & Scarborough, LLP who will act as escrow agent. Within 10 days following the end of the Feasibility Period, KB HOME will deposit additional Earnest Money in the amount of \$150,000.00. The Earnest Money is fully refundable prior to the expiration of the Feasibility Period. After the expiration of the Feasibility Period, all Earnest Money is non-refundable except for Seller's default or failure of a contingency under the Agreement. The Agreement will provide that the earnest money bond will stand as full-liquidated damages in the event KB HOME breaches its obligation to purchase lots under the Agreement for any reason.

LOI The Farm at Wescott 11 06 06.doc



000600

5. **Feasibility Period.** KB HOME would have 60 days following the effective date of the Agreement as a feasibility period (the "Feasibility Period"). During this Feasibility Period, KB HOME will have the right, at KB HOME's sole discretion, to test and review the condition and suitability of the Property for KB HOME's intended use, including but not limited to development costs, condition of title, physical condition of the Property and any other items KB HOME considers necessary, and to obtain the approval of KB HOME's land committee for this transaction. KB HOME and its agents and representatives shall have the right to enter the Property to conduct such tests and reviews. Seller would deliver to KB HOME copies of all tests, surveys, plats, deed restrictions, HOA documents, title policies and construction plans (if any) related to the Property within 7 days following the effective date of the Agreement.
6. **Zoning.** The property is presently or will be rezoned in the future to a classification that will allow a total of 110 townhome residential units that will be allocated to KB Home.
7. **Site Plan.** We understand that the Property will be developed as depicted on the preliminary site plan ("Preliminary Site Plan") attached to this letter as Exhibit "A".
8. **Brokerage Fees.** The parties acknowledge that, except for the broker identified below, whose commission Seller is solely responsible for paying, that no real estate broker or agent is involved in this proposed transaction. The parties agree to defend and indemnify each other from any claims of commissions or brokerage fees arising from KB HOME's or Seller's respective dealings with any other real estate broker or agent.

Seller's Broker: Tim Fraylick
First Charleston Realty
1124 Sam Rittenberg Blvd, Suite 5
N Charleston,, South Carolina 29407
Phone: 843-452-7202
Fax: 843-766-3289

9. **Closing Costs.** KB Home and Seller agree to pay their normal and customary closing costs and escrow fees and agree to prorate all real estate taxes on a calendar year basis as of the date of Closing. Additionally, KB Home and Seller agree that they will be responsible for their own attorney's fees associated with this proposed transaction.
10. **Seller's Representations and Warranties.** Seller shall provide such normal and customary representations and warranties as KB HOME deems appropriate with respect to the Property, including but not limited to the quality of the work performed by Seller on the Property, the existence of any wetlands, endangered species or protected habitat, absence of hazardous or toxic materials, the existence of any condemnation or assessment district proceeding and any moratorium or governmental policies precluding or inhibiting the development of the Property.
11. **Contingencies.** Purchaser's obligations under the Agreement will be contingent upon each of the following matters occurring (collectively, the "Contingency Events").
 - a. all of Seller's warranties, representations and covenants contained in this Agreement shall be and remain true, correct and complete and fully performed as of the Effective Date and through the final Closing;
 - b. there shall have occurred no material adverse change in the physical, financial or legal conditions of the Property from the conditions existing prior to the expiration of the Feasibility Period;
 - c. Seller shall deliver good and marketable title to the Property to Purchaser and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 3

insurance policy insuring good and marketable fee simple title to the Property with a liability limit in the amount of the Purchase Price at standard premium rates;

- d. Seller shall have delivered to Purchaser Lots meeting the Development Specifications (as defined herein)
- e. Additional Contingencies. Seller shall satisfy each of the following obligations by the indicated time:

(i) No later than 10 business days following the expiration of the Feasibility Period Seller shall execute and deliver to Purchaser a letter agreement in favor of Purchaser and in the form attached as Exhibit "D" hereto, duly executed by Seller's Lender, in which Seller's Lender agrees, among other things, in the event of a default by Seller under the Development Loan, to (A) provide written notice to Purchaser of such default, and (B) give Purchaser the right to purchase such loan.

If such conditions have not been timely satisfied, then Purchaser may terminate this Agreement by written Notice to Seller.

12. No Publicity. THE PARTIES UPON EXECUTION OF THIS LETTER OF INTENT WILL BE BOUND BY THE FOLLOWING 2 PARAGRAPHS WHICH WILL ALSO BE INCLUDED IN AND BE A PART OF THE AGREEMENT:

No Publicity.

- a. Seller (including all directors, officers, partners, employees, representatives, attorneys, and agents of Seller) shall not make any media release, public announcement, press release, public disclosure, or any other form of publicity in any manner or medium including, without limitation, newspaper, newsletter, magazine, or electronic communication (collectively, "Publicity") relating in any way to this Agreement, including, without limitation, regarding (i) the execution or existence of this Agreement, (ii) the transaction evidenced by this Agreement, (iii) the status of the transaction evidenced by this Agreement (including, without limitation, any termination of this Agreement or closing of the transaction, or portion thereof, evidenced by this Agreement); (iv) any matter related to or arising out of this Agreement, (v) any of the terms or provisions contained in this Agreement, and/or (vi) any other matter related to or arising from any of the foregoing, without the prior written consent of Purchaser, in its sole and absolute discretion.
- b. Seller shall submit in writing any Publicity desired or generated by Seller, to Purchaser, prior to release, and Seller must not release any such Publicity unless, prior to such release, Purchaser in its sole and absolute discretion has approved such Publicity in writing. Provided, however, if in the written opinion of Seller's counsel such disclosure is required by law, then upon as much prior written notice to Purchaser as is practical under the circumstances giving Purchaser an opportunity to seek an injunction or other equitable relief, Seller may disclose the information necessary to comply with the law. In the event of a breach or threatened breach of this no publicity paragraph, Purchaser shall be entitled to all rights, recourses, and remedies available to it under applicable law and/or in equity, including, without limitation, under the provisions of this Agreement. The foregoing shall not limit Seller's ability to pursue any and all governmental or quasi-governmental approvals that may be contemplated by this Agreement or that may be necessary in connection with the transaction contemplated by this Agreement, in Seller's reasonable discretion.

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 4

13. ~~Exclusive.~~ Seller shall not, so long as Seller and KB HOME are negotiating toward the execution of a definitive Agreement, but in any case for at least 30 days from the date of Seller's execution of this letter of intent, negotiate with or solicit or accept any offer from any other party for the sale of any or all of the Property or any other transaction inconsistent with the transaction proposed herein.

14. Assignment. The rights and interest of KB HOME in and to the Agreement may be assigned or transferred by KB HOME to any entity. The interest of Seller in the Agreement may not be assigned without the prior written consent of KB HOME, which consent shall not be unreasonably withheld.

Excluding the paragraphs of this letter of intent titled "No Publicity" and "Exclusive" (the provisions of which shall be binding upon the parties), this letter constitutes only an expression of intent regarding the terms and conditions on which KB HOME would purchase the Property and shall not be deemed to create a binding obligation between KB HOME and the Seller unless and until a definitive Agreement including the terms hereof, and any other terms acceptable to the parties, in their sole discretion, is executed by both parties.

If the terms of this letter are acceptable to the Seller, then please insert the name of the owner of the Property into the signature block below, and execute one original in the indicated areas and return it to KB HOME via facsimile to (843) 529-4605. It would be helpful to us if you include a copy of Seller's title policy (issued at Seller's acquisition of the Property) along with the fully executed letter of intent.

KB HOME will cause an Agreement to be prepared and delivered to Seller as soon as reasonably possible after the date that a fully executed copy of this letter is received by KB HOME. If the parties are unable to enter into an Agreement acceptable to both parties within 30 days of the Seller's execution of this letter of intent, then the parties shall have no further obligation to each other except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity".

In the event we have not received a satisfactory response from you within 15 days of the date of this letter of intent, we shall assume that you have no further interest in completing a transaction with us and except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity", the terms of this letter are automatically withdrawn.

KB HOME SOUTH CAROLINA INC

By: _____

Jeff Meyer
President

SELLER: WESCOTT LAND COMPANY, LLC

Signature _____

Print Name _____

Its: _____

Date: _____

cc: Senior Regional Counsel

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 5

EXHIBIT "A"
Preliminary Site Plan

Exhibit 16

Sarah Mock

From: Mitchell M Flannery
At: Wednesday, December 27, 2006 2:25 PM.
Cc: tdfraylick@knology.net
Subject: Shetterly, Mike M.; Christopher M Wallace; Richard D Brown.
The Stables

Importance: High



Tim,

I want to thank you and Mr. Hawkins for meeting with Mike and me on Thursday the 21st. After discussing the situation with you in person, I feel more comfortable we may be able to find an amicable resolution. I think it was helpful for us to both know that there are real people on both sides that care about not only the end product, but how we get there.

Just for clarification, we discussed giving you a list of things that we feel need to be rectified onsite, which you would perform at your cost within a few weeks after closing, and in return we would agree to pay \$30,000 per unit and close as soon as possible. Per our conversation and my discussion with Development we would request the following be done to the site:

1. We would like to request a copy of the 'As Built's for the building pads with their original elevations. I believe the pads were 50'x60'.
2. We need to verify that we have all permits to operate. I did forward information to development that was delivered to Jonathan in the summer. I believe these were the DHEC permits but need to verify.
3. We would like for the pads to be shaped back into their original condition and make sure that the pads are 95% compacted at 2,000psf. Do we have compaction letters? If not could you all provide?
4. We would request that we meet with a member of your group onsite to discuss tree replacements that need to be done on site such as the front entrance and other areas. I don't think this is a significant amount but we would like for these to be replaced. If you would like further clarification as to the locations and number, we can do that prior to any confirmation of this agreement.
5. We would request that you clean the stormwater drains from any debris that washed into the roads and storm drains.
6. Clear any trash or debris on site.
7. Correct the rear drainage issue against Planter's Point. We will meet with Kevin on Tuesday and put together a rear drainage plan to shape these lots up so we don't have any drainage issues. We will pay for design, but need you to approve the design and perform the work in order for the above deal to proceed. I don't think this will be anything that you all will be opposed to so I would like to continue working towards getting the above stuff completed.

I am meeting with Mike Shetterly today to discuss the tax issue and give me a synopsis of the contract and our past course of conduct as it pertains to this issue. Please review the above and let me know should you have any questions or concerns. If you all are agreeable I would suggest that we draft an amendment and move forward. Thanks again for your time and consideration.

Mitchell M. Flannery
Land Acquisition Manager
Coastal Carolina Division
Hilton Head / Savannah / Charleston / Myrtle Beach / Wilmington
D.R. Horton
America's Builder
Direct Line Myrtle Beach: 843-652-2309
Direct Line Charleston: 843-284-5034
Cellular: 843-318-1253
Fax: 469-522-8236

000606

Affirmative Defense through Third Affirmative Defense, of Wescott's Answer and Counterclaim, these paragraphs constitute the Wescott's answers and affirmative defenses; therefore, no response from D.R. Horton is required. To the extent a response is required, D.R. Horton denies each allegation contained therein and demands strict proof thereof.

ANSWERING THE COUNTERCLAIM

3. In answer to Paragraph 18, delineated as "For a First Counterclaim", D.R. Horton reasserts and realleges Paragraphs 1 and 2 above as if set forth herein verbatim.

4. As to the allegations contained in Paragraph 19 of the Counterclaim, D.R. Horton, admits, upon information and belief, the allegations contained therein.

5. As to the allegations contained in the second Paragraph 19 [sic] of the Counterclaim, D.R. Horton lacks knowledge and information sufficient to form a belief and therefore denies the same and demands strict proof thereof.

6. As to the allegations contained in Paragraph 20 of the Counterclaim, D.R. Horton asserts that the terms and conditions of the Contract speak for themselves. D.R. Horton admits the remaining allegations of said paragraph in that the property in question is in Dorchester County.

7. As to the allegations contained in Paragraph 21 of the Counterclaim, D.R. Horton admits so much of said paragraph in that the property was to be purchased in phases and that Wescott was required to develop lots. Further, D.R. Horton asserts that the terms and conditions of the Contract speaks for themselves. The remaining allegations of Paragraph 21 are inconsistent or contrary to the Contract are therefore denied and strict proof thereof demanded.

8. As to the allegations contained in Paragraph 22 of the Counterclaim, D.R. Horton denies that Wescott had conveyed on July 27, 2005 any of the phases contemplated by the Contract. and

demands a more definite statement.

9. As to the allegations contained in Paragraph 23 of the Counterclaim, D.R. Horton admits that Wescott failed to convey the lots as required by the Contract and that the parties executed an Amendment to the Contract dated July 27, 2005. As to the remaining allegations of Paragraph 23 of the Counterclaim, D.R. Horton denies any allegations inconsistent with the limited admission or the terms of the Contract and demands strict proof thereof.

10. As to the allegations contained in Paragraphs 24, 25 and 26 of the Counterclaim, and all its subparts, D.R. Horton admits that the parties executed an Amendment to the Contract of Sale and that the Contract speaks for itself. Any allegations inconsistent with said Contract are denied and strict proof thereof demanded.

11. As to the allegations contained in Paragraph 27 of the Counterclaim, D.R. Horton denies the allegations contained there and demands strict proof thereof.

12. As to the allegations contained in Paragraph 28 of the Counterclaim, D.R. Horton is without sufficient information to form a belief and therefore denies the same and demands strict proof thereof.

13. As to the allegations contained in Paragraph 29 of the Counterclaim, D.R. Horton admits that a letter was received and that the letter speaks for itself. Any allegation inconsistent therewith is denied and strict proof thereof demanded.

14. As to the allegations contained in Paragraph 30 of the Counterclaim, D.R. Horton admits that the parties executed an Amendment to the Contract of Sale and that the Contract speaks for itself. Any allegations inconsistent with said Contract are denied and strict proof thereof demanded.

15. As to the allegations contained in Paragraph 31 of the Counterclaim, D.R. Horton admits

that Wescott's counsel wrote a letter to D.R. Horton's counsel dated August 10, 2006. Any allegation inconsistent with the contents of the letter are denied and strict proof thereof demanded.

16. As to the allegations contained in Paragraphs 32, 33 and 34 of the Counterclaim, D.R. Horton admits that letters and emails were exchanged and sent and that the correspondence speaks for itself. Any allegation inconsistent therewith is denied and strict proof thereof demanded.

17. As to the allegations contained in Paragraphs 35, 36 and 37 of the Counterclaim, D.R. Horton admits that D.R. Horton hired Mike Shetterly and that Mr. Shetterly wrote a letter dated October 16, 2006. All allegations inconsistent with that letter are denied and strict proof thereof demanded.

18. As to the allegations contained in Paragraphs 38 and 39 of the Counterclaim, D.R. Horton admits that the parties executed a Contract of Sale and that the Contract speaks for itself. Any allegations inconsistent with said Contract are denied and strict proof thereof demanded.

19. As to the allegations contained in Paragraph 40 of the Counterclaim, D.R. Horton is without knowledge and information sufficient to form a belief and therefore denies the same and demands strict proof thereof.

20. As to the allegations contained in Paragraph 41 of the Counterclaim, D.R. Horton admits that a letter was sent and that the letter speaks for itself. Any allegations inconsistent with said letter are denied and strict proof thereof demanded.

21. D.R. Horton admits, upon information and belief, the allegations contained in Paragraph 42 of the Counterclaim.

22. As to the allegations contained in Paragraph 43 of the Counterclaim, D.R. Horton is without knowledge and information sufficient to form a belief and therefore denies the same and demands

strict proof thereof.

23. As to the allegations contained in Paragraph 44 of the Counterclaim, D.R. Horton admits filing a Lis Pendens on or about December 4, 2006. Any allegation in Paragraph 44 inconsistent therewith is denied and strict proof thereof demanded.

24. As to the allegations contained in Paragraphs 45 and 46 of the Counterclaim, D.R. Horton denies the same and demands strict proof thereof.

25. D.R. Horton admits the allegations contained in Paragraph 47 of the Counterclaim.

26. As to the allegations contained in Paragraph 48 of the Counterclaim, D.R. Horton moves to strike the phrase "Horton's unwarranted aggression" and/or for a more definite statement to define the "unwarranted aggression" and to define the "deal" Wescott alleges to put back together. Without a more definite statement, D.R. Horton denies the allegations of Paragraph 48 of the Counterclaim and demands strict proof thereof.

27. D.R. Horton admits the allegations contained in Paragraph 49 of the Counterclaim regarding the parties negotiation of a new amendment and Westcott's refusal to sign prior to the appearance at the closing table. D.R. Horton is without sufficient information to admit or to deny the remaining allegations contained therein and therefore denies the same and demands strict proof thereof.

28. D.R. Horton admits, upon information and belief, the allegations contained in Paragraph 50 of the Counterclaim.

29. As to the allegations contained in Paragraphs 51 and 52 of the Counterclaim, D.R. Horton is without knowledge or information sufficient to form a belief and therefore denies the same and demands strict proof thereof.

30. As to the allegations contained in Paragraphs 53 and 54 of the Counterclaim, D.R. Horton

agrees that the parties negotiated a Second Amendment that was never executed. As to the remaining allegations of Paragraphs 53 and 54 inconsistent with the limited admission, D.R. Horton denies the same and demands strict proof thereof.

31. As to the allegations contained in Paragraphs 55 of the Counterclaim, D.R. Horton denies the same and demands strict proof thereof.

32. As to the allegations contained in Paragraph 56 of the Counterclaim, D.R. Horton denies that a closing could occur because the parties did not have a meeting of the minds as to the terms for a closing and Wescott was in material breach of the contract.

33. D.R. Horton admits the allegations contained in Paragraph 57 of the Counterclaim.

34. As to the allegations contained in Paragraphs 58 and 59 of the Counterclaim, D.R. Horton admits, upon information and belief that Hawkins did receive multiple offers from K.B. Homes. D.R. Horton denies the remaining allegations contained in Paragraphs 58 and 59 and demands strict proof thereof.

35. As to the allegations contained in Paragraph 60 of the Counterclaim, D.R. Horton denies the same and demands strict proof thereof.

36. As to the allegations contained in Paragraphs 61 and 62 of the Counterclaim, D.R. Horton is without sufficient information to form a belief and therefore denies the same and demands strict proof thereof.

37. As to the allegations contained in Paragraph 63 of the Counterclaim, D.R. Horton denies the same and demands strict proof thereof.

FURTHER ANSWERING THE COUNTERCLAIM
(Breach of Contract)

38. As to Paragraph 64 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 37 above as if set forth herein verbatim.
39. As to the allegations contained in Paragraphs 65, 66, 67, 68, 69 and 70 of the Counterclaim, D.R. Horton admits that it entered a contract with Wescott. Any allegation inconsistent with the terms of the Contract or the parties course of dealing is denied and strict proof thereof demanded.
40. As to the allegations contained in Paragraph 71 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit of deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

FURTHER ANSWERING THE COUNTERCLAIM
(Unfair Trade Practices)

41. As to Paragraph 72 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 40 above as if set forth herein verbatim.
42. As to the allegations contained in Paragraphs 73 and 74 of the Counterclaim, D.R. Horton denies the allegations contained therein and demands strict proof thereof.
43. As to the allegations contained in Paragraph 75 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit of deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

FURTHER ANSWERING THE COUNTERCLAIM
(Abuse of Process)

44. As to Paragraph 64 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 43 above as if set forth herein verbatim.

45. As to the allegations contained in Paragraphs 65 and 66 of the Counterclaim, D.R. Horton denies the allegations contained therein and demands strict proof thereof.

46. As to the allegations contained in Paragraph 67 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit of deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

**FURTHER ANSWERING THE COUNTERCLAIM
(Malicious Prosecution)**

47. As to Paragraph 68 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 46 above as if set forth herein verbatim.

48. As to the allegations contained in Paragraph 69 of the Counterclaim, D.R. Horton denies the allegations contained therein and demands strict proof thereof.

49. As to the allegations contained in Paragraphs 70 and 71 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit of deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

**FURTHER ANSWERING THE COUNTERCLAIM
(Breach of Contract Accompanied by a Fraudulent Act)**

50. As to Paragraph 72 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 49 above as if set forth herein verbatim.

51. As to the allegations contained in Paragraphs 73, 74, 75, 76, 77 and 78 of the Counterclaim, D.R. Horton denies the allegations contained therein and demands strict proof thereof.

**FURTHER ANSWERING THE COUNTERCLAIM
(Tortious Interference with Prospective Economic Advantage)**

52. As to Paragraph 79 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1

through 51 above as if set forth herein verbatim.

53. As to the allegations contained in Paragraphs 80, 81 and 82 of the Counterclaim, D.R.

Horton denies the allegations contained therein and demands strict proof thereof.

54. As to the allegations contained in Paragraph 83 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit or deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

**FURTHER ANSWERING THE COUNTERCLAIM
(Slander of Title)**

55. As to Paragraph 84 of the Counterclaim, D.R. Horton reasserts and realleges Paragraphs 1 through 54 above as if set forth herein verbatim.

56. As to the allegations contained in Paragraph 85 of the Counterclaim, D.R. Horton admits its filing a Lis Pendens in conjunction with its breach of contract action and interest in the property. Any allegation inconsistent with said Lis Pendens is denied and strict proof thereof demanded.

57. As to the allegations contained in Paragraphs 86 and 87 of the Counterclaim, the same constitutes a conclusion of law to which D.R. Horton is required neither to admit or deny. To the extent a response is required, this paragraph is denied and strict proof thereof demanded.

**FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Rule 12(b)(6))**

58. D.R. Horton reasserts and realleges Paragraphs 1 through 57 above as if set forth herein verbatim.

59. Defendant/Counter Claimants have failed to state facts sufficient to constitute a cause of action against D.R. Horton and its Counterclaim should be dismissed pursuant to Rule 12(b)(6),

SCRCP.

**FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Waiver, Estoppel, Laches, and Release)**

60. D.R. Horton reasserts and realleges Paragraphs 1 through 59 above as if set forth herein verbatim.
61. Defendant/Counter Claimants' claims may be barred by the doctrine of waiver, estoppel, laches, and/or Release.

**FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Statute of Frauds)**

62. D.R. Horton reasserts and realleges Paragraphs 1 through 61 above as if set forth herein verbatim.
63. Defendant/Counter Claimants' claims are barred by the statute of frauds.

**FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Intervening Acts of Third Parties)**

64. D.R. Horton reasserts and realleges Paragraphs 1 through 63 above as if set forth herein verbatim.
65. Defendant/Counter Claimants' damages, if any, are the direct and proximate result of intervening and superceding acts of third parties not affiliated with Plaintiff and not under Plaintiff's domain or control.

**FOR A SIXTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Economic Loss Rule & Lack of Injury)**

66. D.R. Horton reasserts and realleges Paragraphs 1 through 65 above as if set forth herein

verbatim.

67. Defendant/Counter Claimants' claims are barred by economic loss rule, and also by the fact that Defendant/Counter Claimants have sustained no injury.

**FOR A SEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)**

68. D.R. Horton reasserts and realleges Paragraphs 1 through 67 above as if set forth herein verbatim.

69. Defendant/Counter Claimants have failed to adequately or properly mitigate its damages.

RESERVATION AND NON-WAIVER

70. D.R. Horton reasserts and realleges Paragraphs 1 through 69 above as if set forth herein verbatim.

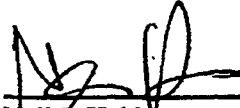
71. D.R. Horton reserves and does not waive any additional or further defenses as may be revealed by additional information that maybe acquired in discovery or otherwise.

WHEREFORE, Plaintiff, D.R. Horton, having fully answered the Counterclaim of the Defendant/Counter Claimants, prays that the Court inquire into the above-referenced matter and, to the extent the principals of law and equity allow, dismiss the Counterclaim, and award D.R. Horton the damages incurred in this action, including a reasonable attorney's fee, and for such other

and further relief as the Court may deem just and proper.

Dated this 22nd day of May, 2009.

ELMORE & WALL, P.A.



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STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C/A: 2007-CP-18-337

D.R. HORTON, INC.,)

Plaintiff,)

-vs-)

WESCOTT LAND COMPANY,)
LLC,)

Defendant.)

THOMAS R. HAWKINS and)
WESCOTT LAND COMPANY,)
LLC,)

Counter-Claimants,)

-vs-)

D.R. HORTON, INC.,)

Counter-Claim Defendant.)

2009 SEP 18 AM 9:39
CLERK OF COURT
DORCHESTER COUNTY

**DEFENDANT'S / COUNTER-CLAIMANT'S
WESCOTT LAND COMPANY, LLC'S
MOTION FOR RECONSIDERATION**

Defendant / Counter-Claimant, Wescott Land Company, LLC (hereinafter "Wescott") makes this motion pursuant to Rule 59 S.C.R.C.P. and moves this Honorable Court for an Order altering or amending its grant of summary judgment as to all of the Defendant's Counter-Claims that sounded in tort. This Court's Order was filed on September 4, 2009 and received by the Defendant on September 8, 2009.

The Court granted Plaintiff's Motion for Summary Judgment as to Defendant's Counter-Claims for slander of title, violations of the South Carolina Unfair Trade

Practices Act, abuse of process, malicious prosecution, breach of contract accompanied by fraudulent acts, and tortious interference with prospective contractual relationships.

First, Defendant would ask the Court to amend its Order finding that the contract between the parties required Wescott to convey Phase 3E-1 on or before July 1, 2006, and that Wescott failed to do so. Defendant would further request that the Order be amended insofar as it states that Wescott admits that it did not satisfy all conditions precedent as of July 19, 2006, but continued to demand that D. R. Horton, Inc. (hereinafter "D.R. Horton") close on all three phases within twenty (20) days of July 19, 2006. Wescott has always asserted that it had satisfied all conditions precedent as of July 19, 2006. Furthermore, to the extent that the Court's findings imply that Wescott somehow breached its contract by failing to convey Phase 3E-1 on or before July 1, 2006, Wescott objects to this finding to the extent that it implies that July 1, 2006 was a rigid deadline when in fact the record shows that Phase 3E-1 could not have been closed on by that date based on the conduct of the Plaintiff. Further, it is undisputed in the record that the Plaintiff had full knowledge of the status of the Defendants' efforts to develop Phase 3E and consented to closing at a later date.

In its Order, the Court relies heavily on the fact that Defendants submitted no affidavits to counter those submitted by the Plaintiff. However, Defendants would respectfully argue that failing to submit affidavits is not fatal when there is factual evidence already in the record to support Defendants' Counter-Claims. Indeed, Defendants submitted to the Court a great deal of circumstantial evidence that would tend to show that the Plaintiff, not the Defendant, breached its contract to purchase the property that is the subject of this case. Specifically, the Plaintiff refused to purchase the

entire section of the property known as Phase 3E upon satisfaction of all conditions precedent by Defendant Wescott. The Plaintiff has consistently taken the position that it could only be required to close on the property in a series of takedowns rather than all at once. Additionally, this is the Plaintiff's only argument for refusing to close on the sale of the property. In a letter from Plaintiff's in-house counsel to counsel for the Defendant, the Plaintiff acknowledged that all conditions precedent to the sale had been satisfied by the Defendant. However, sometime later, the Plaintiff asserted that their own in-house attorney's letter was incorrect and that certain conditions precedent had in fact not been satisfied. Plaintiff proceeded to then change his position on several occasions as to which conditions precedent had not been satisfied. Counsel for the two parties attempted to put the deal back together and negotiate the terms of an amendment to the contract. Believing that those terms had been settled upon, Defendants and their attorney showed up to the closing that was scheduled at the offices of Larry Dodds, outside counsel for the Plaintiff. However, the Plaintiff did not attend the closing. Rather, the Plaintiff filed successive *Lis Pendens* preventing the property from being sold to third parties. The first two *Lis Pendens* that were filed were not followed by the filing of a lawsuit as is required under South Carolina law. However, they did have the affect of scuttling at least two opportunities for the Defendant to sell the property to interested third parties. Defendant believes that this timeline as set forth in greater detail in its Memoranda in Opposition to Plaintiff's Motion for Summary Judgment presents sufficient evidence by which a jury might determine that the Plaintiff acted at all times in bad faith and employed various tactics in order to force the Defendant to sell the subject property to the Plaintiff only under terms dictated to the Defendant by the Plaintiff and it believes that, under South

Carolina law, the Defendant is required to show a mere scintilla of evidence in support of its claims (Weston v. Kim's Dollar Store, __ S.E.2d __, 2009 WL2136707 (Ct. App. 2009), and Defendant would submit that it has shown much more than that. Rather than simply restate its legal arguments in this Motion, Defendant has attached its two Memoranda in Opposition to Plaintiff's Motion for Summary Judgment for the Court's further review and would respectfully request the opportunity to be heard once again on these issues.

It is so moved.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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ATTORNEYS FOR COUNTER-CLAIMANTS

September 17, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
D.R. HORTON, INC.,)
Plaintiff,)
v.)
WESTCOTT LAND COMPANY, LLC,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2007-CP-18-337

DEFENDANT'S MEMORANDUM IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT AND MOTION
TO STRIKE

The instant action began when Plaintiff D.R. Horton, Inc., a developer, filed a number of *lis pendens* on properties owned by Defendant Westcott Land Company, LLC. Plaintiff, which claims an entitlement to purchase certain lots in the Westcott development, has now moved for summary judgment on Defendant's counterclaims. Simultaneously, but in a separate pleading, Plaintiff has also requested that this Court strike all of the relief sought by Defendant in the counterclaims save for the single prayer for the retention of the escrowed earnest money. For the reasons that follow, Plaintiff's motions should be denied.

Although presented separately, the arguments in both of Plaintiff's Motions essentially overlap, and the gist of both is that the entirety of this case is limited to a plain reading of the contract, to be interpreted in the light of certain dealings between the parties which Plaintiff claims have modified some of the terms. That being the case, Defendant believes that an overview of the contract, and of the matters that undisputedly occurred subsequent to its execution, is necessary.

In November, 2004, the parties to this action entered into a contract pursuant to which Plaintiff would, over a period of time, purchase some 193 lots located at The Farms, Westcott Plantation. The properties were split into three phases, the first two of which were to be single-

family residence, and the third of which was intended to be townhomes. Defendant was to perform certain preliminary work, including grading, erosion control, and preparation of plans for water, sewer, storm drains, and utility layouts. The contract provided a "take down" schedule, pursuant to which closings on different portions of the property were to be held on the later of either a date certain or the date upon which Defendant had obtained final plat approval and recorded the lots.

The closings on the single-family lots, Phases 1 and 2 of the contract, were completed as scheduled. The contract was amended, effective November 15, 2004, with respect to the work to be done, the conditions precedent to closing, and the closing schedule for the lots in Phase 3, the townhome portions. Specifically, Phase 3 was split into five sub-phases, with the closing on the first 45 lots to be July 1, 2005, and the last 36 on July 1, 2006. All closings remained dependent upon obtaining plat approval and recordation, and the amendment required Defendant to provide Condition Precedent documentation and certifications at least twenty days prior to any scheduled closing. No subsequent closings took place.

By letter dated August 10, 2006, Defendant notified Plaintiff that all final certificates had been obtained, all conditions precedent had been met, and that, pursuant to the terms of the contract and amendments, Plaintiff was required to close on the townhome lots within the specified time. Plaintiff eventually acknowledged that it had properly received the certifications of the completion of all conditions precedent, but demanded that the properties be closed in phases, separated by several months, notwithstanding the fact that all closing dates had passed. Although the parties apparently continued to dispute for some time whether or not the conditions precedent specified in the contract had been completed, the correspondence from Plaintiff, *see*

Exhibit A attached hereto, indicates that Plaintiff itself concurred in the conclusion that all conditions had been met by not later than August 9, 2006.

Although all of the lots were properly platted, and the alternative closing dates specified in the contract had passed, Plaintiff refused to purchase the remaining lots in other than staggered fashion. Defendant refused to transfer the lots unless Plaintiff closed as required by the contract – in other words, within 20 days of the date of the final approval of the plat. On February 26, 2007, Plaintiff filed its Complaint, alleging that Defendant had breached the contract between the parties, and that Plaintiff remained ready, willing, and able to perform in a staggered manner. Plaintiff requested damages for delay, and specific performance. Between the time of the commencement of the negotiations regarding the closing schedule and the time of the filing of the Complaint – a period comprising some six months – Plaintiff filed a series of *lis pendens* on the property as well. These were filed at the RMC Office of Berkeley County, but were never served.

After the filing of the Complaint, Defendant counterclaimed for breach of contract, fraud, unfair trade practices, and slander of title. Defendant sought damages to include treble damages pursuant to the Unfair Trade Practices Act, as well as its fees and costs. Plaintiff asserts that, pursuant to the ruling of the Court of Appeals in *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), there is an absolute privilege to the filing of a *lis pendens*, and that Defendant's claim for slander of title cannot be maintained under any circumstances. Plaintiff further asserts that there is no evidence of any nature to show the existence of any fraudulent statements, that Defendant has failed to make a *prima facie* case under the Unfair Trade Practices Act, and that the evidence is clear, based upon the deposition testimony of Defendant's 30(b)(6) witness, Tim Fraylich, that Defendant failed to meet the conditions

precedent to the fulfillment of a contract, as a result of which Plaintiff cannot be found to have breached. Finally, in its separate Motion, Plaintiff claims that the contract expressly limits Defendant's remedies to retention of the earnest money, and that, if summary judgment is not granted, Defendant's prayer for damages should nonetheless be stricken. These issues are not, however, as easily separated from one another as Plaintiff makes them, but rather are all connected and rest upon the same factual predicates. Under the very specific facts of this action, Plaintiff is not entitled to judgment in its favor as to any of its assertions.

1. Slander of Title

The decision of the Court of Appeals in *Pond Place, supra*, has been interpreted to mean that no filing of a *lis pendens*, under any circumstances, will ever give rise to a cause of action for slander of title. That is, however, far too broad a reading of the case, and is an unjustified interpretation of the decision. Rather, *Pond Place* stands for the proposition that, assuming that the *lis pendens* is properly filed in accordance with all statutory requirements, by one who has a colorable claim to the property to which it attaches, and who completes the statutory process by the timely filing of an associated complaint, its filing is privileged. It does not speak to the filing of a *lis pendens* that is not in compliance with the statutory scheme, is not promptly followed by the filing of a complaint, or which otherwise is unconnected to a legitimate law suit regarding an interest in the property.

Much of the decision in *Pond Place* consists of a historical overview of the rise of the privilege that today attaches, as a matter of course, to pleadings. After a lengthy discussion of the development of the principle that all statements made in the context of litigation, even if otherwise libelous or slanderous, should be protected, the Court of Appeals concluded that "a *lis pendens* filed in conjunction with an action involving the same real estate is merely another form

of pleading. It is premised upon and must be filed in time in conjunction with an underlying complaint involving an issue of property." *Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896. The Court did not, however, extend a blanket privilege that would encompass an improper *lis pendens*.

Plaintiff herein filed a series of *lis pendens*, none of which were served upon Defendant and none of which, until the last, served as the basis for the filing of a complaint. These documents are not "pleadings" within the meaning of *Pond Place*, as they neither complied with the statutory requirements for the filing of a *lis pendens* nor were they "filed...in conjunction with an underlying complaint" as required by the plain language of the Court of Appeals. As such, the extension of the privilege that attaches to pleadings is unwarranted.

At least one court has realized that *Pond Place* does not, on its face, automatically confer privileged status upon the filing of any *lis pendens*, in any case, no matter whether the filing is otherwise in accordance with the law or not. In *BidZirk, LLC v. Smith*, 2007 U.S. Dist. LEXIS 78481 (D.S.C. October 22, 2007)(attached hereto as Exhibit 1), the United States District Court for the District of South Carolina was faced with a motion to dismiss a claim for sanctions predicated upon the allegedly improper filing of a *lis pendens*. The moving party argued, as it does here, that the filing itself was privileged under the ruling of the Court of Appeals in *Pond Place*.

The District Court found that the underlying claims in the case did not affect any interest in real property, and that, notwithstanding any possible privilege language gleaned from *Pond Place*, no privilege attached to a *lis pendens* in such a situation. The court focused primarily on the same criteria as those of the *Pond Place* court: that the filing of a *lis pendens* requires strict compliance with the statute, and may only be properly maintained in those situations set out in

the statutory scheme. Where the plaintiff fails to comply, there is can be no legal basis for the lien, and it cannot be privileged.

Unlike the filing in *BidZirk*, there is no question but that the filings in the instant action do purport to affect an interest in real property. However, they do not comply with the statutory scheme, in that Plaintiff herein filed a series of *lis pendens* on the realty without either serving them upon Defendant or, until the last, following them with the filing of a complaint. They were designed for no purpose other than to cloud Defendant's title to its property, and to interfere with Defendant's ability to freely alienate that property.

There can be no doubt but that the true meaning of the decision in *Pond Place*, as properly recognized by the United District Court, is not to protect as privileged any oppressive or malicious pleading, but merely to recognize that a properly filed *lis pendens*, accomplished in accordance with the statutory requirements of a connection to real property and timely filing of a complaint, is not actionable even should the plaintiff ultimately fail on the merits of his case. The instant matter is precisely the type of situation contemplated by the *BidZirk* court as falling outside the scope of the holding in *Pond Place*, and Plaintiff's Motion for Summary Judgment as to the slander of title claim should be denied.

2. Breach of Contract

Plaintiff's argument with regard to Defendant's claim of breach of contract completely ignores the substantial factual issues that remain in this case.

The contract between the parties was for the sale of a number of building lots in the subdevelopment owned by Defendant. Plaintiff was to close on tracts in the development according to a schedule set out in the contract itself. Closing dates were to occur upon the later of either a date certain or the completion of Defendant's preparatory work and issuance of final

plat approval. Defendant alleges that it completed all of the requisite preliminary work, and obtained all of the final approvals, late in the summer of 2006, an allegation confirmed by correspondence from Plaintiff. Plaintiff then refused to close on the remainder of the lots, claiming a right to stagger its performance notwithstanding the fact that the "later of" dates in the contract had passed. That there exists no right to do so forms the basis of Defendant's claim for breach of contract.

Plaintiff makes no real argument in support of this prong of its Motion, and merely refers, in general terms, to the deposition of Defendant's 30(b)(6) witness, Tim Fraylich. Although a number of pages of Mr. Fraylich's deposition are attached to the Motion, there is no specific reference to any statement or statements that would support Plaintiff's contention that the conditions precedent to Plaintiff's performance under the contract between the parties had not been fulfilled. In fact, several of the pages attached make it clear that Fraylich continued to assert that all these conditions had, in fact, been met, and that Plaintiff had failed to perform. *See, e.g.*, Depo. of Tim Fraylich, p. 66 (attached as Plaintiff's Exhibit B). In addition, as noted, earlier correspondence from Plaintiff, attached hereto as Exhibit 2, clearly demonstrates that Plaintiff itself considered that all of the conditions had been met not later than August 9, 2006.

At best, even if all of the facts in the record are viewed in the light most favorable to the moving party, there exists a serious disagreement with regard to the scope of the work to be performed by Defendant prior to Plaintiff's obligations coming due. A motion for summary judgment should only be granted where there are no genuine issues of material fact, S.C.R.C.P. 56(c); *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), and all inferences should be drawn in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

Plaintiff apparently claims some right, derived not from the four corners of the contract but from either extraneous oral statements or a course of conduct with respect to different types of properties sold separately, to close other than in accordance with the plain language of the contract between the parties. Whether this right exists, whether Defendant fulfilled all conditions precedent to the closings, and, in short, whether or not the contract was breached when Plaintiff refused to consummate the transaction as required, are all factual determinations that have yet to be made. There exist a number of genuine issues of material fact, and Plaintiff's Motion for Summary Judgment with regard to the claim of breach of contract should be denied.¹

3. Fraud

As with the brief portion of its Memorandum dedicated to Defendant's cause of action for breach of contract, Plaintiff does little more than make a few short and conclusory statements in support of its claim that Defendant's cause of action for fraud should be dismissed. Without referring to any facts, and citing only to the general law of fraud, Plaintiff concludes that Defendant has failed to make a *prima facie* case and has asserted merely a failure to follow through on promises of future action. These arguments are without merit, and this portion of Plaintiff's Motion should be denied.

Similar to the claim for breach of contract, this element of Defendant's cause of action depends on a determination of the facts underlying this case. Defendant does not, of course, dispute Plaintiff's statement of the law, or deny that the eight elements of fraud are properly set out in Plaintiff's Memorandum. Plaintiff, however, then leaps to the conclusion that Defendant

¹ Interestingly, Plaintiff relies, throughout both its Motions, on its assertion that the entirety of this case is controlled by the language within the four corners of the contract. It also argues that, notwithstanding the "not later than" language, the staggered closing schedule was established by some extra-contractual and informal agreement. Defendant denies that any such agreement existed, but, in any event, would note that whether it does, or what it consists of, is certainly a genuine issue of material fact within the meaning of S.C.R.C.P. 56.

has not met these elements as Defendant ostensibly alleges only a "failure to perform future promises." This is inaccurate.

The representations alleged to have been fraudulent were those that induced Defendant to both enter into the contract for the sale of the property, and, in particular, the continued representations that Plaintiff would promptly close on those properties once the preliminary work was completed. Defendant continued to rely on these promises, which were part of the contract, in expending substantial monies in furtherance of the completion of the contract. Defendant additionally delayed filing its own action for the breaches of contract committed by Plaintiff, in reliance on continued promises to close timely, to close soon, and, in one instance, the actual scheduling, by Plaintiff, of a closing.² Throughout a lengthy period of time, commencing not later than August 9, 2006, the date upon which the parties are agreed all conditions precedent to the closing had been completed and ending not earlier than the date upon which Plaintiff filed its Complaint in the instant action, Defendant continued to rely on the fraudulent promises and misrepresentations made by Plaintiff with respect to the completion of the contract.

Defendant has not yet deposed Plaintiff or its witnesses, but believes that the information that will be obtained from these sources will substantiate the allegations that Plaintiff never intended to close on the final set of properties. Defendant believes that there exists at least one internal memorandum in Plaintiff's possession directing Plaintiff's local offices to cease all closings. Throughout this period, however, Plaintiff continued to assure Defendant that it would complete its duties pursuant to the contract, in an on-going attempt to lull Defendant into false sense of security, and to induce Defendant to continue to work on the real estate.

² In fact, Plaintiff scheduled a closing to be held at the offices of its own attorney. Defendant appeared; Plaintiff did not.

Furthermore, had Plaintiff not made knowingly false and fraudulent statements to Defendant during the fall and winter of 2006, after all of Defendant's duties with respect to the property had been completed but before any closing had occurred, Defendant would have terminated the contract by the end of August, in accordance with its terms. Had Defendant been able to do so, it could have sold the property in question freely to one of several other entities interested in its purchase. Because, and only because, Defendant continued to hold off on any negative action in reliance on Plaintiff's continued promises, Plaintiff was able to file its series of *lis pendens* and tie up the property.

Defendant has clearly made a *prima facie* case of fraud, in that it has alleged an identifiable series of false and fraudulent misstatements made over a period of time, intended to induce it to take no action with respect to the termination of the contract and subsequent sale of the property. Although Defendant has yet to fully discover the underlying facts, as discovery has not been completed, it is apparent that sufficient genuine issues of material fact exist with regard to Plaintiff's actions and statements so as to withstand any motion for summary judgment as to this issue. Defendant would, therefore, request that this prong of Plaintiff's Motion be denied, and Defendant be permitted to continue with the discovery necessary to fully develop the facts.

4. Unfair Trade Practices Act

For the same reasons, it is difficult to fully and adequately respond to Plaintiff's assertions with respect to Defendant's claim under the SCUTPA, as here too there has as yet been insufficient discovery to permit Defendant to flesh out this claim. Defendant's contention that Plaintiff's actions constitute an unfair trade practice do not, however, rest solely on the breach of contract.

Defendant does not dispute Plaintiff's statement that a claim of breach of contract, standing alone, cannot state a claim under the Unfair Trade Practices Act. The unfair trade practice in this case is not, however, limited to the breach of the contract entered into with Defendant. As Defendant will develop through the depositions of Plaintiff and its principals, Plaintiff has engaged in a pattern and procedure of engaging in the same acts complained of herein, not just in South Carolina but throughout the country.

Plaintiff is a national builder of residential developments. In furtherance of its overall plans, Plaintiff routinely enters into contracts similar to the one between it and Defendant herein throughout the country. Defendant anticipates that depositions of Plaintiff will reveal that it has equally routinely contracted for the purchase of land upon completion of certain conditions precedent by the seller, and, upon completion of those conditions, refused to close, while simultaneously filing *lis pendens* on the property in order to ensure that the seller could not otherwise sell the real estate, all in order to drive prices down and obtain the land for substantially less than the contract price or market value.

Carried out across the country, this procedure would clearly be a violation of the Unfair Trade Practices Act. Further discovery is necessary to demonstrate the factual predicates of this allegation. Nevertheless, it is sufficient to form a valid basis for a claim of a violation of the SCUTPA, and Plaintiff's Motion for Summary Judgment as to this claim should be denied.

5. Motion to Strike

In addition to its Motion for Summary Judgment, Plaintiff has filed a separate Motion to Strike, alleging that Defendant's damages are limited by the terms of the contract to retention of the earnest money deposit, and that any damages in excess of that amount should be stricken from the pleadings. Again, although Plaintiff has correctly set forth the general legal standard by

which a Motion to Strike is to be evaluated, it is inapplicable to this case, and Plaintiff's Motion should be denied.

The basis of the Motion is that the contract between the parties is clear on its face on the issue of damages. Pursuant to the contract, the seller may, upon the purchaser's breach: 1) waive the breach; 2) extend the time for compliance; or 3) terminate the contract and retain the earnest money. If the seller elects the third remedy, which is clearly what Defendant herein has done, the contract further provides that the seller's damages are capped at the amount of the earnest money.

Once the contract has been terminated, of course, the seller would be free to sell the property to any other potential purchaser, and the original buyer, Plaintiff herein, would have no more rights in the terminated contract or in the realty. The contract does not address the situation that occurred here – where the purchaser breached the contract by refusing to close on the property, but simultaneously locked up the property itself and refused to permit Defendant to effectively terminate the contract according to its own terms. This constitutes, in effect, a secondary breach of the contract, in that Plaintiff's refusal to close has made it impossible for Defendant to complete the contract, and Plaintiff's *lis pendens* has made it impossible for Defendant to terminate.

That the contract provides for retention of the earnest money as the sole recovery in the event of a breach of the terms of the contract does not limit Defendant to that as the only means of recovery for damages outside the contract itself. Defendant's causes of action arise in part from the breach of the contract itself. In part, however, Defendant has asserted a right to damages for tortious acts outside the four corners of the contract, and arising independent of it. The contract

does not, and cannot, limit Defendant's right to recovery for damages that stem from matters not within the scope of the document itself.

The contract itself limits the right of the Seller to recover any damages other than termination of the contract and retention of the earnest money in the event of a default by the Purchaser. It does not deal with breaches of the contract, or with the possibility of other torts, that may occur but are not a default of the other terms and conditions of the contract. Plaintiff can seek to limit Defendant's recovery for those of Plaintiff's actions that constitute the breaches of the original contract. Plaintiff cannot, however, limit Defendant's recovery for those acts, including the filing of multiple *lis pendens* on Defendant's property, all of which took place after the contract had been breached and which constitute separate and independent tortious acts. Plaintiff's Motion to Strike should therefore be denied.

CONCLUSION

Plaintiff's Motions for Summary Judgment and to Strike both, in essence, rely on the same fundamental and unwarranted conclusion: that this case is limited to a simple breach of contract. Many of the acts of which Defendant complains, however, exist outside the four corners of the contract for the purchase of the property in question, and consist of fraudulent, tortious, and improper acts intended to induce Defendant to continue to perform, to refrain from pursuing its claims, and to ensure that Defendant is unable to exercise its own rights with respect to the breached contract and its own property. Furthermore, some of Plaintiff's own arguments, designed to demonstrate that the case is entirely controlled by the language of the contract, involve extraneous oral agreements to alter closing schedules and make side agreements regarding the scope of the work to be done in order to satisfy the conditions precedent to the closings.

Many of the facts have yet to be completely developed, as Defendant has not deposed Plaintiff's witnesses. Plaintiff has not, however, presented any facts of its own – it has merely concluded that it need not do so, as Plaintiff appears to believe that the only issue before this Court is the language of the contract itself. That conclusion is unwarranted and erroneous. Certainly the contract between the parties forms the basis for their relationship, and certainly Defendant's claim of breach of contract relies on the language of the contract, including the addendum establishing the closing schedule. To the extent that there is a question regarding the scheduling of some of the closings, its language may be dispositive of certain issues. Its existence does not, however, dispose of the substantial issues raised by Defendant's counterclaims, all of which involve acts taken after the contract was breached, and none of which fall within the scope of activity contemplated by the contract.

Defendant's counterclaims state a claim as a matter of law, but require further discovery before their merits are capable of determination. There remain numerous and genuine issues of material fact with respect to each of those counterclaims, and Plaintiff's Motion for Summary Judgment should be denied. In addition, as the prayer for damages falls outside the scope of the contract, it is not limited by the terms of the document, and Defendant would also request that the Motion to Strike similarly be denied.

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LEXSEE

BidZirk, LLC, Daniel G. Schmidt, III, and Jill Patterson, Plaintiffs, v. Philip J. Smith, Defendant.

C.A. No. 6:06-109-HMH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, GREENVILLE DIVISION

2007 U.S. Dist. LEXIS 78481

October 22, 2007, Decided
October 22, 2007, Filed

PRIOR HISTORY: *BidZirk, LLC v. Smith*, 2007 U.S. Dist. LEXIS 43927 (D.S.C., June 15, 2007)

COUNSEL: [*1] For BidZirk LLC, Daniel G. Schmidt, III, Jill Patterson, Plaintiffs: Kevin Morgan Elwell, LEAD ATTORNEY, KM Elwell PC, Greenville, SC.

Phillip J. Smith, Defendant, Pro se, Greenville, SC.

Phillip J. Smith, Counter Claimant, Pro se, Greenville, SC.

JUDGES: Henry M. Herlong, Jr., United States District Judge.

OPINION BY: Henry M. Herlong, Jr.

OPINION

OPINION & ORDER

This matter is before the court on Philip J. Smith's ("Smith") pro se motion for summary judgment and the court's sua sponte inquiry regarding sanctions against the Plaintiffs. After a review of the law and facts of this case, the court grants Smith's motion for summary judgment and sanctions Plaintiffs' counsel.

I. FACTUAL BACKGROUND

This case arises from the posting of a four-part article titled "Special Report: You Gotta Be Berserk to Use an eBay Listing Company! The Whole Story" ("article") on Smith's blog located at <http://www.jackwhispers.blogspot.com> ("blog"). (Pls.' Mem. Opp'n Summ. J. Ex. 2 (Article).) The article concerns Smith's experience using BidZirk, an auction listing company, to sell items on eBay. (Id.) "An auction

listing company is a business that accepts goods on consignment, and administers auction sales of consigned goods on web sites [*2] such as eBay." (Compl. P 6.) BidZirk is paid a fee for these services based on a percentage of the money received from an auction. (Id. P 7.)

1 In essence, this is a case in which the Plaintiffs have sued Smith because he published articles on the internet critical of the Plaintiffs' business.

In the article, Smith depicts BidZirk's trademark and details his interactions with Daniel G. Schmidt ("Schmidt"), BidZirk's president. (Pls.' Mem. Opp'n Summ. J. Ex. 2 (Article).) Smith relates the positive and mostly negative aspects of utilizing an eBay listing company, like BidZirk, and provides a checklist for his readers to utilize in deciding whether to use a listing company. (Id.)

On January 10, 2006, the Plaintiffs filed suit against Smith. BidZirk alleges a claim under the Lanham Act for damages and an injunction, alleging that Smith improperly placed BidZirk's trademark on his blog. In addition, Schmidt has sued for defamation alleging that Smith published false and derogatory statements about Schmidt on his blog. Finally, Schmidt and Jill Patterson ("Patterson") have sued for invasion of privacy alleging that Smith linked their picture to the blog. The link was an article with a picture [*3] of Schmidt and Patterson in it. Smith failed to answer and on February 16, 2006, a default was entered by the clerk. The court set aside entry of default on February 27, 2006, and allowed Smith time to answer.

On February 13, 2006, BidZirk moved for a preliminary injunction. United States Magistrate Judge William M. Catoe issued a Report and Recommendation on March 21, 2006, recommending denying the motion. The

dismiss for lack of jurisdiction on November 7, 2006. The Plaintiffs moved to amend the complaint, which was granted on January 29, 2007.³ However, the Plaintiffs never filed an amended complaint. The Plaintiffs filed a motion for judgment on the pleadings (document number 33) and a motion for summary judgment (document number 72), which were denied on February 23, 2007, and May 30, 2007, respectively. At a status conference [*4] on September 17, 2007, Smith orally moved for summary judgment. The court allowed Smith fifteen days to submit a memorandum in support of his oral motion. Smith filed a supplemental memorandum on September 26, 2007. In addition, at the status conference, the court allowed the Plaintiffs fifteen days to submit a memorandum addressing why they should not be sanctioned for filing a *lis pendens* against Smith's condo and for asking abusive discovery requests. The Plaintiffs submitted their brief concerning sanctions on September 27, 2007, and their memorandum in opposition to summary judgment on October 15, 2007.

2 The Plaintiffs incorrectly state in their memorandum that this motion is still pending. Given that the Plaintiffs failed to file the second amended complaint, the court will not address any claims raised therein.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c). Rule 56(c) [*5]* mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2503, 91 L. Ed. 2d 202 (1986). However, "[o]nly disputes over facts that might affect the

of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. With respect to this burden, "it is the responsibility of the plaintiff, not the court, to identify with particularity the [*6] evidentiary facts existing in the record which can oppose the defendant's summary judgment motion." *Malina v. Baltimore Gas & Elec. Co.*, 18 F.Supp. 2d 596, 604 (D. Md. 1998).

B. Smith's Summary Judgment Motion

1. Defamation

"In order to prove defamation, the complaining party must show: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857, 860 (S.C. 2002). "[L]ibel is a written defamation." *Holtzschetter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 501 (S.C. 1998).

Whether the alleged defamatory statement is actionable *per se* "is always a question of law for the court." *Id.* at 501. "If a defamation is actionable *per se*, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages." *Id.* In the alternative, if a "defamation is not actionable *per se*, then at common law the plaintiff must plead and prove common law actual malice and special damages." *Id.* at 501-02.

Libel is [*7] actionable *per se* if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." *Id.* at 502 (internal quotation marks omitted). "In other words, if the trial judge can legally presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, then the libel is actionable *per se*." *Holtzschetter*, 506 S.E.2d at 502.

Schmidt alleges that Smith's statements that Schmidt was a "yes man" who over promised and under delivered

is defamation per se. (Pls.' Mem. Opp'n Summ. J. Ex. 3 (Schmidt Aff. P 9).) The court has reviewed the article and the court finds that Smith's statements about Schmidt are patently not defamatory. Smith stated in the article as follows:

From the beginning . . . I could tell the owner was a yes man. Of course, I have to be honest . . . eBay is; in and of itself a yes man paradise. Many sellers over promise and under deliver.

Although the owner seemed like a yes man . . . I had done my home work . . . he had owned an ecommerce [*8] B2B company called Channellinx. Tech savvy? Possibly . . .

(Id. Ex. 2 (Article).) "Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

An alleged defamatory statement "must be provable as false before there can be liability under state defamation law." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). "[O]pinion statements, defamatory or otherwise, are not actionable unless they contain provably true or false factual connotations." *Woodward v. Weiss*, 932 F. Supp. 723, 726 (D.S.C. 1996) (alteration in original) (internal quotation marks omitted). The statement that "I could tell the owner was a yes man" is an opinion statement that cannot be characterized as true or false. The term "yes man" has different meanings to different people. See *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (finding that the term "scam" "means different things to different people . . . and there is not a single [*9] usage in common phraseology. While some connotations of the word may encompass criminal behavior, others do not. The lack of precision makes the assertion 'X is a scam' incapable of being proven true or false." (Alteration in original)); *Lauderback v. Am. Broad. Cos., Inc.*, 741 F.2d 193, 196 (8th Cir. 1984) (insurance agent referred to as a "crook"). "Clearly, if the statement was not capable of being verified as false, there could be no liability for defamation." *Woodward*, 932 F. Supp. at 726. Based on the foregoing, calling Schmidt a "yes man" cannot give rise to liability for defamation.

Further, even if the term "yes man" could be verified as true or false, it is plainly not defamatory. Immediately

after stating that Schmidt seemed like a "yes man," Smith describes Schmidt as possibly tech savvy, which is a positive statement about Schmidt. In addition, Smith stated that in the ebay industry many sellers commonly over promise and under deliver. However, Smith never said that Schmidt over promised and under delivered in this transaction. None of Smith's statements "reduce[d] [Schmidt's] character or reputation in the estimation of his friends or acquaintances, or the public, or to [*10] disgrace him, or to render him odious, contemptible, or ridiculous." *Holtzscheiter*, 506 S.E.2d at 502 (internal quotation marks omitted). Based on the foregoing, the court finds that Smith's statements were patently not defamatory.

2. Invasion of Privacy

"In South Carolina, three separate and distinct causes of action can arise under the rubric of invasion of privacy: (1) wrongful appropriation of personality; (2) wrongful publicizing of private affairs; and (3) wrongful intrusion into private affairs." *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 383 S.E.2d 2, 5 (S.C. Ct. App. 1989). In their complaint, Schmidt and Patterson allege a claim for wrongful appropriation. However, in their memorandum in opposition to Smith's summary judgment motion, Schmidt and Patterson concede that they have no invasion of privacy claim arising under the three causes of action listed above. (Pls.' Mem. Opp'n Summ. J. 21.) Instead, Patterson and Schmidt allege a claim for false light invasion of privacy. No South Carolina court has recognized a cause of action for false light invasion of privacy. Therefore, this claim fails as this cause of action does not exist under South Carolina law. Further, to the extent [*11] South Carolina would recognize this cause of action, the claim is wholly without merit.

The Restatement (Second) of Torts defines the tort of false light invasion of privacy as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 625E. Schmidt and Patterson allege that Smith's

linking to the photograph was accompanied by text in his posting that portrayed Schmidt and Patterson as irresponsible and overcommitted, because [Smith] presumed that the marriage would take time away from Schmidt's and Patterson's service of [Smith] as a customer of BidZirk.

(Pls.' Mem. Opp'n Summ. J. 24 & Ex. 6 (Patterson Aff.P3) & Ex. 3 (Schmidt Aff. P 12).) Smith's article stated as follows

He [*12] explained to me how he had just gotten married and was planning his honeymoon in a week's time.

Wait! He was getting married, going on a honeymoon, and starting a (in his own words) 'multi-location business that will be national in 5 years time'?

(Id. Ex. 2 (Article).) The article with the picture was hyperlinked to the language "he had just gotten married and was planning his honeymoon in a week's time." (Id.) Smith's statements did not cast Schmidt and Patterson in a false light. Smith merely stated the fact that Schmidt and Patterson had much going on in their lives as they were getting married, going on a honeymoon, and starting a new business. Nothing about Smith's statements "would be highly offensive to a reasonable person." Restatement (Second) of Torts § 625E (emphasis added). Based on the foregoing, this claim is baseless.

To the extent Patterson and Schmidt continue to allege a claim for wrongful appropriation, this claim also is wholly without merit.

Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive [*13] right at common law to publicize and profit from his name, likeness, and other aspects of personal identity.

Id. at 5-6.

This claim fails because Smith did not place Patterson and Schmidt's picture on his blog. In contrast, Smith's blog included a link that readers could click on that linked the reader to another website, www.communityjournals.com, which contained the ar-

ticle and picture. Notably, Patterson and Schmidt consented to Community Journals' use of Schmidt and Patterson's picture. Schmidt and Patterson consented to the circulation of the article and picture in the Community Journal to publicize the opening of BidZirk. See *United States v. Gines-Perez*, 214 F. Supp. 2d 205, 225 (D. Puerto Rico 2002) ("[P]lacing information on the information superhighway necessarily makes said matter accessible to the public, no matter how many protectionist measures may be taken, or even when a web page is 'under construction.'" "[I]t strikes the Court as obvious that a claim to privacy is unavailable to someone who places information on an indisputably, public medium, such as the Internet, without taking any measures to protect the information."), vacated on other grounds by, 90 Fed. Appx. 3, 2004 WL 528426 (1st Cir. 2004). [*14] Smith did not transport the picture to his blog. Instead, Smith's blog contained a link that readers could click on that takes the reader to the site where the article and picture are located, <http://www.communityjournals.com/btc2005/html/2005BTC049.jpg>.

The court finds that "a person who places a photograph on the Internet precisely intends to forsake and renounce all privacy rights to such imagery, particularly under circumstances . . . where [Patterson and Schmidt] did not employ protective measures or devices that would have controlled access to the Web page or the photograph itself." *Gines-Perez*, 214 F. Supp. 2d at 225. Further, there is no evidence that Smith's link to the article containing the picture of Patterson and Schmidt was done to benefit Smith in any way. Based on the foregoing, the court finds that Schmidt and Patterson consented to the display of their picture on the internet.

3. Lanham Act

Under the Lanham Act,

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false [*15] or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B)(1998). BidZirk alleges that it is entitled to damages under 15 U.S.C. § 1117(a), which provides that if the defendant violates § 1125(a) then the plaintiff can "recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." Further, BidZirk alleges that it is entitled to treble damages and reasonable attorney's fees under § 1117(b).

In addition, BidZirk seeks a permanent injunction. The court has the power to grant injunctions "to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of [15 U.S.C. § 1125]." 15 U.S.C. § 1116(a) (West Supp. 2007). Section 1125(c)(1) provides:

Subject to the principles of equity, the owner of a famous mark that is [*16] distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

BidZirk alleges that its mark is famous and distinctive, that Smith's infringement is in connection with a commercial use, that Smith's infringement dilutes the mark, and that Smith's infringement is not excused by any statutory defense. Even if Smith has infringed BidZirk's mark, the court finds that this infringement is excused by a statutory defense. Under § 1125(c)(4)(C), no "forms of news reporting and news commentary" are actionable under § 1125. These terms are not defined in the Lanham Act. Further, there is no published case deciding whether a blogger is a journalist.

However, in determining whether Smith was engaged in news reporting or news commentating, the court has applied the functional analysis suggested by commentators and the Plaintiffs in [*17] their memorandum in support of a preliminary injunction, which examines the content of the material, not the format, to determine whether it is journalism. See David L. Hudson, Jr., Blogging, <http://www.firstamendmentcenter.org/press/topic.aspx?topic=blogging>; (Pls.' Mem. Supp. Preliminary Injunction Ex. 34 (Hudson on Blogging)). In addition, the court has

considered the intent of Smith in writing the article. The court agrees that not all bloggers are journalists. However, some bloggers are without question journalists. See CNN BLOGS: YOUR SAY, <http://www.cnn.com/exchange/blogs/>.

Upon review of the content of the article, the court finds that Smith's use of the BidZirk mark in the article was in the context of news reporting or news commentary. The article posted by Smith concerning the Plaintiffs is written for the purpose of conveying information to the public. In the four installments of the article, Smith describes his experience with BidZirk in great detail. (Pls.' Mem. Opp'n Summ. J. Ex. 2 (Article).) In addition, Smith addresses the positive and negative aspects, in his opinion, of dealing with an eBay listing company, such as BidZirk. (Id.) Further, Smith provides a checklist [*18] for using an eBay listing company and tips for selling items on eBay. (Id.) Smith felt that what he learned from his experience with BidZirk would be helpful to others in dealing with an eBay listing company. The fact that Smith reports negatively about his experience with BidZirk does not dictate that the article's function or intent was not news reporting or news commentary.

There is no evidence that the sole purpose of the article was to denigrate BidZirk. Smith's article was titled "Special Report: You Gotta Be Berserk to Use an eBay Listing Company! The Whole Story." (Id.) Smith plainly states at the beginning of the article as follows: "In this special report . . . I'll be telling my detailed story of using such a company and relate how my selling Apple parts on eBay for 9 years has given me unique insight into this matter." (Id.) Smith further states that he has done research in preparation for his article as follows:

This is my story as experienced by me personally. I have dealt with a company called BIDZIRK, in my home town. I have also visited several competitors. In doing extensive Google research, I have found that my problems are almost universal . . . but that only larger [*19] clients really complain. At the end, I will offer a checklist for you to use when choosing a listing company that includes questions you may not have thought of before.

(Pls.' Mem. Opp'n Summ. J. Ex. 2 (Article).) Smith engaged in background research and provided consumers with a checklist for use in selecting a listing company. Smith's article evidences his intent to report what he believed was a newsworthy story for consumers. Based on

26, 2006. After a status hearing on May 2, 2007, Magistrate Judge Catoe ordered Elwell to withdraw the lis pendens on May 7, 2007. During the May 2, 2007 hearing, Elwell argued that this action is an action "affecting title to real estate," but had no law to support his point. At the status conference hearing on September 17, 2007, the court allowed Elwell to brief why the court should not issue sanctions against the Plaintiffs for filing the lis pendens. In the brief, [*20] the Plaintiffs allege that at the time the lis pendens was filed, they believed that they were entitled to judgment as a matter of law because Smith had failed to answer certain requests to admit. The Plaintiffs further allege that they were attempting to protect their ability to collect on a judgment. The Plaintiffs acknowledge that filing the lis pendens was wholly improper. (Pls.' Mem. Regarding Sanctions 3.)

A plaintiff may "[i]n an action affecting the title to real property . . . not more than twenty days before filing the complaint or at any time afterwards . . . with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby." *S.C. Code Ann. § 15-11-10* (2005). "Generally, the filing of a lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881, 889 (S.C. 2002). However, "[s]ince the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the [*21] statutory provisions is required." *Id.*

"[A]n action 'affecting the title to real property' clearly allows the filing of a lis pendens by an interested party in order to protect their ownership interest in the property subject to the litigation." *Id.* However, "[w]here no real property is implicated . . . a notice of pendency of action need not be filed." *Id.* at 890. Further, "[o]ne who places a lis pendens notice on property without a 'colorable claim' of right to or interest in the property subjects themselves to a claim for slander of title." *Ex parte Boykin*, 656 So. 2d 821, 826 n.4 (Ala. Civ. App. 1994).

Without question, the instant matter is not an action affecting the title to real property. Therefore, the court will consider whether to impose sanctions. *Rule 11(b)* of the Federal Civil Procedure states that

lief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to [*22] harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Several factors that should be considered when assessing sanctions include:

(1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by his attorney, recognizing that we seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, [*23] and deterring similar conduct in the future; and (6) the public interest.

Sanderson v. Boddie-Noell Enter., Inc., 227 F.R.D. 448, 454 (E.D. Va. 2005).

The court finds that the degree of Plaintiffs' counsel's culpability weighs heavily in favor of sanctioning the Plaintiffs' counsel, Kevin Elwell ("Elwell"). Elwell is

a competent attorney who knew or should have known with the most basic research that his actions were improper. In addition, after Smith moved to strike the lis pendens, Elwell argued in court that the lis pendens was proper. Elwell had no basis to support his position. (Mem. Regarding Sanctions 2.)

Further, the court finds that Smith has been prejudiced by the filing of the lis pendens. The title to his property was clouded for over six months. Smith alleges that during that time he was attempting to sell his property. Moreover, the public interest in preventing legal counsel from filing improper lis pendens and encumbering property is great. A lis pendens is a very powerful document and the statute is strictly applied because a lis pendens clouds the title to property. There is no evidence that Elwell's client is responsible for Elwell's wrongful conduct. However, taking [*24] into account the facts and the factors listed above, the court finds that based on Elwell's grossly improper conduct, he should be sanctioned in the amount of \$ 1,000.00 payable immediately to the Defendant.

3 The court has also considered *Rule 11* sanctions against the Plaintiffs and their attorney for the bringing of this action. Although awarding sanctions is a close question, the court declines to do so.

Therefore, it is

ORDERED that Smith's motion for summary judgment, document number 125, is granted. It is further

ORDERED that Plaintiffs' counsel, Kevin Elwell, is sanctioned in the amount of \$ 1,000.00.

IT IS SO ORDERED.

s/ Henry M. Herlong, Jr.

United States District Judge

Greenville, South Carolina

October 22, 2007

000645

Doug Brown, Division President
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5061
Phone: (843) 284-5000

With copy to:

O. Kenneth Bagwell, Jr.
General Counsel, Northeast Region
D.R. Horton, Inc.
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Mount Pleasant, SC 29464
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Phone: (843) 284-5000

Thank you for your attention, and please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

O. Kenneth Bagwell, Jr.
O. Kenneth Bagwell/Jr.

OKB/vll

Xc: Wescott Land Company, LLC (via facsimile and first-class mail)

Larry Dodds, Jr., Esq. (via facsimile and first-class mail)
Dodds & Hennessy

Doug Brown, President
Coastal Carolinas Division
D.R. Horton, Inc.

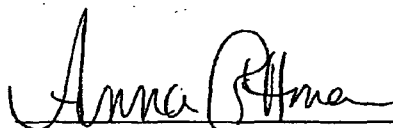
Richard Shively, City Manager
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Scott Varn, Project Manager
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Defendant's Memorandum in Opposition to Motion for Summary Judgment and Motion to Strike was served by mailing or hand delivery on the following:

Michael M. Shetterly, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart, PC
P.O. Box 2757
Greenville, SC 29602


Anna Pittman

January 4, 2008
Charleston, South Carolina
06-579

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
C/A: 2007-CP-18-337

D.R. HORTON, INC.,)
)

Plaintiff,)
)

-vs-)
)

WESCOTT LAND COMPANY,)
LLC,)

Defendant.)
)

THOMAS R. HAWKINS and)
WESCOTT LAND COMPANY,)
LLC,)

Counter-Claimants,)
)

-vs-)
)

D.R. HORTON, INC.,)
)

Counter-Claim Defendant.)
)

CERTIFIED COPY
2009 MAY 15 AM 11:02
Joseph M. [Signature]
CLERK OF COURT
DORCHESTER COUNTY

**COUNTER-CLAIMANTS' SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Counter-Claimants, Wescott Land Company, LLC (hereinafter "Wescott") and Thomas R. Hawkins (hereinafter "Hawkins"), submit the following to supplement the Memorandum in Opposition to Plaintiff's Motion for Summary Judgment previously submitted to the Court by Wescott's former counsel. With regard to Counter-Claimants' Counter-Claims for breach of contract and violations of the South Carolina Trade Practices Act, Counter-Claimants rely upon the arguments of their former counsel, Steven Smith (hereinafter "Smith"), set forth in its original Memorandum in Opposition. Counter-Claimants would add, however, that they have recently discovered new evidence

that would tend to prove that Horton's misconduct is not only capable of repetition, but that it is part of an ongoing pattern of egregious behavior. First, Horton was sued by Wescott Development, LLC and other entities unrelated to Counter-Claimants in 2001 for actions that were nearly identical to those that form the bases for the Counter-Claims before this Court. Specifically, Horton was accused of breaching a contract to purchase developed property and filing *Lis Pendens* to prevent the owner from selling to third parties. Secondly, Chris Phillips, a Virginia-based developer is expected to testify that he was treated in much the same way by Horton and that a Horton executive admitted to him that they were actually refusing to close on the property because the company was "over-assetted." Because Wescott has recently abandoned its cause of action for fraud, it requests that the Court disregard portion of Wescott's original Memorandum in Opposition that deals solely with that cause of action. Additionally, Wescott has recently filed Amended Counter-Claims upon which Plaintiff intends to move for summary judgment. As such, all recently added causes of action are addressed herein.

FACTUAL BACKGROUND

Wescott's previously submitted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment contains an overview of the factual background of this case and therefore need not be repeated herein. However, Wescott submits the following to supplement the factual background portion of its previous Memorandum based on documents that have been exchanged throughout the course of this litigation as well as deposition testimony taken from various witnesses.

The Second Amendment to the parties' Contract of Sale, attached hereto as Exhibit 2, contemplated closing phases 3A, 3D, 3E-1, 3E-2 and 3E-3 of the Project in a

series of takedowns. Phases 3A and 3D closed before any dispute arose between the parties. The Amended Contract states that 3E-1 shall close "on or before the later of January 1, 2006 or upon final plat approval and recordation..."

Phase 3E-2 was to close "on or before the later of April 1, 2006 or upon final plat approval and recordation..." Finally, 3E-3 was to close "on or before the later of July 1, 2006 or upon final plat approval and recordation..." Phase 3E has been referred to by the parties throughout their dealings as the "townhouse lots." The plat showing Phase 3E was prepared by third parties on behalf of D.R. Horton (hereinafter "Horton"). The plat was submitted to the City of North Charleston for preliminary approval reflecting Phase 3E as a single phase, not as a series of three separate takedowns. Therefore, in order for Phase 3E to close as a series of takedowns, as contemplated by the Amendment to the parties' Contract, Horton would have to purchase the property prior to final plat approval and recordation and final plat approval and recordation could be achieved only after all components of Phase 3E had been developed by Wescott. What's more, a number of the conditions precedent to the closing of portions of Phase 3E could be satisfied only when the entire phase passed various inspections by the City, DHEC and other governmental agencies. Once again, Horton was well aware that if it was to close Phase 3E in a series of takedowns, it would have to close on 3E-1 and 3E-2 prior to the satisfaction of certain conditions precedent. As it happened, July 1, 2006, the date for the closing of the final takedown, passed with none of the takedowns having closed.

On August 2, 2006, counsel for Wescott wrote to Horton to inform them that all conditions precedent to the closing of Phase 3E had been completed and that the final plat had been approved and recorded by the City of North Charleston on July 19, 2006.

Smith's letter is attached hereto as Exhibit 3. Smith went on to say, "[A]s all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006, will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004." The timetable set forth by Smith is reflective of Paragraph 2 of the Amendment to the parties' Contract, which gave Horton twenty (20) days to confirm that all conditions precedent had in fact been satisfied from the date that Horton received notice from Wescott that the conditions had been satisfied. This 20 day due diligence period was confirmed by Ken Bagwell (hereinafter "Bagwell"), regional counsel for Horton, at page 24 of his deposition. In fact, it was Bagwell who responded to Smith's August 2, 2006 letter with a letter dated August 11, 2006, attached hereto as Exhibit 5. Bagwell's letter states:

The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

Bagwell went on to say, however, that it is Horton's position that the amended Contract contemplated the purchase and sale of the townhouse lots in three (3) separate takedowns. Bagwell then proposed a second amendment to the Contract that acknowledges that the

townhouse lots are now substantially complete and that establishes the new takedown schedule.

"Substantial Completion" is a defined term within the parties' Contract that essentially means that Horton has received proof and acknowledges that all conditions precedent have been met.

Wescott was not interested in entering into another, which would cause further delays in the closing of Phase 3E, and declined Bagwell's offer to enter into one.

Horton grew more insistent that the parties enter into a Second Amended Contract setting forth new takedown dates. This is reflected in e-mail communications between Mitchell Flannery (hereinafter "Flannery"), one of the principals of Horton's Charleston office, and Tim Fraylick (hereinafter "Fraylick"), one of the owners of Wescott Land, LLC. Exhibit 6, attached hereto, is a September 13, 2006 e-mail from Flannery to Fraylick stating that 36 units had been funded for the first takedown and that they were willing to close on only that takedown within two weeks. Attached to that e-mail was a proposed Second Amended Contract. Numbered paragraph 1 to the proposed Second Amendment states: "[t]he Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract." Nowhere in this proposed Second Amendment is any indication that Horton was dissatisfied with the condition of Phase 3E or that it was taking the position that any conditions precedent had not been satisfied.

Exhibit 7 attached hereto is another e-mail from Flannery to Fraylick, dated September 18, 2006. In this e-mail, Flannery reiterates that Horton had funded the purchase of 36 units, which could be purchased in short order, and that the parties would need to enter into a Second Amendment to the Contract to dictate the timetable for the closing of subsequent takedowns. The same proposed Second Amendment is attached to this e-mail, again making no mention of Wescott's failure to satisfy any conditions precedent. What's more, this e-mail from Flannery contains an implied threat, stating, "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." In his deposition, Flannery testified regarding his references to funding for 36 lots stating, "I don't know whether that was a, you know, whether I was trying to get them to work with me or whether there was really money. I really don't know. I don't remember." (Deposition of Flannery, Page 40, lines 15-18.)

On October 16, 2006, Michael Shetterly (hereinafter "Shetterly"), outside counsel for Horton, wrote to Smith, a copy of which is attached hereto as Exhibit 8. In this letter, nearly 90 days after the date that Wescott submitted proof of the satisfaction of all of the conditions precedent, and nearly 75 days after the date that Horton's in-house counsel contended that such proof was submitted, Shetterly took the position that certain conditions precedent still had not been satisfied as of mid-October. Specifically, Shetterly stated that Paragraph 15, subparts (i) and (j) had not been accomplished at all. Shetterly explained, "[C]ontrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any 'sign-off' from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been

installed on the site. Until these items are complete, the conditions precedent have not been completed."

In addition to this being the first mention of Wescott's alleged failure to satisfy certain conditions precedent, this letter misstates the requirements set forth in Paragraph 15 of the parties' Contract. Contrary to Shetterly's assertion, Paragraph 15, subpart (i) simply states, "[T]he Lot(s) shall be cleared of any trash, construction materials, debris, brush, partially constructed buildings, materials and all rights of way have been graded, seeded and strawed as may be required by any applicable governmental authority." It makes no mention of erosion control or sign-offs from any particular governmental entity. Even if Shetterly's conditions were part of the contract, at the very least a factual issue exists as to whether Wescott had taken all necessary and reasonable steps to control erosion, maintain clean jobsites, and stay within the good graces of all governmental entities overseeing the Project, including DHEC.

In direct contravention to Shetterly's assertion that street lights were required to have been installed, Paragraph 15(j) requires merely "[C]ontracts by Seller for the installation of street lights and street signs as required by any appropriate governmental authority and such contracts shall in no way place any financial burden upon Purchaser." In reality, Wescott did not have any authority to install street lights on what were to become publicly dedicated streets. That authority lay solely with SCE&G, and all necessary contracts and approvals have been obtained such that SCE&G could install street lights very soon thereafter. Shetterly's letter goes on to say, however, that Horton proposes that the parties execute a Second Amendment to the contract excusing

Wescott's alleged failure to satisfy these conditions and setting forth a new takedown schedule.

Over the course of the ensuing weeks, Shetterly and Smith began to negotiate the terms of a new deal between the parties. Horton even appeared to acquiesce to the idea of closing all of 3E at once. However, Wescott was adamant that it would not enter into a Second Amendment to the parties' Contract except at the closing table, out of fear that Horton would use a new Amendment to insert further delays into the process. In the meantime, Wescott received a written offer from KB Home, a national builder comparable to Horton, to purchase Phase 3E at \$30,000 per lot-- \$5,000 more per lot than the price under the Horton Contract. A copy of this written offer is attached hereto as Exhibit 15.

A meeting was held on December 21, 2006 at Smith's office, wherein the parties attempted to hammer out the details of this last-ditch effort to make their deal work. At this meeting Horton reiterated its concerns about erosion control on the site, abandoned its complaint about street lights, and for the first time raised the issue that it was concerned about the compaction of the building pads at Phase 3E. Flannery sent an e-mail to Fraylick memorializing the topics discussed at that meeting on December 27, 2006, which is attached hereto as Exhibit 16.

The closing of all of Phase 3E was scheduled to take place at the office of Larry Dodds (hereinafter "Dodds"), another of Horton's lawyers, on February 2, 2007. Leading up to that closing, lawyers for both parties attempted to hammer out the final details of the Second Amendment to the parties' Contract, which was to be ratified at the closing table. As of late January 2007, the only remaining obstacle to the closing was Horton's

insistence that Wescott re-do compaction tests on the building pads to certify that they were compacted to 2,000 PSF. Wescott contended that they had long since submitted proof of compaction and that the pads were in substantially the same condition as they were then.

Ironically, if the building pads had fallen out of compaction, it was only the result of Horton's own delays. Flannery himself testified, "[A]nd we had concerns, you know, being that fall, we had concerns that those pads were deteriorating and, you know, basically fell out of compliance on conditions precedent to closing." (Deposition of Mitchell Flannery, Page 6, Lines 6 - 9.) Of course, had Horton closed on Phase 3E months earlier as they were required to do under the Contract, this would not have been a concern at all.

Representatives of Wescott came to the offices of Dodds on February 2nd at the appointed time to attend the closing. Dodds himself had prepared all necessary closing documents and was awaiting funds from Horton to hit his trust account. However, Horton sent no representatives to the closing. According to Shetterly, Smith called him from Dodds' office on February 2nd to inquire as to why no one was there from Horton. Shetterly explained to Smith that he had not received final confirmation that Wescott was willing to redo the compaction tests and that that was a deal breaker for Horton. That was the last of the parties' attempts to close on the deal, and immediately thereafter Horton filed its first *Lis Pendens* against the property, preventing Wescott from selling it to any third parties.

Looking back at the timeline, Horton gave numerous and varied reasons for not closing on the sale. First, it insisted that under the contract it was entitled to purchase

takedown 3E-1 and purchase the subsequent two takedowns at later dates. Months later and well after their period of due diligence had expired, Horton claimed that neither satisfactory erosion controls nor street lights were in place but still focused on the argument that the property should be closed in a series of takedowns. Thereafter, Horton finally relented and agreed to close on the entire property at once but, approximately one month before the scheduled closing, raised questions regarding the compaction of the lots—making that their new primary focus and their ultimate reason for not coming to the closing scheduled at their own attorney's office.

Wescott has always contended that Horton's myriad reasons for delaying closing on Phase 3E were pretextual and that the only real reason for its delay was that it had determined that its financial interests were best served by not closing. Phase 3E consisted of 110 townhome lots. Horton was pre-selling townhomes to consumers as the development began to take shape. Based on the Pre-Sale Contracts that Horton has produced through discovery, only 19 of 110 lots had pre-sold. To purchase more than Phase 3E-1 at one time would shift the carrying costs of the property to Horton. The following excerpt is taken from the deposition of Mitchell Flannery:

Q. ... Why was it important to Horton to close this deal in a series of takedowns?

A. Well, I mean, I think it's - That's why we negotiated the deal, to take at this time down in phases, because it's easier. It's easier economically [sic] to take down the phases....

Deposition of Mitchell Flannery, Page 22, Lines 20 - 25.

THE WITNESS ... I think we probably had a feel good from the top that, you know, if we had these sales that we could buy this property.

Q. Okay.

A. I mean, that typically - it's just a phone call to the CEO and say, 'Listen, we've got this funded, or got 'em sold.' And, typically, typically, when we got 'em sold, we can buy 'em.

Deposition of Mitchell Flannery, Page 44, Lines 17 - 25.

Bagwell admitted much the same thing:

A. So, we were trying to protect all of our investment, this property, our contract rights, buy the lots, and wrap it up as quickly as we could. But we didn't feel like we needed to take down one hundred and ten lots and sit on them while we're trying to sell them.

When we had been trying to buy the lots all along. That's, we're not land developers, we're not land speculators, we're home builders, and so that's not our risk.

Deposition of Ken Bagwell, Page 32, Lines 15 - 23.

The gravamen of Wescott's tort claims in this case is that Horton believes that its own liability for nonperformance under the Contract was forfeiture of its earnest money, used various pretexts to string the transaction out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Horton added insult to injury by filing *Lis Pendens*, preventing Wescott from selling the property to anyone else.

LEGAL ARGUMENT

Wescott's arguments in support of its Counter-Claims for breach of contract, unfair trade practices, and slander of title are addressed in its initial Memorandum in Opposition and therefore are not addressed here as well.

SUMMARY JUDGMENT STANDARD

... [I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co., Inc. 361 S.C. 326, 673 S.E.2nd 801 (2009).

ABUSE OF PROCESS

Wescott, through its counsel Steve Smith, notified Horton that it was in default on the parties' Contract on August 2nd and again on August 10, 2006. Horton failed to cure its default and close on the purchase of Phase 3E, and Wescott rescinded the contract. Even though the parties continued to negotiate in an attempt to put their deal back together, Wescott refused to sign a new Contract with Horton except at the closing table in order to be consistent in its position that the parties no longer had any contractual obligations to each other. Despite Wescott's valid rescission of the contract, Horton filed a *Lis Pendens* against the property. As Horton concedes in its Memorandum in Support of Summary Judgment, a *Lis Pendens* is valid only if suit is filed within twenty (20) days of the filing of the *Lis Pendens*. The initial *Lis Pendens* Horton filed was allowed to expire on its own. However, by the time it expired, damage had already been done. Namely, KB Homes had made a written offer to purchase the property that Wescott could not ratify because of the cloud Horton had placed on the title to the property. The following dialogue is taken from the deposition testimony of Hawkins, the majority owner of Wescott:

Q. Did you have any written contracts that the *lis pendens* interfered with, or you're just talking about prospective?

A. Everything I had. I mean, whatever contracts I got, the lis pendens would have interfered with it.

Q. No. Those were prospective contracts, right?

A. Yeah, but you can't pursue a contract when something is in this condition. I mean, I would have mislead somebody by saying I got a piece of property I can sell them and sit down and try to negotiate a contract to its finality and then, at the end, find out I can't sell it to them.

Q. But you didn't have any contracts with somebody signed and then D.R. Horton did something that prevented you from —

A. The only reason we didn't have signed ones was because we didn't want to go through with them with this thing upside-down and then this mess that we was in. If it wasn't for that, surely we would have had contracts. This piece of property would have been built out a long time ago by somebody else most likely.

Deposition of Thomas Hawkins, Page 208, Lines 2 – 25.

The essential elements of abuse of process as the tort has developed have been stated to be: first an ulterior purpose and second a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act of threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Huggins v. Winn Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2nd 693, 694 (1962), quoting *Prosser* Section 100 at 668-69 (2nd Ed. 1955).

In this instance, Horton cannot claim that it carried the process out to its authorized conclusion because it allowed the *Lis Pendens* to die on the vine. What's more, Horton's lack of specific knowledge of KB Homes' offer does not excuse their conduct. They knew that Wescott had every right to walk away from the parties' Contract at that point, but Horton was not satisfied with that reality. Instead, it misused a *Lis Pendens* to tie up the property while it continued to browbeat Wescott into accepting Horton's new terms. Indeed, this is the very course of action that was threatened by Flannery in his e-mail to Fraylick of September 18, 2006, saying "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." This is precisely the same conduct that was addressed in Broadmoor Apts. Of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2nd 9 (1991). In that case, our Supreme Court held that filing a *Lis Pendens* even when followed by a Summons and Complaint, could constitute abuse of process when done without justification and for the purpose of preventing third parties from purchasing the subject property.

MALICIOUS PROSECUTION

With regard to malicious prosecution, Horton merely takes the position that Wescott's claims are not ripe. Horton is correct that one of the elements of that tort is the termination of legal proceedings in favor of the Plaintiff-- in this case, the Counter-Claimant Wescott. However, Horton cites no authority for the proposition that a claim for malicious prosecution cannot be heard simultaneously with other claims. This argument is applicable only to the Counter-Claims that have recently been brought by Hawkins, individually, based on his current ownership of the subject property. Horton now argues that because it has not initiated any action against Hawkins individually,

Hawkins cannot prevail on a claim of malicious prosecution. Hawkins' claim for malicious prosecution is a direct result of the *Lis Pendens* that is currently filed against the subject property. It is disingenuous of Horton to now take the position that Hawkins is completely free to do with the property what he wishes despite the *Lis Pendens* even though the pending litigation, among other things, demands strict performance of the expired Contract between Horton and Wescott. The fact that Hawkins is not named individually on the *Lis Pendens* is of no consequence.

The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, *i.e.*, the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2nd 881, 889 (S.C. Ct. App. 2002), quoting 51 Am. Jur. 2d *Lis Pendens* §2 (2000).

"The filing of a *Lis Pendens* allows a claimant to protect their ownership interest in the property that is the subject of litigation." *Id.* Undoubtedly, had Hawkins attempted to convey the subject property to any third parties during the pendency of this case, Horton would have sought to set aside Wescott's conveyance to Hawkins. Additionally, Hawkins was absolutely correct in his above-quoted deposition testimony in saying that no reasonable arms-length third party would purchase property that is the subject of a *Lis Pendens* and/or pending litigation.

With regard to Horton's argument that Wescott's claim for malicious prosecution is not ripe, Wescott would respectfully submit that Horton is not referring to the civil proceeding that underpins Wescott's malicious prosecution claim—namely, the filing of

the original *Lis Pendens*, which expired under its own terms. In fact, the very case that Horton cites as grounds for its summary judgment motion as to Wescott's cause of action for slander of title, Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2nd 881 (S.C. Ct. App. 2002), states, "[T]he jurisdictions are in agreement that the proper action against a maliciously filed *lis pendens* is under abuse of process or malicious prosecution." *Id.* at 31, 897. As such, the fact that neither Wescott nor Hawkins have yet prevailed against Horton in the present action has absolutely no bearing on the rightness of either of their claims for malicious prosecution based on the first *Lis Pendens*.

BREACH OF CONTRACT
ACCOMPANIED BY A FRAUDULENT ACT

Horton attempts to blur the line between fraud and Breach of Contract Accompanied by a Fraudulent Act by citing to case law that deals with the requirements for proving common law fraud. While both the requirements for pleading and proving a claim for fraud are quite stringent in South Carolina, the bar is set lower for Breach of Contract Accompanied by a Fraudulent Act.

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2nd 502, 503-04 (Ct. App. 1985) summarizes the three elements of breach of contract with fraudulent intent as follows:

- (1) *A breach of contract* In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement. . . .
- (2) *Fraudulent intent relating to the breaching of the contract and not merely to its making. . . .* Fraudulent intent is normally proved by circumstances surrounding the breach. . . .
- (3) *A fraudulent act accompanying the breach. . . .* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

Where these three elements are not present, there is no claim. *See, e.g.*, Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995) (no breach); Minter v. GOCT, Inc., ___ S.C. ___, 473 S.E.2d 67 (Ct. App. 1996) (no independent fraudulent act); Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 459 S.E.2d 851 (Ct. App. 1995) (no showing of intent to defraud), *aff'd as to different issue*, ___ S.C., 481 S.E.2d 706 (1997); South Carolina Nat'l Bank v. Southern Polymers, Inc., 313 S.C. 246, 437 S.E.2d 148 (Ct. App. 1993) (no breach); Foxfire Village Inc. v. Black & Veatch, 304 S.C. 366, 404 S.E.2d 912 (Ct. App. 1991), *cert. denied* (1991) (no fraudulent or dishonest intent). The fraudulent act referred to in the third element

... is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. "... [F]raud, in this sense, assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.'

Harper v. Ethridge & Fann, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986) (citation omitted; quoting Sullivan v. Calhoun, 117 S.C. 137, 108 S.E.2d 189 (1921)); *see, e.g.*, Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993). Since the fraudulent act element is different than the conduct encompassed in fraud, it can be an abuse of discretion to allow a party to amend a complaint which includes a fraud claim to also include a claim for breach of contract with fraudulent intent. *See, e.g.*, Ball v. Canadian Am. Express, 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994), *cert. denied* (1994).

'Since a breach of contract is an element of the cause of action, an action for breach of contract accompanied by fraudulent act is an action *ex contractu*, not *ex delicto* ...; however it partakes of elements of both contract and tort.' Peeples v. Orkin Exterm. Co., 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964). Thus, the right to bring the claim is dependent upon the right to maintain the contract action. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 341 S.E.2d 378 (1986); *see, e.g.*, Wilson Group Inc. v. Quroum Health Resources, Inc., 880 F. Supp. 416 (D.S.C. 1995) (contract statute of limitations applicable). A separate action for fraud may be brought for the fraudulent act. *Id.* A separate claim may also be brought for the breach of contract. Perry v. Green, *supra*. Given these overlaps, the plaintiff must elect one cause of action; however, the timing of the election depends upon the circumstances. *See, e.g.*, Perry v. Green, *supra* (claim for breach of contract and for breach of contract with fraudulent interest); Riddle v. Pitts, 283 S.C. 387, 324 S.E.2d 59 (1984). For general references to election, see *supra* note 1.

If a breach of contract is accompanied by fraudulent intent and accompanied by a fraudulent act, then punitive damages may be recovered. See, e.g., *Ateyeh v. Volkswagen of Florence, Inc.*, *supra*; *Peeples v. Orkin Exterm. Co.*, *supra*; *Moody v. Stem*, 214 S.C. 45, 51 S.E.2d 163 (1948); *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 (1942); *Holland v. Spartanburg Herald-Jones Co.*, 166 S.C. 454, 165 S.E. 203 (1932); *Givens v. North Augusta Elec. & Improvement Co.*, 91 S.C. 417, 74 S.E. 1067 (1912); *Prince v. State Mutual Life Ins. Co.*, 77 S.C. 187, 57 S.E. 766 (1907); *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987); *Floyd v. Country Squire Mobile Homes*, *supra*.

F.P. Hubbard & R.R. Felix, The South Carolina Law of Torts, Ch. 5 §A footnote 22 (2d ed. 1997).

In *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2nd 606 (2002), our Supreme Court held that viewing the evidence in the light most favorable to the Plaintiff, there was a question of fact as to whether the reasons given by the Defendant for terminating the Plaintiff's employment were pretextual. The Court went on to hold that if the Plaintiff could prove that she was fired for reasons other than the pretextual reasons given, she could recover for Breach of Contract Accompanied by a Fraudulent Act. In other words, breaching a contract under false pretenses is enough to support this cause of action.

Wescott has put forth facts sufficient to support recovery for this cause of action, ranging from Horton's shifting reasons for refusing to close on Phase 3E of the property, its reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contracts, as well as Flannery's written threat to tie up the property if Horton did not get its way. What's more, Wescott would assert that the filing of its successive *Lis Pendens* for the purpose of preventing third parties from acquiring the property and forcing Wescott to bend to Horton's will is in itself a

fraudulent act accompanying Horton's breach of the parties' Second Amended Contract.

Clearly Horton's conduct went beyond merely breaching the Contract.

TORTIOUS INTERFERENCE
WITH PROSPECTIVE ECONOMIC ADVANTAGE

To recover on a cause of action for intentional interference with prospective contractual relations, we hold that plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff.

Crandall Corporation v. Navistar International Transportation Corp., 302 S.C. 265, 395 S.E.2nd 179, 180 (1990).

Horton argues that because Wescott and Hawkins decided not to accept offers from third parties to purchase the subject property, that Horton is somehow immune from liability for this cause of action. However, Hawkins' deposition testimony, which is cited above, explains that both he and Wescott declined to ratify numerous offers to purchase the subject property out of concern that Horton's *Lis Pendens* would prevent those deals from going forward. Furthermore, Horton's argument that its lack of knowledge about specific offers from third parties to purchase the property precludes them from being held liable for tortious interference with prospective contractual relations. There is no case law in South Carolina that inserts this element into the tort. If Horton acted in bad faith by filing a *Lis Pendens* to "tie up the property" as Flannery threatened to do, it was with full knowledge that their actions would prevent Wescott, and subsequently Hawkins, from selling the subject property to third parties. Wescott would seek to prove that this was a tactic designed to bully Wescott into coming back to the negotiating table and selling Horton the property under terms dictated by Horton.

CONCLUSION

Summary judgment in favor of Horton is inappropriate as to each of Defendant's Counter-Claims. As demonstrated, questions of fact exist as to each cause of action alleged by Counter-Claimants. In fact, the Counter-Claimants would assert that the evidence clearly demonstrates that Horton engaged in a pattern of misconduct designed to force Wescott to closing on the subject property under Horton's own terms—namely, that the property would be sold only piecemeal despite the plain language of the Contract which allowed for a single closing on the entire tract.

As plainly demonstrated by the testimony of Horton's own representatives, their motive for engaging in this conduct was to avoid buying any portion of the property until they had pre-sold enough lots to avoid incurring any carrying costs thereby leaving the burden of carrying the property on the shoulders of Wescott.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

M. DAWES COOKE, Esquire
K. MICHAEL BARFIELD, State ID 69400
885 Island Park Drive (29492)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 FAX (843) 577-7708
mbarfield@barnwell-whaley.com

ATTORNEYS FOR COUNTER-CLAIMANTS

May 14, 2009

Charleston, South Carolina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via e-mail and U.S. Mail this 14th day of May 2009 to counsel of record as follows:

Neil Haldrup, Esquire
Elmore & Wall, PA
P. O. Box 1200
Charleston, SC 29402
145 King Street, Suite 302
Charleston, SC 29401
e-mail: neil.haldrup@elmorewall.com

Attorneys for Plaintiff

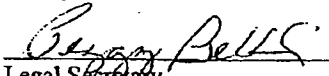

Legal Secretary

Exhibit 2

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

AMENDMENT TO CONTRACT OF SALE
Effective November 15, 2004

WHEREAS, By CONTRACT OF SALE effective November 15, 2004, WESCOTT LAND COMPANY, LLC, as Seller, and D.R. HORTON, INC., as Purchaser, agreed to buy and sell the premises known generally as one hundred ninety three (193) lots in The Farm at Wescott subdivision in Dorchester County, South Carolina.

WHEREAS, under the terms of said Contract of Sale, Seller agreed to develop certain property in The Farm at Westcott Plantation to deliver the lots to Purchaser and Purchaser agreed to purchase said lots within a certain time schedule, and

WHEREAS, the parties have agreed to amend Contract of Sale to further specify the duties and responsibilities of the Parties as to the development of the property and the time period for Seller to deliver the lots and the time period for Purchaser to purchase the said lots as set forth below.

NOW THEREFORE, for and in consideration of the premises, the sum of Ten and no/100 (\$10.00) Dollars in hand paid to each party hereto to the other and other good and valuable consideration, the receipt and the sufficiency of which are hereby acknowledged by the parties hereto, the Seller and Purchaser do hereby amend the CONTRACT OF SALE effective November 15, 2004 and do mutually covenant and agree as follows:

1. Pursuant to paragraph 3a and 3b in CONTRACT OF SALE effective November 15, 2004 and notes in Exhibit "B" attached thereto, Purchaser and Seller agree to amend the Exhibit B "Take Down Schedule" to provide that Purchaser shall purchase and seller shall sell the properties as follows:
 - a. Phase 3A (45 lots) on or before the later of July 1, 2005 or upon final plat approval and recordation. 45 lots @ \$32,000/lot = \$1,440,000.00
 - b. Phase 3D (38 lots) on or before the later of October 1, 2005 or upon final plat approval and recordation. 38 lots @ \$32,000/lot = \$1,216,000.00
 - c. Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation 37 lots @ \$25,500/lot = \$943,500.00
 - d. Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation 23 lots @ \$25,500/lot = \$586,500.00 and 14 lots @ \$24,500/lot = \$343,000.00
 - e. Phase 3E-3 (38 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation. 38 lots @ \$24,500/lot = \$931,000.00
2. Purchaser and Seller agree to amend Paragraph 15 by adding the sentence: "Seller agrees to provide the Condition Precedent document and certifications set forth in Paragraph 15 to Purchaser twenty (20) days prior to the scheduled closing date in order to give Purchaser sufficient time to verify all such documentation, inspect the property to be purchased, conduct final title examinations and prepare for closing."

3. As a condition of development of the property and final plat and subdivision approval, the City of North Charleston may require a completion bond for certain uncompleted items. Purchaser has agreed to post such bond for the uncompleted items and, except for the items noted below, Seller has agreed to reimburse Purchaser for the cost of such bond.

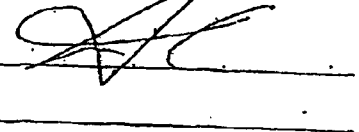
4. As a condition of development of the property, the City of North Charleston has required that certain trees be planted along the rights-of-way of the property and that sidewalks be installed throughout the subdivision. The parties agree that the Purchaser shall bear the cost of the tree planting and sidewalk construction, and ~~this work is outside the scope of work of the Seller and shall not be part of Seller's contract~~ Purchaser agrees to provide to the City of North Charleston its bond to insure the completion of the tree planting and the sidewalk installation. The parties agree that it is in the best interest of development of the property that the tree planting and sidewalk construction be delayed until construction of the detached single family houses and the multifamily townhouses be completed. Purchaser agrees to provide to the City of North Charleston its bond to insure the completion of the tree planting and the sidewalk installation. *203*

CORPORATE APPROVAL OF CONTRACT BY OFFICE OF PURCHASER

NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THIS AMENDMENT TO CONTRACT OF SALE Effective November 15, 2004 SHALL NOT BE A VALID AND ENFORCEABLE OBLIGATION OF PURCHASER UNLESS EXECUTED BY EITHER ONE OF DONALD R. HORTON, DONALD J. TOMNITZ OR BRIAN GARDNER, EACH AN OFFICER OF PURCHASER WITHIN THIRTY DAYS OF THE DATE HEREOF.

In all other respects such CONTRACT OF SALE effective November 15, 2004 shall remain in full force and effect.

In Witness Whereof, the parties have executed this AMENDMENT TO CONTRACT OF SALE Effective November 15, 2004 in multiple copies each of which shall be deemed to be an original this 27 day of July, 2005. *203*

D. R. HORTON, INC.

WESCOTT LAND COMPANY, LLC.

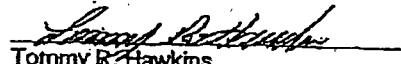

Tommy R. Hawkins,
Member

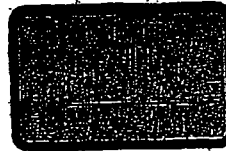
Exhibit 3

000672

Steven L. Smith
ssmith@scnlaw.com

LAW OFFICES
SMITH & KOONTZ
PROFESSIONAL ASSOCIATION

7455 CROSS COUNTY ROAD, SUITE ONE
POST OFFICE BOX 40578
CHARLESTON, SOUTH CAROLINA
29423-0578



TELEPHONE
843-760-0220
FACSIMILE
843-552-2678

August 2, 2006

D.R. Horton, Inc.
Attn: Doug J. Brown
503 Wanda Oak Boulevard
Suite 200
Mt. Pleasant, SC 29464

Re: Closing Schedule for The Farm at Westcott Plantation - Phases 3D, 3E-1, 3E-2
and 3E-3

Dear Mr. Brown:

At this time, we are requesting that the closing on the above-referenced properties take place no later than August 9, 2006. All conditions precedent to the closing, as set out in Paragraph 15 of the Amendment to the Contract of Sale, have now been satisfied, and proof thereof was provided to the seller on July 19, 2006.

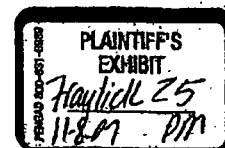
As all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006 will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004.

Please let me know when we can plan for the closing, and please feel free to give me a call should any further information be required.

Sincerely,

Steven L. Smith

SLS/kak



000673

Exhibit 5

000674

D.R. HORTON DHI
NYSE
America's Builder

August 11, 2006

VIA FACSIMILE TRANSMISSION
(Original by First-Class Mail)

Steven L. Smith, Esq.
Smith & Koontz
Post Office Box 40578
Charleston, SC 29423-0578

Re: Contract between Wescott Land Company, LLC ("Wescott") and D.R.
Horton, Inc. ("Horton") dated November 15, 2004 (the "Contract")

Dear Mr. Smith:

I received a copy of your letter to Brian Gardner dated August 10, 2006, and I am writing to respond on behalf of Horton.

The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

Furthermore, the Contract, as amended by that Amendment dated July 27, 2005, contemplates the purchase and sale of the townhouse lots in three (3) separate, quarterly takedowns. Accordingly, Horton will close on the purchase of thirty-seven (37) townhouse lots, or such similar number of lots that constitute complete townhouse buildings, on or before August 31, 2006. Horton will close on the purchase of a like number of townhouse lots on or before November 30, 2006. Horton will close on the purchase of the remaining townhouse lots on or before February 28, 2007.

For the sake of clarity, I propose that the parties execute a Second Amendment to the Contract that acknowledges that the townhouse lots are now substantially complete and that establishes the new takedown schedule. I will prepare a draft of the amendment and forward it to you under separate cover. Please also take notice that, effective immediately, Horton's addresses for delivery of notice are as follows:

503 Wando Park Blvd. • Suite 200 • Mt. Pleasant, SC 29464 • (843) 284-5000 • Fax (843) 284-5010

000675

Doug Brown, Division President
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5061
Phone: (843) 284-5000

With copy to:

O. Kenneth Bagwell, Jr.
General Counsel, Northeast Region
D.R. Horton, Inc.
503 Wando Park Blvd., Ste 200
Mount Pleasant, SC 29464
Fax: (843) 284-5060
Phone: (843) 284-5000

Thank you for your attention, and please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

O. Kenneth Bagwell, Jr.
O. Kenneth Bagwell, Jr.

OKB/vll

Xc: Wescott Land Company, LLC (via facsimile and first-class mail)✓

Larry Dodds, Jr., Esq. (via facsimile and first-class mail)✓
Dodds & Hennessy

Doug Brown, President✓
Coastal Carolinas Division
D.R. Horton, Inc.

Richard Shively, City Manager✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Scott Varn, Project Manager✓
Charleston Office, Coastal Carolinas Division
D.R. Horton, Inc.

Exhibit 6

Sarah Mock

From:



Mitchell M Flannery

Wednesday, September 13, 2006 1:59 PM

tdfraylick@knology.net

Farm @ Wescott

Subject:

Attachments:

SECOND AMENDMENT TO LAND PURCHASE CONTRACT proposed by Bagweel
8-21-06.doc

Importance:

High

Tim,

Thanks for your time. As I mentioned before we have 36 units funded for takedown 1 and will agree to take 40 units down the 2nd phase and 36 the last phase. I do not want to have to send this \$\$ back and ask for it again at a later date but if we can not close in the next 2 weeks I will be forced to send it back. I am going to propose to my Division President that we possibly shrink the takedowns to 2 months apart rather than 3 months apart with the first closing immediately. We both are pretty adamant about how we view the contract so it will not benefit either party if we start butting heads. I will get back with you shortly.

Mitchell



000678

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made August 21, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (37 townhouse lots) shall occur on or before September 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (37 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (36 townhouse lots) shall occur on or before March 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

Title: _____

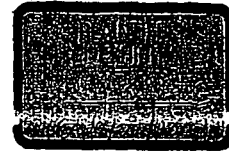
Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region

Exhibit 7

Sarah Mock

From: Mitchell M Flannery
To: Monday, September 18, 2006 9:38 AM
Cc: tdfaylick@knology.net
Subject: Taylor, Gray; Larry Dodds
Attachments: 2nd Amendment - Modified for Takedown Schedule
2nd Amendment 9-18-06 - Modified by Flannery.pdf
Importance: High



Tim,

As I mentioned last week we have 36 units funded and I need to either close on this in the next few weeks or I'll have to send the money back to corporate and that isn't always a good thing. As we discussed both groups do not see eye to eye as the contract stands and if we don't amicably try to move forward we are going to get into something we both don't want to deal with. To give a little I am proposing to shrink the takedown over 2 months rather than 3 and basically if we can close now you are really only 4 months out of this phase being completely taken down. If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal. I have not run this by corporate but I have run our numbers and shrinking to two months may work. Please call me today to discuss what direction you all would like to take so we can prepare the closing. Thanks

Mitchell M. Flannery
Land Acquisition Manager
Coastal Carolina Division
Hilton Head / Savannah / Charleston / Myrtle Beach / Wilmington
D.R. Horton
America's Builder
Direct Line Myrtle Beach: 843-652-2309
Direct Line Charleston: 843-284-5034
Cellular: 843-318-1253
E-Fax: 469-522-8236

000682

SECOND AMENDMENT TO LAND PURCHASE CONTRACT

This Second Amendment is made September 18, 2006, by and between D.R. Horton, Inc. ("Purchaser") and Wescott Land Company, LLC ("Seller"). Both parties state and acknowledge as follows:

A. The parties previously entered into a Contract of Sale having an effective date of December 16, 2004 regarding the purchase and sale of fully developed single-family and townhouse lots to be located in The Farm at Wescott in Dorchester County, South Carolina.

B. The parties previously amended the Land Purchase Contract by that Amendment to Contract of Sale dated July 27, 2005. The Contract of Sale, as amended by the previous Amendment, is hereinafter referred to as the "Contract."

C. The parties now desire to amend the Contract again.

THEREFORE, in consideration of the reciprocal covenants, conditions and provisions stated herein, the parties agree as follows:

1. The Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract.

2. Exhibit B is hereby amended to provide:

(a) Closing on Phase 3E-1 (36 townhouse lots) shall occur on or before October 5, 2006. The purchase price for Phase 3E-1 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot conveyed to Purchaser.

(b) Closing on Phase 3E-2 (40 townhouse lots) shall occur on or before December 5, 2006. The purchase price for Phase 3E-2 shall be Twenty-five Thousand Five Hundred Dollars (\$25,500.00) per fully developed lot, conveyed to Purchaser, LESS Fourteen Thousand Dollars (\$14,000.00).

(c) Closing on Phase 3E-3 (34 townhouse lots) shall occur on or before February 6, 2007. The purchase price for Phase 3E-3 shall be Twenty-four Thousand Five Hundred Dollars (\$24,500.00) per fully developed lot conveyed to Purchaser.

3. NEITHER THIS AMENDMENT NOR ANY FUTURE AMENDMENT TO THE CONTRACT SHALL BE A VALID, BINDING OR ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL SUCH DOCUMENT IS RATIFIED IN WRITING BY DONALD R. HORTON, DONALD J. TOMNITZ, SAMUEL R. FULLER, BILL W. WHEAT, STACEY H. DWYER, GEORGE SEAGRAVES OR BRIAN F. GARDNER, EACH OF WHOM IS A CORPORATE OFFICER OF PURCHASER.

4. Except as amended herein, all terms and provisions of the Contract remain unmodified. As amended herein, the Contract remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment as of the date first stated above.

Seller:

Wescott Land Company, LLC

By: _____

Print Name: _____

Title: _____

Purchaser:

D.R. Horton, Inc.

By: _____

Print Name: _____

Title: _____

Pursuant to Section 21 of the Contract, the undersigned hereby ratifies this Second Amendment on behalf of D.R. Horton, Inc.

Brian F. Gardner,
President, Northeast Region.

Exhibit 8

000685

**Ogletree
Deakins**
ATTORNEYS AT LAW
mike.shetterly@odnss.com

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

The Ogletree Building
300 North Main Street
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: 864.271.1300
Facsimile: 864.235.4754
www.ogletreedeakins.com

October 16, 2006

Via Facsimile (843.552.2678)

Steve Smith, Esquire
Smith Collins Newton & Koontz P.A.
PO Box 40578
N. Charleston, SC 29423-0578

Re: Westcott/D.R. Horton

Dear Steve:

In follow-up to our conversation of Wednesday, October 11, 2006, your client has not complied with the Conditions Precedent requirements of the contract set forth in the contract, or as amended.

Paragraph 15, subparts (i) and (j), have not been accomplished at all. Contrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any "sign-off" from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been installed on the site. Until these items are complete, the conditions precedent have not been completed.

Until all conditions precedent have been met, and written notice and substantiating documentation of that fact have been received, Westcott is not compliant with the contract requirements and no closing can be scheduled.

Under the contract, D.R. Horton has the right to extend closing deadlines as it deems fit to allow Westcott more time to complete the requirements, go ahead and close and force Westcott to complete the conditions precedent after the closing, or alternatively, it can elect its remedies under the contract. The contract clearly gives D.R. Horton to elect which course it chooses to take.

What D.R. Horton has offered, and what I am authorized to offer again, is to forgive the remaining conditions precedents that have not been done, or been done poorly, in exchange for a reasonable take-down schedule. D.R. Horton proposes to modify the contract to forgive the remaining requirements under the conditions precedent, which D.R. Horton will then assume as its own obligations, and take down the lots in three phases - (1/3 before the end of October; 1/3

Steve Smith, Esquire
October 16, 2006
Page 2



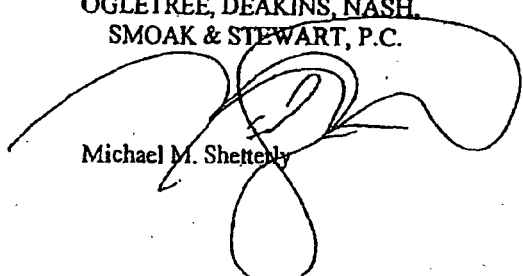
before the end of December; 1/3 before the end of February). We believe our proposal is in the best interest of both parties.

Please let me know your client's decision.

With kindest regards, I am

Very truly yours,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



Michael M. Shetterly

MMS:clr

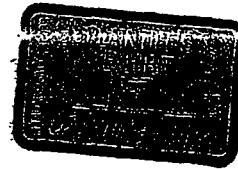
4454421.1

000687

Exhibit 15



4401 Belle Oaks Drive, Suite 280
N. Charleston, SC 29405
Phone: (843) 576-6840
Fax: (843) 529-4605



November 6, 2006

VIA FAX 843/552-0083

Mr. Tommy Hawkins
Wescott Land Company, LLC
7150 Bryhawke Circle
North Charleston, SC 29418

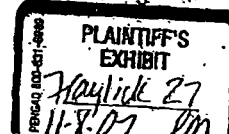
Re: Letter of Intent to purchase 110 developed lots (collectively the "Lots") located in The Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina ("Property")

Dear Mr. Tom Hawkins:

This letter sets forth the general terms and conditions upon which KB HOME SOUTH CAROLINA INC or its designee ("KB HOME"), would purchase the Lots from WESCOTT LAND COMPANY, LLC ("Seller"). This letter is subject to the drafting and execution of a mutually acceptable purchase and sale agreement ("Agreement"), which shall be prepared by KB HOME embodying, among others, the following terms:

1. **Property.** The "Property" means 110 townhome building Lots contained in Phase 3E of the Farm at Wescott subdivision (the "Subdivision"), located on Patriots Park Rd. in Dorchester County North Charleston, South Carolina. All of the Lots are at least twenty feet in width and at least seventy-five feet in depth. The name of the current owner of the property is: Wescott Land Company, LLC.
2. **Purchase Price.** The "Purchase Price" shall be \$30,000.00 per padded Lot. The escalator will be 1.25 % per quarter.
3. **Closing.** The Lots will be purchased on a quarterly basis, in accordance with a lot takedown schedule to be agreed to by the parties in the Agreement. The initial closing of Lots shall occur 30 days after the last of the following occurs: (a) the end of the feasibility period; or (b) all of the contingencies as set forth in the paragraph of this letter of intent, titled "Contingencies" have been satisfied or waived by KB HOME in writing.
4. **Earnest Money.** Within 10 business days of the effective date of the Agreement, KB HOME shall deposit an earnest money bond issued by Safeco Insurance Company of America ("Safeco") (or another financial institution selected by KB HOME and reasonably acceptable to Seller) in the amount of \$50,000.00 with Nelson Mullins Riley & Scarborough, LLP who will act as escrow agent. Within 10 days following the end of the Feasibility Period, KB HOME will deposit additional Earnest Money in the amount of \$150,000.00. The Earnest Money is fully refundable prior to the expiration of the Feasibility Period. After the expiration of the Feasibility Period, all Earnest Money is non-refundable except for Seller's default or failure of a contingency under the Agreement. The Agreement will provide that the earnest money bond will stand as full-liquidated damages in the event KB HOME breaches its obligation to purchase lots under the Agreement for any reason.

LOI The Farm at Wescott 11 06 06.doc



000689

5. **Feasibility Period.** KB HOME would have 60 days following the effective date of the Agreement as a feasibility period (the "Feasibility Period"). During this Feasibility Period, KB HOME will have the right, at KB HOME's sole discretion, to test and review the condition and suitability of the Property for KB HOME's intended use, including but not limited to development costs, condition of title, physical condition of the Property and any other items KB HOME considers necessary, and to obtain the approval of KB HOME's land committee for this transaction. KB HOME and its agents and representatives shall have the right to enter the Property to conduct such tests and reviews. Seller would deliver to KB HOME copies of all tests, surveys, plats, deed restrictions, HOA documents, title policies and construction plans (if any) related to the Property within 7 days following the effective date of the Agreement.
6. **Zoning.** The property is presently or will be rezoned in the future to a classification that will allow a total of 110 townhome residential units that will be allocated to KB Home.
7. **Site Plan.** We understand that the Property will be developed as depicted on the preliminary site plan ("Preliminary Site Plan") attached to this letter as Exhibit "A".
8. **Brokerage Fees.** The parties acknowledge that, except for the broker identified below, whose commission Seller is solely responsible for paying, that no real estate broker or agent is involved in this proposed transaction. The parties agree to defend and indemnify each other from any claims of commissions or brokerage fees arising from KB HOME's or Seller's respective dealings with any other real estate broker or agent.

Seller's Broker: Tim Fraylick
First Charleston Realty
1124 Sam Rittenberg Blvd, Suite 5
N Charleston,, South Carolina 29407
Phone: 843-452-7202
Fax: 843-766-3289

9. **Closing Costs.** KB Home and Seller agree to pay their normal and customary closing costs and escrow fees and agree to prorate all real estate taxes on a calendar year basis as of the date of Closing. Additionally, KB Home and Seller agree that they will be responsible for their own attorney's fees associated with this proposed transaction.
10. **Seller's Representations and Warranties.** Seller shall provide such normal and customary representations and warranties as KB HOME deems appropriate with respect to the Property, including but not limited to the quality of the work performed by Seller on the Property, the existence of any wetlands, endangered species or protected habitat, absence of hazardous or toxic materials, the existence of any condemnation or assessment district proceeding and any moratorium or governmental policies precluding or inhibiting the development of the Property.
11. **Contingencies.** Purchaser's obligations under the Agreement will be contingent upon each of the following matters occurring (collectively, the "Contingency Events"):
 - a. all of Seller's warranties, representations and covenants contained in this Agreement shall be and remain true, correct and complete and fully performed as of the Effective Date and through the final Closing;
 - b. there shall have occurred no material adverse change in the physical, financial or legal conditions of the Property from the conditions existing prior to the expiration of the Feasibility Period;
 - c. Seller shall deliver good and marketable title to the Property to Purchaser and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 3

insurance policy insuring good and marketable fee simple title to the Property with a liability limit in the amount of the Purchase Price at standard premium rates;

- d. Seller shall have delivered to Purchaser Lots meeting the Development Specifications (as defined herein)
- e. Additional Contingencies. Seller shall satisfy each of the following obligations by the indicated time:

(i) No later than 10 business days following the expiration of the Feasibility Period Seller shall execute and deliver to Purchaser a letter agreement in favor of Purchaser and in the form attached as Exhibit "D" hereto, duly executed by Seller's Lender, in which Seller's Lender agrees, among other things, in the event of a default by Seller under the Development Loan, to (A) provide written notice to Purchaser of such default, and (B) give Purchaser the right to purchase such loan.

If such conditions have not been timely satisfied, then Purchaser may terminate this Agreement by written Notice to Seller.

12. No Publicity. THE PARTIES UPON EXECUTION OF THIS LETTER OF INTENT WILL BE BOUND BY THE FOLLOWING 2 PARAGRAPHS WHICH WILL ALSO BE INCLUDED IN AND BE A PART OF THE AGREEMENT:

No Publicity.

- a. Seller (including all directors, officers, partners, employees, representatives, attorneys, and agents of Seller) shall not make any media release, public announcement, press release, public disclosure, or any other form of publicity in any manner or medium including, without limitation, newspaper, newsletter, magazine, or electronic communication (collectively, "Publicity") relating in any way to this Agreement, including, without limitation, regarding (i) the execution or existence of this Agreement, (ii) the transaction evidenced by this Agreement, (iii) the status of the transaction evidenced by this Agreement (including, without limitation, any termination of this Agreement or closing of the transaction, or portion thereof, evidenced by this Agreement); (iv) any matter related to or arising out of this Agreement, (v) any of the terms or provisions contained in this Agreement, and/or (vi) any other matter related to or arising from any of the foregoing, without the prior written consent of Purchaser, in its sole and absolute discretion.
- b. Seller shall submit in writing any Publicity desired or generated by Seller, to Purchaser, prior to release, and Seller must not release any such Publicity unless, prior to such release, Purchaser in its sole and absolute discretion has approved such Publicity in writing. Provided, however, if in the written opinion of Seller's counsel such disclosure is required by law, then upon as much prior written notice to Purchaser as is practical under the circumstances giving Purchaser an opportunity to seek an injunction or other equitable relief, Seller may disclose the information necessary to comply with the law. In the event of a breach or threatened breach of this no publicity paragraph, Purchaser shall be entitled to all rights, recourses, and remedies available to it under applicable law and/or in equity, including, without limitation, under the provisions of this Agreement. The foregoing shall not limit Seller's ability to pursue any and all governmental or quasi-governmental approvals that may be contemplated by this Agreement or that may be necessary in connection with the transaction contemplated by this Agreement, in Seller's reasonable discretion.

Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 4

~~13. Exclusive.~~ Seller shall not, so long as Seller and KB HOME are negotiating toward the execution of a definitive Agreement, but in any case for at least 30 days from the date of Seller's execution of this letter of intent, negotiate with or solicit or accept any offer from any other party for the sale of any or all of the Property or any other transaction inconsistent with the transaction proposed herein.

14. Assignment. The rights and interest of KB HOME in and to the Agreement may be assigned or transferred by KB HOME to any entity. The interest of Seller in the Agreement may not be assigned without the prior written consent of KB HOME, which consent shall not be unreasonably withheld.

Excluding the paragraphs of this letter of intent titled "No Publicity" and "Exclusive" (the provisions of which shall be binding upon the parties), this letter constitutes only an expression of intent regarding the terms and conditions on which KB HOME would purchase the Property and shall not be deemed to create a binding obligation between KB HOME and the Seller unless and until a definitive Agreement including the terms hereof, and any other terms acceptable to the parties, in their sole discretion, is executed by both parties.

If the terms of this letter are acceptable to the Seller, then please insert the name of the owner of the Property into the signature block below, and execute one original in the indicated areas and return it to KB HOME via facsimile to (843) 529-4605. It would be helpful to us if you include a copy of Seller's title policy (issued at Seller's acquisition of the Property) along with the fully executed letter of intent.

KB HOME will cause an Agreement to be prepared and delivered to Seller as soon as reasonably possible after the date that a fully executed copy of this letter is received by KB HOME. If the parties are unable to enter into an Agreement acceptable to both parties within 30 days of the Seller's execution of this letter of intent, then the parties shall have no further obligation to each other except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity".

In the event we have not received a satisfactory response from you within 15 days of the date of this letter of intent, we shall assume that you have no further interest in completing a transaction with us and except for those obligations contained in the paragraph of this letter of intent, titled "No Publicity", the terms of this letter are automatically withdrawn.

KB HOME SOUTH CAROLINA INC

By: _____

Jeff Meyer
President

SELLER: WESCOTT LAND COMPANY, LLC

Signature _____

Print Name _____

Its: _____

Date: _____

cc: Senior Regional Counsel

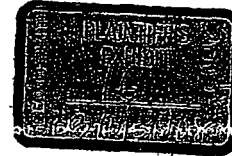
Letter of Intent
The Farm at Wescott Phase 3E
November 6, 2006
Page 5

EXHIBIT "A"
Preliminary Site Plan

Exhibit 16

Sarah Mock

From: Mitchell M Flannery
it: Wednesday, December 27, 2006 2:25 PM
cc: tdfaylick@knology.net
Subject: Shetterly, Mike M.; Christopher M Wallace; Richard D Brown
The Stables
Importance: High



Tim,

I want to thank you and Mr. Hawkins for meeting with Mike and me on Thursday the 21st. After discussing the situation with you in person, I feel more comfortable we may be able to find an amicable resolution. I think it was helpful for us to both know that there are real people on both sides that care about not only the end product, but how we get there.

Just for clarification, we discussed giving you a list of things that we feel need to be rectified onsite, which you would perform at your cost within a few weeks after closing, and in return we would agree to pay \$30,000 per unit and close as soon as possible. Per our conversation and my discussion with Development we would request the following be done to the site:

1. We would like to request a copy of the 'As Built's' for the building pads with their original elevations. I believe the pads were 50'x60'.
2. We need to verify that we have all permits to operate. I did forward information to development that was delivered to Jonathan in the summer. I believe these were the DHEC permits but need to verify.
3. We would like for the pads to be shaped back into their original condition and make sure that the pads are 95% compacted at 2,000psf. Do we have compaction letters? If not could you all provide?
4. We would request that we meet with a member of your group onsite to discuss tree replacements that need to be done on site such as the front entrance and other areas. I don't think this is a significant amount but we would like for these to be replaced. If you would like further clarification as to the locations and number, we can do that prior to any confirmation of this agreement.
5. We would request that you clean the stormwater drains from any debris that washed into the roads and storm drains.
6. Clear any trash or debris on site.
7. Correct the rear drainage issue against Planter's Point. We will meet with Kevin on Tuesday and put together a rear drainage plan to shape these lots up so we don't have any drainage issues. We will pay for design, but need you to approve the design and perform the work in order for the above deal to proceed. I don't think this will be anything that you all will be opposed to so I would like to continue working towards getting the above stuff completed.

I am meeting with Mike Shetterly today to discuss the tax issue and give me a synopsis of the contract and our past course of conduct as it pertains to this issue. Please review the above and let me know should you have any questions or concerns. If you all are agreeable I would suggest that we draft an amendment and move forward. Thanks again for your time and consideration.

Mitchell M. Flannery
Land Acquisition Manager
Coastal Carolina Division
Hilton Head / Savannah / Charleston / Myrtle Beach / Wilmington
D.R. Horton
America's Builder
Direct Line Myrtle Beach: 843-652-2309
Direct Line Charleston: 843-284-5034
Cellular: 843-318-1253
Fax: 469-522-8236

000695

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

FIRST JUDICIAL CIRCUIT

CASE NO. 2007-CP-18-337

D. R. HORTON, INC.,
PLAINTIFF

VS.

WESCOTT LAND COMPANY, LLC,
DEFENDANT

HEARING ON
MOTION FOR
SUMMARY JUDGEMENT

TRANSCRIPT OF RECORD

THOMAS R. HAWKINS AND WESCOTT
LAND COMPANY, LLC,
COUNTER-CLAIMANTS

DATE:

VS.

D. R. HORTON, INC.,
COUNTER-CLAIM DEFENDANT

MAY 14, 2009

BEFORE:

HONORABLE JAMES C. WILLIAMS, JR., PRESIDING JUDGE

APPEARANCES:

NEIL S. HALDRUP, ESQUIRE

ATTORNEY FOR PLAINTIFF/COUNTER-CLAIM DEFENDANT

DAWES COOKE, JR., ESQUIRE
K. MICHAEL BARFIELD, ESQUIRE

ATTORNEYS FOR DEFENDANT/COUNTER-CLAIMANTS

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

1 DATE:

2 MAY 14, 2009

3 COURT REPORTER: STATE OF SOUTH
4 CAROLINA, COUNTY OF DORCHESTER, IN THE COURT OF COMMON
5 PLEAS, CIVIL ACTION NUMBER 2007-CP-18-337, D. R.
6 HORTON, INCORPORATED, PLAINTIFF, VERSUS WESCOTT LAND
7 COMPANY, LLC, DEFENDANT. ALSO, THOMAS R. HAWKINS AND
8 WESCOTT LAND COMPANY, LLC, COUNTER-CLAIMANTS, VERSUS
9 D. R. HORTON, INCORPORATED, COUNTER-CLAIM-DEFENDANT.
10 ATTORNEY FOR PLAINTIFF, NEIL S. HALDRUP, H-A-L-D-R-U-
11 P.

12 MR. COOKE: I COME BEARING GIFTS.

13 THE COURT: MR. COOKE, YOU OF ALL
14 PEOPLE KNOW THAT I'M NOT SMART ENOUGH TO READ ALL OF
15 THIS THIS FAST AND DIGEST IT.

16 MR. COOKE: OH, BELIEVE ME, I KNOW
17 THAT, JUDGE, BUT WE FIGURED YOU'D BE IN THIS MURDER
18 TRIAL ALL WEEK AND - - -

19 MR. HALDRUP: WHEN WE CONSENTED TO
20 THE AMENDMENT WE DIDN'T KNOW THEY WERE GOING TO ADD A
21 PARTY, AND WE ARGUED AND BRIEFED SUMMARY JUDGEMENT AS
22 TO WESCOTT AND AS TO TOMMY HAWKINS, WHO THEY'VE ADDED
23 AS A COUNTER-CLAIMANT. BUT IF WE DON'T RESOLVE THIS
24 TODAY THERE'S GOING TO BE SOME ADDITIONAL DISCOVERY
25 BECAUSE THERE'S A NEW PARTY MAKING CLAIMS FOR

1 SIGNIFICANT DAMAGES.

2 THE COURT: WELL, CAN WE RESOLVE
3 IT WITHOUT THAT DISCOVERY?

4 MR. HALDRUP: I'M SORRY?

5 THE COURT: CAN WE RESOLVE IT
6 WITHOUT THAT DISCOVERY?

7 MR. HALDRUP: I THINK SO.

8 THE COURT: ALRIGHT, I'M
9 LISTENING.

10 MR. HALDRUP: OKAY.

11 COURT REPORTER: JUDGE, I DIDN'T
12 GET THE VERY FIRST PART OF THIS BECAUSE I DIDN'T
13 REALIZE YOU WERE ON THE RECORD YET.

14 THE COURT: I DIDN'T HEAR YOU.

15 COURT REPORTER: I SAID, I DIDN'T
16 GET THE VERY FIRST PART OF THIS BECAUSE I DIDN'T THINK
17 YOU WERE ON THE RECORD YET.

18 THE COURT: WE DIDN'T NEED TO BE
19 ON THE RECORD.

20 COURT REPORTER: OKAY.

21 THE COURT: NO.

22 MR. HALDRUP: MAY IT PLEASE THE
23 COURT.

24 THE COURT: YES, SIR.

25 MR. HALDRUP: YOUR HONOR, MY NAME

1 IS NEIL HALDRUP, I REPRESENT D. R. HORTON, THE
2 PLAINTIFF IN THIS ACTION. I'M HERE TODAY WITH MIKE
3 SHEDDERLY, YOU MAY HAVE SEEN HIS NAME IN THE
4 MEMORANDUM THAT WE SUBMITTED. HE'S AN ATTORNEY THAT
5 REPRESENTED D. R. HORTON BEFORE I GOT INVOLVED. I'M
6 ALSO HERE WITH BRYAN GARDNER, WHO IS THE PRESIDENT OF
7 THE DIVISION OF D. R. HORTON THAT'S RESPONSIBLE FOR
8 THIS PROJECT.

9 THE COURT: ALRIGHT, SIR.

10 MR. HALDRUP: WE HAVE FILED A
11 MOTION FOR SUMMARY JUDGEMENT AS TO ALL CAUSES OF
12 ACTION OF WESCOTT, AND THE RECENTLY ADDED COUNTER-
13 CLAIMANT OF MR. HAWKINS. AND YOU KNOW, IN THE
14 TIGHTEST NUT SHELL THAT I CAN TELL YOU, THIS IS A
15 BREACH OF CONTRACT CASE. AND THE DEFENDANTS HAVE
16 ASSERTED COUNTER-CLAIMS THAT MAKE IT EXTREMELY
17 COMPLICATED. AND SO, THAT'S THE REASON FOR THE LENGTH
18 OF OUR BRIEF, AND I APOLOGIZE FOR THAT, BUT I THINK IF
19 YOU TOOK THE TIME TO READ IT, AND I KNOW WHEN WE CAME
20 LAST TIME YOU HAD READ THE BRIEFS AND REMARKABLY YOU
21 HAD A PRETTY GOOD SENSE OF WHAT WAS GOING ON. SO, AS
22 I RECITE THE FACTS IF YOU - - -

23 THE COURT: NO, SIR, YOU GO AHEAD.

24 MR. HALDRUP: ALRIGHT. IT'S A
25 BREACH OF CONTRACT CASE, AND THE REMEDIES ARE CLEARLY

1 DEFINED IN THE CONTRACT. THERE'S A SECTION FOR
2 SELLER'S REMEDIES AND THERE'S A SECTION FOR
3 PURCHASER'S REMEDIES, AND THE CONTRACT THAT THE
4 PARTIES ENTERED IS ATTACHED AS EXHIBIT, OR ATTACHMENT
5 A TO OUR MEMORANDUM. THE REMEDY FOR THE SELLER IN THE
6 EVENT THAT THERE'S A BREACH IS CLEAR, THAT THEY'RE
7 ENTITLED TO RETAIN THE EARNST MONEY AND THE CONTRACT
8 CLEARLY STATES THAT THAT'S THEIR EXCLUSIVE REMEDY,
9 THAT THEY'RE NOT ENTITLED TO ANY OTHER REMEDIES AT LAW
10 OR UNDER THE CONTRACT.

11 THEIR COUNTER-CLAIM ASSERTS THAT
12 D. R. HORTON BREACHED THE CONTRACT, BUT THEY ADMIT THAT
13 THEY DIDN'T SATISFY THE CONDITIONS PRECEDENT SET FORTH
14 IN THAT CONTRACT WITHIN THE TIME FRAME ALLOWED. THEY
15 REFUSED TO CLOSE ON THE PROPERTY WHEN D. R. HORTON
16 TOOK THE POSITION THAT WHEN WESCOTT FAILS TO SATISFY
17 THOSE CONDITIONS WITHIN THE TIME FRAME, D. R. HORTON
18 COULD EITHER TERMINATE THE CONTRACT OR EXTEND THE
19 DATES. AND THAT'S EXACTLY WHAT D. R. HORTON DID, THEY
20 OFFERED TO EXTEND THE DATES, BUT WESCOTT REFUSED TO DO
21 THAT. AND THEY'VE NEVER SATISFIED THE CONDITIONS THAT
22 WERE SET FORTH IN THE CONTRACT, AND THAT'S WHY WE ARE
23 HERE TODAY, BECAUSE D. R. HORTON WANTED TO PURSUE THE
24 COMPLETION OF THIS CONTRACT, AND THEY FILED A LIS
25 PENDENS TO SHOW THEIR INTEREST IN THAT PROPERTY, AND A

1 SIMPLE BREACH OF CONTRACT CLAIM AGAINST WESCOTT.
2 WELL, IN RESPONSE WE GOT A NUMBER OF COUNTER-CLAIMS
3 THAT TRUMP UP THEIR DAMAGES THAT ARE NOT BASED, IN
4 FACT, ARE NOT BASED IN WHAT THE REMEDY IS IN THE
5 CONTRACT.

6 TO GIVE YOU A LITTLE BIT OF
7 HISTORY, TOMMY HAWKINS, WHO IS NOT HERE TODAY, I THINK
8 YOU SAW THAT HE WAS IN THE HOSPITAL AND I HOPE THAT HE
9 DOING WELL. HE HAS BEEN IN THE LAND ACQUISITION AND
10 DEVELOPMENT BUSINESS FOR, I THINK, FORTY SOME YEARS.
11 HE ACQUIRED FOUR HUNDRED ACRES IN THE WESCOTT AREA OF
12 DORCHESTER COUNTY AND SOLD A LITTLE CHUNK OF THAT OFF
13 TO ANOTHER DEVELOPER, LIKE TWENTY-SIX ACRES. HE GOT
14 THAT PROPERTY FOR FIFTEEN HUNDRED DOLLARS AN ACRE.
15 AFTER HE SOLD OFF A SMALL CHUNK HE ENTERED A SERIES OF
16 CONTRACTS WITH D. R. HORTON TO SELL PIECES OF THAT
17 FOUR HUNDRED ACRES AND ENDED UP FROM ABOUT TWO
18 THOUSAND TO TWO THOUSAND AND FOUR SELLING OVER SEVEN
19 MILLION DOLLARS WORTH OF PROPERTY TO HORTON. AND THEY
20 WENT THROUGH, ENTERED CONTRACTS, SATISFIED THE
21 CONDITIONS, HORTON WENT THROUGH WITH THE SALES. SO,
22 WE KIND OF FAST FORWARD TO THE SUMMER OF TWO THOUSAND
23 AND FOUR. THERE'S ABOUT FORTY-EIGHT ACRES, FORTY-
24 SEVEN POINT SOME ACRES LEFT, AND THE PARTIES ENTERED
25 ANOTHER CONTRACT. IT WAS A LITTLE BIT DIFFERENT

1 BECAUSE TOMMY HAWKINS OWNED THE PROPERTY ALL THROUGH
2 THOSE FIRST TRANSACTIONS, BUT ON THIS ONE WHAT THE
3 PARTIES AGREED TO DO WAS, TOMMY HAWKINS WOULD SET UP
4 AN LLC, AND THAT LLC WOULD FURTHER DEVELOP THE
5 PROPERTY BY PUTTING IN WATER AND SEWER AND ROADS AND
6 DEVELOPING IT SO THAT WHEN D. R. HORTON PURCHASED
7 PORTIONS OF THAT FINAL FORTY-EIGHT ACRES IT WOULD BE
8 READY TO BUILD ON. AND THAT WAS A LITTLE BIT
9 DIFFERENT THAN THEY HAD DONE ON THE FIRST THREE
10 HUNDRED PLUS ACRES, D. R. HORTON SIMPLY BOUGHT THE
11 PROPERTY AND THEN CONTRACTED TO SOMEBODY LIKE MR.
12 HAWKINS'S SUBSIDIARY OR SOME OTHER CONTRACTOR THAT
13 COULD DO THAT WORK. SO, THIS WAS A LITTLE BIT
14 DIFFERENT. THEY SET IT UP IN THE SUMMER OF TWO
15 THOUSAND FOUR AND SAID -- D. R. HORTON SAID, WE WILL
16 BUY THIS PROPERTY IN SIXTEEN PHASES, WE'LL BUY TEN TO
17 TWENTY LOTS EVERY QUARTER ONCE WE GET THE BALL
18 ROLLING. AND BEFORE WE HAVE AN OBLIGATION TO PURCHASE
19 THAT PROPERTY WESCOTT, THIS NEW COMPANY THAT YOU'VE
20 SET UP, IS GOING TO DEVELOP THIS PROPERTY. AND BEFORE
21 D. R. HORTON HAS AN OBLIGATION TO BUY ANY OF THE LOTS
22 WITHIN A PARTICULAR QUARTER WESCOTT AGREED TO PERFORM
23 A LAUNDRY LIST OF CONDITIONS PRECEDENT, THAT ARE SET
24 FORTH IN THE CONTRACT, AND YOU MAY HAVE LOOKED AT SOME
25 OF THOSE ALREADY.

1 AFTER THEY ENTERED THIS CONTRACT,
2 AT SOME POINT, AND IT'S IN DISPUTE AS TO WHY THEY
3 ENTERED AN AMENDMENT TO THE CONTRACT, BUT I THINK IT'S
4 OF NO MOMENT FOR TODAY'S PURCHASES. THE FACT IS, THEY
5 DID ENTERED AN AMENDMENT, AND INSTEAD OF HAVING
6 SIXTEEN CLOSINGS THEY REDUCED IT DOWN TO FIVE CLOSINGS
7 IN FIVE QUARTERS. SO, INSTEAD OF HAVING FOUR YEARS,
8 SIXTEEN QUARTERS IS FOUR YEARS, THEY ENTERED THIS
9 CONTRACT IN THE FALL OF TWO THOUSAND FOUR, NOVEMBER OF
10 TWO THOUSAND FOUR, THE FIRST TAKE DOWN WOULDN'T HAVE
11 STARTED UNTIL TWO THOUSAND FIVE. IF THEY WOULD HAVE
12 GONE SIXTEEN QUARTERS AFTER THEY WOULD STILL BE HAVING
13 TRANSACTIONS OR QUARTERLY TAKE DOWNS. BUT IN THE
14 SUMMER OF TWO THOUSAND FIVE THEY DID ENTER THIS
15 AMENDMENT, AND THE AMENDMENT IS VERY CLEAR. IT'S
16 ADDRESSING THE TAKE DOWN SCHEDULE. IT DIDN'T AFFECT
17 ANY OF THE OBLIGATIONS OF WESCOTT TO PERFORM THE
18 CONDITIONS PRECEDENT, BUT IT DID ACCELERATE THE SALE
19 OF THE LOTS. AND INSTEAD OF SIXTEEN IT BROUGHT IT
20 DOWN TO FIVE, AND IT WAS SUPPOSED TO CONCLUDE IN THE
21 SUMMER OF TWO THOUSAND AND SIX. THOSE LOTS COMPRISED
22 EIGHTY-THREE RESIDENTIAL LOTS AND A HUNDRED AND TEN
23 TOWN HOME LOTS. THE EIGHTY-THREE RESIDENTIAL LOTS, D.
24 R. HORTON BOUGHT THOSE, WESCOTT DID WHAT THEY WERE
25 SUPPOSED TO DO, THAT'S NOT IN DISPUTE, NOBODY HAS ANY

1 ARGUMENTS ABOUT THAT. SO, D. R. HORTON PERFORMED ON
2 THREE HUNDRED ACRES PLUS THE THIRTY-ONE ACRES THAT
3 COMPRISED THOSE EIGHTY-THREE LOTS. AND NOW WE'RE LEFT
4 WITH A HUNDRED AND TEN TOWN HOME LOTS. THE CONTRACT,
5 AGAIN IF YOU LOOK AT ATTACHMENT B TO OUR MEMO, SETS
6 FORTH THE SCHEDULE FOR THOSE PHASED TAKE DOWNS. THE
7 FIRST ONE WAS SUPPOSED TO OCCUR ON JANUARY THE FIRST
8 OF TWO THOUSAND SIX, IT WOULD TAKE ABOUT A THIRD,
9 THIRTY-SIX OF THOSE HUNDRED AND TEN LOTS IN THE FIRST
10 PHASE, THEN THREE MONTHS LATER THEY WOULD TAKE DOWN
11 ANOTHER CHUNK, AND ON JULY FIRST THEY WOULD TAKE DOWN
12 THE FINAL CHUNK OF A HUNDRED AND TEN LOTS. WELL,
13 JANUARY FIRST CAME AND WENT, AND WESTCOTT HAD NOT
14 PERFORMED THE CONDITIONS PRECEDENT. THE SECOND TAKE
15 DOWN DATE CAME AND WEN AND WESCOTT HAD NOT PERFORMED
16 THE CONDITIONS PRECEDENT. THE THIRD TAKE DOWN, JULY
17 FIRST, TWO THOUSAND SIX, CAME AND WENT AND WESTCOTT
18 HAD NOT SATISFIED THE CONDITIONS PRECEDENT. THE
19 CONTRACT CLEARLY STATES THAT IF WESCOTT FAILS TO
20 CONVEY THE PROPERTY OR SATISFIED THE CONDITIONS
21 PRECEDENT WITHIN SIX MONTHS OF THE DATE INDICATED IN
22 THE CONTRACT, WHICH WAS JANUARY ONE OF TWO THOUSAND
23 AND SIX FOR THE FIRST PHASE, THAT D. R. HORTON HAS TWO
24 OPTIONS, THEY CAN EITHER TERMINATE THE CONTRACT OR
25 EXTEND THE DATES OF THE CONTRACT. WELL, IT'S WITHOUT

1 DISPUTE, AND IT'S ATTACHED TO OUR BRIEF, THAT THE
2 FIRST TIME WESCOTT EVEN ATTEMPTED TO CONVEY THE
3 PROPERTY OR INDICATE THAT THEY HAD SATISFIED THE
4 CONDITIONS WAS JULY NINETEENTH OF TWO THOUSAND SIX,
5 SIX MONTHS AND NINETEEN DAYS AFTER THEY WERE SUPPOSED
6 TO DO THAT. THEY JUMPED THE GUN ON THAT A LITTLE BIT,
7 YOUR HONOR, BECAUSE BY THEIR OWN ADMISSION THINGS KEPT
8 TRICKLING IN FOR THE NEXT SEVERAL WEEKS THAT WERE
9 CONDITIONS THAT THEY WERE SUPPOSED TO HAVE SATISFIED
10 AND REPRESENTED THAT THEY HAD SATISFIED ON JULY
11 NINETEENTH OF TWO THOUSAND AND SIX. NEVERTHELESS,
12 WESCOTT, AFTER BEING IN MATERIAL BREACH OF THE
13 CONTRACT, WRITES TO D. R. HORTON AND SAYS, BECAUSE
14 WE'VE SATISFIED THE CONDITIONS ON JULY NINETEENTH, YOU
15 ARE NOT OBLIGATION -- AND WE'VE DONE THAT FOR ALL
16 THREE PHASES, WE'VE KIND OF ACCELERATED AND BUNCHED
17 ALL OF OUR PERFORMANCE AT ONE TIME INSTEAD OF DOING IT
18 IN PHASES AS THE CONTRACT HAD INDICATED, WE ARE NOW
19 READY TO CONVEY ALL ONE HUNDRED AND TEN LOTS TO YOU.
20 AND THEY SAID, YOU DO THIS WITHIN TWENTY DAYS OF JULY
21 NINETEENTH, OTHERWISE YOU WILL BE IN DEFAULT OF THE
22 CONTRACT. LIKE I SAID, AFTER JULY NINETEENTH THEY
23 CONTINUED TO HAVE THINGS TRICKLE IN THE DOOR. AND ON
24 AUGUST ELEVENTH, THE GENERAL COUNSEL FOR D. R. HORTON
25 WROTE AND SAID, WE JUST GOT EVERYTHING THAT YOU

1 REPRESENT YOU GAVE US ON JULY NINETEENTH AS OF THE
2 MORNING OF AUGUST ELEVENTH. AND THE CONTRACT, AGAIN
3 THE AMENDMENTS OF THE CONTRACT INDICATES THAT D. R.
4 HORTON HAS TWENTY DAYS TO REVIEW THOSE MATERIALS TO
5 SEE IF WHAT WESCOTT TOLD THEM THEY HAD DONE WAS, IN
6 FACT, REALLY DONE. AND SO, MR. BAGWELL, IN HIS LETTER
7 OF AUGUST ELEVENTH, SAYS, THE EARLIEST THAT WE WOULD
8 HAVE TO CLOSE ON ANYTHING WOULD BE AUGUST THIRTY-
9 FIRST, TWENTY DAYS POST AUGUST ELEVENTH. THE EARLIEST
10 WE WOULD HAVE TO CLOSE WOULD BE AUGUST THIRTY-FIRST.
11 AND SO, WHAT WE PROPOSED WAS THAT THE PARTIES ENTER AN
12 AMENDMENT TO EXTEND THE DATES, JUST LIKE THE CONTRACT
13 SAYS. WHEN WESCOTT IN BREACH OF THE CONTRACT D. R.
14 HORTON CAN EITHER TERMINATE THE CONTRACT OR THEY CAN
15 EXTEND THE DATES. AND SO, THAT'S EXACTLY WHAT HE
16 OFFERED TO DO. AND IF YOU WOULD LOOK AT ATTACHMENT G
17 TO OUR MEMORANDUM, IT'S THE LETTER THAT'S IN DISPUTE,
18 AND INDICATES THAT HE PROPOSED THE TAKE DOWN SCHEDULE
19 JUST AS THE CONTRACT ALLOWED. BUT WESCOTT TOOK THE
20 POSITION, WE'RE NOT EVEN GOING TO RESPOND TO IT, WE
21 WANT TO ENFORCE WHAT WE'VE GOT, AND WE'RE GOING TO
22 REQUIRE YOU TO TAKE DOWN ALL ONE HUNDRED AND TEN LOTS.
23 WELL, THE PARTIES CONTINUED TO NEGOTIATE FROM THAT
24 POINT THROUGH THE FALL OF TWO THOUSAND AND SIX ABOUT
25 HOW TO MAKE THIS THING WORK OUT. AND WESCOTT TOOK THE

1 POSITION THAT THE RIGHT TO CURE NOTICE IN THE CONTRACT
2 WAS SATISFIED WHEN THEY SENT THEIR AUGUST LETTER AND
3 IT GAVE D. R. HORTON SIXTY DAYS AFTER WESCOTT DECLARED
4 THEM IN BREACH, OR IN DEFAULT, TO CURE. AND IF THEY
5 HADN'T CURED IN THAT SIXTY DAYS THEN ALSO WESCOTT HAD
6 ALL KINDS OF REMEDIES IN THE CONTRACT, WHICH WOULD BE
7 TO TERMINATE AND TO SELL TO SOMEBODY ELSE. AND IF
8 THAT'S WHAT THEY BELIEVED THEN THEY COULD HAVE TAKEN
9 THAT ACTION ON NOVEMBER FIRST, OR SOMETIME AROUND THAT
10 TIME OF TWO THOUSAND SIX, AND MOVE FORWARD. FOR
11 WHATEVER REASON, THEY DIDN'T DO THAT, AND THE PARTIES
12 CONTINUED TO NEGOTIATE. THEY NEGOTIATED THROUGH
13 JANUARY OF O-SEVEN, AND THEY CONTINUED TO EXCHANGE
14 PROPOSALS BACK AND FORTH, AND ALL PROPOSALS ARE
15 CONTAINED AS AN EXHIBIT TO OUR MEMORANDUM, I BELIEVE
16 IT'S ATTACHMENT O.

17 WHAT THE REAL ISSUE WAS, D. R.
18 HORTON WANTED TO BUY THIS PROPERTY, BUT THEY STILL
19 WANTED WESCOTT TO DO WHAT IT WAS REQUIRED TO DO UNDER
20 THE CONTRACT, AND THAT WAS TO SATISFY THE CONDITIONS
21 PRECEDENT. AND THE BIG ISSUE THAT CAME UP, AMONG
22 OTHERS, BUT THE BIG ISSUE THAT BECAME THE STUMBLING
23 BLOCK WAS WESCOTT'S FAILURE TO CERTIFY THAT THE PADS
24 THAT WERE BUILT FOR D. R. HORTON TO BUILD ON WERE
25 COMPACTED TO NINETY-FIVE PER CENT COMPACTION WITH TWO

1 THOUSAND POUNDS PER SQUARE FOOT. AND WE SUBMITTED AN
2 AFFIDAVIT OF BILL WRIGHT WITH WRIGHT, PADGETT AND
3 CHRISTOPHER, WHO IS THE PRINCIPAL ENGINEER THAT
4 WESCOTT WAS USING THROUGHOUT THE PROJECTS THAT SAYS,
5 WRIGHT, PADGETT AND CHRISTOPHER NEVER PROVIDED
6 COMPACTION TESTS. AND EVEN IF THEY HAD, THAT THOSE
7 COMPACTION RESULTS WOULD NOT BE VALID ON JULY
8 NINETEENTH OF TWO THOUSAND SIX, OR ANY DATE
9 THEREAFTER, BECAUSE IF YOU DO A COMPACTION TEST ON A
10 PAD AND THEN THAT MUCH TIME TRANSPIRES AFTER IT DUE TO
11 RAIN EVENTS OR ANY WEATHER EVENTS, THAT COMPACTION
12 RESULT THAT THEY MAY HAVE CERTIFIED AT SOME POINT IS
13 NO LONGER VALID. AND SO, IN HIS AFFIDAVIT HE ATTACHES
14 WHAT WRIGHT, PADGETT, CHRISTOPHER PROVIDED, THAT WAS
15 IN MAY OF TWO THOUSAND SIX. AND IT SAID THAT THE
16 BEARING CAPACITY OF THE FOUNDATIONS WOULD SUPPORT TWO
17 THOUSAND POUNDS PER SQUARE FOOT, BUT THE THOSE
18 CERTIFICATIONS NEVER REFERENCED COMPACTION, AND THEY
19 ARE TWO TOTALLY DIFFERENT EFFECTS. AND HE MAKES IT
20 VERY CLEAR. AND TO ADD STRENGTH TO HIS CREDIBILITY
21 TOMMY HAWKINS, WHO IS THE MAJORITY SHAREHOLDER OF THE
22 LLC, INDICATED THAT HE WOULDN'T DISPUTE WHAT MR.
23 WRIGHT WOULD SAY. AND SO, THROUGHOUT JANUARY OF TWO
24 THOUSAND SEVEN D. R. HORTON IS SAYING, LOOK, WE WANT
25 TO CLOSE ON ALL ONE HUNDRED AND TEN LOTS. WE'RE

1 WILLING TO GIVE YOU A PREMIUM ON THE PER LOT PRICE,
2 BUT WE WANT TO BE SURE THAT YOU HAVE SATISFIED THE
3 CONDITIONS, AND YOU'VE NOT GIVEN US PROOF THAT YOU'VE
4 DONE THIS COMPACTION TESTING. SO, THESE EXCHANGES
5 WOULD GO BACK AND FORTH. D. R. HORTON WOULD SEND ONE
6 THAT WOULD SAY, YOU NEED TO GIVE US THESE COMPACTION
7 RESULTS. WESCOTT WOULD SEND A DRAFT BACK AND INDICATE
8 THAT THEY HAD TAKEN IT OUT. D. R. HORTON WOULD SEND
9 IT BACK AND PLACE IT IN. AND THIS WENT BACK AND FORTH
10 THROUGH JANUARY, AND RESULTED IN AN E-MAIL FROM
11 WESCOTT'S PRIOR COUNSEL THAT SAID, THIS ISN'T AT ALL
12 WHAT WE AGREED TO, THIS COMPACTION REQUIREMENT THAT
13 YOU'VE PLACED IN THIS AMENDMENT THAT WE'RE GETTING
14 READY TO CLOSE ON. SO, MR. SHEDDERLY RESPONDS AND
15 SAYS, WE'VE BEEN TALKING ABOUT THIS SINCE THE
16 BEGINNING, AND IT'S A REQUIREMENT, AND IT'S SOMETHING
17 THAT WE'RE GOING TO REQUIRE TO CLOSE ON THIS PROPERTY.
18 WE'RE ENTITLED TO ENFORCE OUR CONTRACT, AND THAT'S
19 WHAT WE'RE GOING TO DO. WHAT DOES TOMMY WANT TO DO,
20 MR. HAWKINS, WANT TO DO? THAT'S THE E-MAIL EXCHANGE.
21 THERE WAS NO RESPONSE TO THAT, AND WESCOTT, FOR
22 WHATEVER REASON, SHOWED UP FOR THE CLOSING. D. R.
23 HORTON DIDN'T HAVE ANY BELIEF THAT THERE WAS GOING TO
24 BE A CLOSING BECAUSE THEY HAD NEVER RECEIVED ANY
25 RESPONSE FRO WESCOTT ON THEIR POSITION. MR. SMITH,

1 AND THE EXCERPTS FROM HIS DEPOSITION ARE IN OUR BRIEF,
2 CALLED MR. SHEDDERLY AND SAYS, WHAT'S GOING ON, WHY
3 AREN'T YOU HERE? AND MR. SHEDDERLY SAID, THE
4 COMPACTION ISSUE HAS NEVER BEEN RESOLVED. AND WHEN
5 QUESTIONED ABOUT THAT WITH MR. SMITH, HE SAID THAT IT
6 WAS CLEAR THAT THAT WAS ALWAYS D. R. HORTON'S
7 POSITION, AND THAT HE UNDERSTOOD THAT, AND THAT MR.
8 SHEDDERLY HAD BEEN TELLING HIM THAT WAS D. R. HORTON'S
9 POSITION FOR THIRTY PLUS DAYS. AND SO, THAT WAS THE
10 END OF THE NEGOTIATIONS OR DISCUSSION AMONG THE
11 PARTIES.

12 BECAUSE THEY COULDN'T GET A
13 MEETING OF THE MINDS TO EXTEND THE DATES, AS WAS D. R.
14 HORTON'S RIGHT, D. R. HORTON WANTED THIS PROPERTY AND
15 FILED A LIS PENDENS AGAINST WHO THEY THOUGHT WAS THE
16 OWNER, WESCOTT. THAT'S WHO THEY HAD BEEN DEALING
17 WITH, THAT'S WHO THEY HAD A CONTRACT WITH, SO THEY
18 FILED A LIS PENDENS, AND IN COMPLIANCE WITH THE
19 STATUTE THEY FILED A COMPLAINT WITHIN TWENTY DAYS
20 AGAINST WESCOTT FOR BREACH OF CONTRACT. IN RESPONSE,
21 WESCOTT FILED A CLAIM FOR BREACH OF CONTRACT OF THEIR
22 OWN FOR FRAUD, FOR UNFAIR TRADE PRACTICES, AND SLANDER
23 OF TITLE. THERE WAS A LITTLE BIT OF DISCOVERY THAT
24 WAS DONE AND A MOTION FOR SUMMARY JUDGEMENT FILED ON
25 ALL THOSE CAUSES OF ACTION. YOU MAY REMEMBER THAT THE

1 ATTORNEYS, THE ORIGINAL ATTORNEYS CAME IN AND MR.
2 SMITH INDICATED, WELL, I'M GOING TO BE A WITNESS, I
3 CAN'T ARGUE THIS, AND YOU RELIEVED THEM AND NOW I'M
4 HERE.

5 WE CONTINUED ON WITH DISCOVERY AND
6 LEARNED THAT IN DECEMBER OF TWO THOUSAND AND SIX, WHEN
7 THESE NEGOTIATIONS WERE GOING ON BETWEEN D. R. HORTON
8 AND WESCOTT, THAT WESCOTT SOLD THE PROPERTY TO TOMMY
9 HAWKINS. SO, NOW TOMMY HAWKINS OWNS THE PROPERTY
10 DURING THIS NEGOTIATION IN JANUARY OF TWO THOUSAND AND
11 SEVEN, AND THE LIS PENDENS THAT D. R. HORTON FILED WAS
12 AGAINST WESCOTT. WE ALSO LEARNED, WE DIDN'T KNOW THIS
13 PRIOR TO DISCOVERY, THAT IN NOVEMBER OF TWO THOUSAND
14 SIX, WHEN THE DISPUTE WAS ONGOING, THAT WESCOTT HAD
15 TWO OFFERS FROM K.V. HOMES TO PURCHASE THE PROPERTY,
16 AND THOSE OFFERS WERE IN EXCESS OF WHAT D. R. HORTON
17 HAD AGREED TO PAY. SO, IT'S PRETTY CLEAR THAT WESCOTT
18 SAID, HEY, WE CAN GO AND MAKE ANOTHER FIVE THOUSAND
19 DOLLARS PER LOT. D. R. HORTON'S CONTRACT SAID, WE'LL
20 PAY YOU TWENTY-FOUR THOUSAND FIVE TO TWENTY-FIVE
21 THOUSAND FIVE PER LOT, TIMES A HUNDRED AND TEN, ABOUT
22 TWO POINT SIX MILLION DOLLARS. WESCOTT HAD OFFERS FROM
23 K. V. HOMES, THE FIRST ONE WAS FOR THIRTY THOUSAND AND
24 THE SECOND ONE WAS FOR THIRTY-THREE THOUSAND DOLLARS A
25 LOT. SO, THREE TO THREE POINT THREE MILLION DOLLARS,

1 OR EVEN MORE THAN THAT. AND SO, THEY COULD HAVE
2 ENTERED THOSE CONTRACTS. IF THEY FELT THEY WERE RIGHT,
3 IF D. R. HORTON HAD BREACHED THE CONTRACT, AND HAD
4 GIVEN THEM NOTICE AND THEY HAD GIVEN THEM SIXTY DAYS
5 NOTICE TO CURE, WESCOTT COULD HAVE SOLD THAT PROPERTY
6 IN NOVEMBER. THEY DECIDED NOT TO. THAT WAS THEIR OWN
7 VOLITION. THERE WAS NO ALLEGATION OF A LIS PENDENS,
8 THERE WAS NO LAW SUIT FILED, THERE WAS NOTHING THAT
9 WOULD HAVE RESTRICTED THEM, IF THEY THOUGHT THEY
10 RIGHT, FROM DOING THAT.

11 IN FEBRUARY, AFTER NEGOTIATIONS
12 BROKE DOWN AND THIS DISCUSSION BETWEEN THE ATTORNEYS
13 TOOK PLACE, D. R. HORTON DID FILE A LIS PENDENS
14 AGAINST WESCOTT. BUT NOW TOMMY HAWKINS OWNS THE
15 PROPERTY. AND MR. HAWKINS, THESE ARE ATTACHED AS
16 EXHIBITS AS WELL, RECEIVED ANOTHER OFFER FROM K. V.
17 HOMES FOR EVEN MORE MONEY PER LOT, AND THEN,
18 SUBSEQUENT TO THAT, RECEIVED AN OFFER FROM JESCO,
19 ANOTHER DEVELOPER, FOR THIRTY-FIVE THOUSAND DOLLARS
20 PER LOT. THERE WAS NOTHING THAT WOULD HAVE RESTRICTED
21 HIM FROM SELLING THAT PROPERTY K. V. HOMES OR TO
22 JESCO, OTHER THAN HE DIDN'T THINK IT WAS THE RIGHT
23 THING TO DO BECAUSE OF THE DISPUTE BETWEEN D. R.
24 HORTON AND WESCOTT. BUT THAT WAS BY HIS OWN VOLITION,
25 IT HAD NOTHING TO DO WITH D. R. HORTON FILING THE LIS

1 PENDENS. THERE'S NO TESTIMONY THAT YOU WILL HEAR
2 TODAY, NO AFFIDAVITS, NO ALLEGATIONS FROM K. V. HOMES
3 OR JESCO OR ANYBODY ELSE THAT THE REASON THEY DIDN'T
4 BUY THIS PROPERTY FROM WESCOTT OR TOMMY HAWKINS WAS
5 BECAUSE OF THE LIS PENDENS OR THE LAW SUIT OR ANY
6 DISPUTE OVER THE PROPERTY. THE DECISION, AS THEY
7 TESTIFIED, WAS THAT WESCOTT AND TOMMY HAWKINS BELIEVED
8 THAT THEY SHOULDN'T DO IT. BUT AGAIN, IF THEY WERE
9 RIGHT, IF D. R. HORTON BREACHED THE CONTRACT, THEY
10 COULD DO WHATEVER THEY WANT WITH IT, AND IF THEY
11 TURNED OUT TO BE WRONG THEN THEY SUFFER SOME
12 CONSEQUENCES.

13 SO, I THINK THAT BRINGS US TO
14 TODAY, THAT -- WELL, ACTUALLY, WHEN WE CAME LAST TIME
15 THERE WAS DISCUSSION ABOUT AN AMENDMENT. WE AMENDED
16 OUR CONTRACT TO CLEAN UP WHAT REMEDIES THAT WE SAW,
17 AND IN RESPONSE WESCOTT FILED SOME ADDITIONAL COUNTER-
18 CLAIMS, ONE FOR ABUSE OF PROCESS, ONE FOR MALICIOUS
19 PROSECUTION, ONE FOR BREACH OF CONTRACT ACCOMPANIED
20 BY A FRAUDULENT ACT, AND ONE FOR INTENTIONAL
21 INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE IS
22 WHAT THEY CALLED IT, I THINK WE REFER TO IT AS
23 INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL
24 RELATIONS, BUT IT'S THE SAME BODY OF LAW THAT WOULD
25 APPLY TO THAT. AND IN ADDITION, TOMMY HAWKINS WAS

1 NAMED AS A COUNTER-CLAIMANT, AND ASSERTED ALL THOSE
2 CAUSES OF ACTION, THE ORIGINAL CAUSES OF ACTION AND
3 ALL THE NEW CAUSES OF ACTION AGAINST D. R. HORTON.
4 AND JUST ON ITS FACE THAT'S A LITTLE ABSURD IN THAT D.
5 R. HORTON AND TOMMY HAWKINS DON'T HAVE A CONTRACT SO
6 THEY DON'T HAVE A BREACH OF CONTRACT. D. R. HORTON
7 NEVER SERVED ANY PLEADINGS, LIS PENDENS, ANYTHING
8 AGAINST TOMMY HAWKINS, SO THERE CAN'T BE SLANDER OF
9 HIS TITLE, THERE CAN'T BE ABUSIVE PROCESS, THERE CAN'T
10 BE MALICIOUS PROSECUTION, THERE CAN'T BE BREACH OF
11 CONTRACT ACCOMPANIED BY A FRAUDULENT ACT, BECAUSE D.
12 R. HORTON AND TOMMY HAWKINS HAVE NO RELATIONSHIP.

13 TO ADDRESS THEIR CAUSES OF ACTION
14 THE FIRST ONE I'LL ADDRESS IS SLANDER. THE CASE LAW
15 IS CLEAR, THERE'S A CASE CALLED PONDS PLACE, IT'S
16 CITED IN OUR BRIEF, THAT GIVES THE SAME PRIVILEGE TO
17 FILING A LIS PENDENS AS TO ANY OTHER PLEADING. FOR
18 EXAMPLE, I COULD FILE A COMPLAINT AND MAKE ALL KINDS
19 OF SLANDEROUS ALLEGATIONS AGAINST A DEFENDANT BUT THAT
20 DOES NOT GIVE RISE TO A CAUSE OF ACTION EVEN IF THOSE
21 ALLEGATIONS ARE PROVED TO BE FALSE. AND SO, WE HAVE
22 NOTHING DIFFERENT HERE THAT -- D. R. HORTON FILED THIS
23 LIS PENDENS BECAUSE THEY HAD AN ABSOLUTE INTEREST IN
24 THIS PROPERTY AND WANTED TO PROTECT THAT INTEREST, AND
25 THAT'S WHAT YOU DO WHEN YOU HAVE A DISPUTE OVER A

1 PIECE OF PROPERTY. AND SO, THE COURTS HAVE SAID THAT,
2 YOU HAVE AN ABSOLUTE PRIVILEGE TO FILE A LIS PENDENS,
3 EVEN IF YOU MAY BE WRONG. AND THAT'S NOT GOING TO
4 CREATE A CAUSE OF ACTION.

5 THE COURT: IS IT ABSOLUTE OR
6 CONDITIONAL?

7 MR. HALDRUP: IT'S ABSOLUTE, YOUR
8 HONOR.

9 THE COURT: OKAY.

10 MR. HALDRUP: THE PONDS PLACE CASE
11 THAT WAS CITED, THERE WAS A PIECE OF PROPERTY THAT HAD
12 SOME RESTRICTIONS ON IT, AND A GROUP OF OWNERS
13 CONTESTED THE CHANGING OF THE REQUIREMENT OF THE
14 NEIGHBORHOOD THAT YOU HAD TO BUY IN FIVE ACRE CHUNKS,
15 AND THAT THE OWNERS OF THE PROPERTY WANTED TO REDUCE
16 IT TO ONE ACRE CHUNKS. AND SO, THOSE PEOPLE THAT HAD
17 BOUGHT THINKING THEY WERE GOING TO LIVE IN A
18 NEIGHBORHOOD THAT HAD A BUNCH OF LARGE PARCELS
19 CONTESTED AND FILE A LIS PENDENS ON THE PROPERTY AND
20 NAMED THE OWNER OF THE PROPERTY FOR SLANDER OF TITLE.
21 THE COURT DETERMINED THAT THE REDUCTION IN THE LOT
22 SIZE WAS APPROPRIATE BECAUSE THE MAJORITY OF THE HOME
23 OWNERS HAD AGREED TO IT. SO, THE OWNERS HAD THE
24 RIGHT, THEY HAD FOLLOWED THEIR DECLARATIONS AND HAD
25 AMENDED, AND SO, IT WAS TURNED OUT THAT THEY WERE

1 RIGHT. AND SO, THE LOWER COURT ORDERED THE LIS
2 PENDENS RESOLVED. AND THEN IN RESPONSE TO THAT PONDS
3 PLACE FILED A NEW ACTION FOR SLANDER OF TITLE, AND THE
4 COURT SAID THAT POND PLACE, THOSE OWNERS WERE CORRECT.
5 BUT THE COURT OF APPEALS REVERSED HOLDING A LIS
6 PENDENS IS ENTITLED TO THAT SAME ABSOLUTE PRIVILEGE.
7 REGARDLESS, THERE IS A BASIS FOR D. R. HORTON'S FILING
8 THIS LIS PENDENS, AND THAT IS BECAUSE OF THEIR
9 INTEREST IN THIS LAND. NOT ONLY DID THEY HAVE AN
10 INTEREST IN THE LOTS, BECAUSE THAT'S WHAT THEIR
11 CONTRACT SAID, THEY HAD ALSO POSTED A BOND ON THIS
12 PROPERTY AND WERE OBLIGATED TO THE CITY OF NORTH
13 CHARLESTON TO MAKE SOME IMPROVEMENTS TO THE PROPERTY,
14 AND THE CITY OF NORTH CHARLESTON COULD COME BACK AND
15 SAY, YOU HAVEN'T PUT UP THE TREES AND DONE WHAT YOU
16 WERE SUPPOSED TO DO. SO, THEY STILL HAD AN OBLIGATION
17 TO THE CITY OF NORTH CHARLESTON. THEY ALSO HAD BUILT
18 A AMENITY CENTER IN THE AREA AND HAD ALLOCATED SOME OF
19 THE SALE PROCEEDS FROM THIS PROJECT TO HELP COVER THE
20 COST OF THAT AMENITY CENTER. SO, THEY HAD AN ABSOLUTE
21 INTEREST, WHETHER IT WAS A PRIVILEGE OR NOT. NOW, I
22 THINK, I HAVEN'T READ THE MOST RECENT MEMORANDUM, BUT
23 IN THE FIRST MEMORANDUM WESCOTT HAD CITED THE PIDZERK
24 CASE AND THAT IS, TOTALLY DOESN'T APPLY BECAUSE THE
25 ARE TOTALLY DIFFERENT. SOMEBODY HAD POSTED A BLOG AND

1 DEFAMED OR SLANDERED SOMEBODY IN THAT BLOG, AND THE
2 PERSON THAT WAS SLANDERED FILED A LIS PENDENS AGAINST
3 THE BLOGGER'S CONDOMINIUM. AND OF COURSE, THAT
4 DOESN'T HAVE ANY RELATIONSHIP TO WHAT YOUR COMPLAINT
5 ABOUT THE BLOG SAYS. AND SO, YOU NEED TO IMMEDIATELY
6 REMOVE YOUR LIS PENDENS, AND IF YOU DON'T THERE WILL
7 BE SANCTIONS, AND THERE WERE. BUT THIS IS TOTALLY
8 DIFFERENT. AND SO, FROM THE SLANDER STANDPOINT, YOUR
9 HONOR, THERE AREN'T REALLY ANY FACTS IN DISPUTE.
10 THERE IS A CONTRACT DISPUTE BETWEEN THE PARTIES. D.
11 R. HORTON SAYS WESCOTT IS IN BREACH OF SATISFYING
12 THEIR CONDITIONS. WESCOTT SAYS, YOU SHOULD HAVE
13 CLOSED ON THE PROPERTY SOONER, AND YOU SHOULDN'T HAVE
14 FILED THE LIS PENDENS. BUT THAT IS EXACTLY WHAT A LIS
15 PENDENS IS FOR. AND SO, THE SLANDER OF TITLE ACTION,
16 THERE AREN'T ANY FACTS IN DISPUTE AND A SUMMARY
17 JUDGEMENT WOULD BE APPROPRIATE.

18 AS TO MR. HAWKINS, D. R. HORTON
19 NEVER FILED ANY LIS PENDENS AGAINST MR. HAWKINS, AND
20 NEVER SUED MR. HAWKINS, SO THERE CAN'T BE SLANDER IN
21 TITLE THERE.

22 AS FOR THE BREACH OF CONTRACT
23 ACTION, WESCOTT CLAIMS THAT HORTON'S FAILURE TO CLOSE
24 ON THE PROPERTY IS WHAT THEIR BREACH IS. AND IT'S NOT
25 DISPUTED THAT WESCOTT NEVER SATISFIED THE CONDITIONS

1 PRECEDENT, WHICH TRIGGER D. R. HORTON'S OBLIGATION.
2 MR. WRIGHT'S AFFIDAVIT, AND ENGINEER, SAYS THAT NO
3 COMPACTION TEST RESULTS HAD EVER BEEN SUBMITTED, AND
4 EVEN IF THEY HAD BEEN SUBMITTED IN THE PACKAGE THAT
5 WESCOTT GAVE TO HORTON, THAT THEY WOULDN'T BE VALID ON
6 JULY NINETEENTH OR ANY DATE THEREAFTER. AND SO,
7 FAILURE TO SATISFY THE CONDITIONS PRECEDENT IS
8 UNDISPUTED. THEY DON'T HAVE ANY WITNESS OR EXPERT
9 THAT CAN REFUTE THE FACT THAT D. R. HORTON WAS,
10 REQUIRED SOMETHING SET FORTH IN THE CONTRACT, AND THAT
11 WESCOTT FAILED TO PERFORM. SO, AS TO THAT CAUSE OF
12 ACTION THERE REALLY AREN'T ANY FACTS IN DISPUTE.
13 WESCOTT BREACHED, THEY HAVEN'T SHOWN ANYTHING TO
14 COUNTER MR. WRIGHT'S AFFIDAVIT, AND WE'D BE ENTITLED
15 TO SUMMARY JUDGEMENT ON THAT.

16 TOMMY HAWKINS DIDN'T HAVE A
17 CONTRACT WITH D. R. HORTON AND CERTAINLY HIS BREACH OF
18 CONTRACT CAN'T SURVIVE.

19 WESCOTT ORIGINALLY ASSERTED A
20 CAUSE OF ACTION FOR FRAUD WHICH THEY REMOVED IN THEIR
21 AMENDED COMPLAINT. ANOTHER CAUSE OF ACTION THAT THEY
22 HAVE RAISED IS UNFAIR TRADE PRACTICES. AND AGAIN, ALL
23 THESE THINGS HAVE A COMMON THEME, IF THEY SAY THAT
24 YOUR FAILURE TO CLOSE AND YOUR FILING A LIS PENDENS
25 CREATE SOME UNFAIR TRADE PRACTICE, CREATE SOME BREACH

1 OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT, CREATE
2 INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS,
3 BUT IT ALL GOES BACK TO NOT CLOSING AND FILING A LIS
4 PENDENS. AND D. R. HORTON, IT'S NOT DISPUTED, HAD A
5 BASIS TO NOT CLOSE BECAUSE THE CONDITIONS PRECEDENT
6 WEREN'T MET, AND THEY HAD AN ABSOLUTE RIGHT TO FILE A
7 LIS PENDENS. NOW, THE CONSEQUENCE OF THAT MAY, IN
8 FACT, BE THAT WESCOTT COULDN'T SELL IT TO SOMEBODY
9 ELSE. I AGREE THAT BY THEIR OWN ADMISSION, AND AS
10 WE'VE CITED IN THE BRIEF, THAT WAS THEIR DECISION.
11 THERE'S NO WITNESS THAT'S COME FORWARD AND SAID, THE
12 REASON I DIDN'T BUY THE PROPERTY IS BECAUSE OF D. R.
13 HORTON'S LAW SUIT OR BECAUSE OF D. R. HORTON'S LIS
14 PENDENS AGAINST WESCOTT OR ANYBODY ELSE, AND THEY HAVE
15 NOT COME FORWARD TO THE COURT TODAY TO DO THAT.
16 THEY'VE MADE THE ALLEGATION THAT THAT'S WHY THEY
17 DIDN'T SELL IT, BUT WHEN DEPOSED THEY'VE INDICATED
18 THAT THEY DECIDED THAT THEY WOULDN'T SELL IT TO
19 SOMEBODY ELSE BECAUSE OF THESE THINGS. BUT THAT
20 DOESN'T GIVE RISE TO AN UNFAIR TRADE PRACTICE CLAIM.
21 THIS IS, AGAIN, JUST SIMPLY A BREACH OF ACTION, AND
22 THE REMEDIES ARE SET FORTH IN THE CONTRACT. THESE ARE
23 SOPHISTICATED PARTIES THAT HAVE A LONG HISTORY
24 TOGETHER, AND HAD PERFORMED TRANSACTIONS IN THE PAST.

25 I THINK THAT I RECEIVED TODAY

1 NOTICE THAT THEY'VE NAMED, WESCOTT HAS NAMED A NEW
2 WITNESS WHO THEY SAY WILL SAY THAT HE HAD THE SAME
3 THING HAPPEN TO HIM, BUT THEY DON'T HAVE AN AFFIDAVIT
4 FROM HIM, AND THEY'VE ATTACHED A COMPLAINT FROM TWO
5 THOUSAND AND ONE THAT MAKES SIMILAR ALLEGATIONS
6 AGAINST D. R. HORTON. BUT THAT CASE WAS SETTLED,
7 THERE'S NO RULING, THERE'S NO FINDING, THERE'S NOTHING
8 THAT THEY'VE SUBMITTED THAT SAYS JUST BECAUSE SOMEBODY
9 EIGHT YEARS AGO MADE ALLEGATIONS THAT THEY HAVE ANY
10 BASIS OF FACT OR THAT THEY WOULD SUPPORT AND UNFAIR
11 TRADE PRACTICES CLAIM. NOW, YOU MAY CONSIDER THAT
12 TESTIMONY OR REFERENCE TO SOMEONE'S ALLEGED TESTIMONY
13 TODAY, BUT I DON'T THINK ANY OF THAT GETS IN AT TRIAL.

14 THE COURTS HAVE SAID IN SOUTH
15 CAROLINA THAT A SIMPLE BREACH OF CONTRACT DOES NOT
16 GIVE RISE TO AN UNFAIR TRADE PRACTICE. THESE PARTIES
17 ARE SOPHISTICATED PRIVATE PARTIES, AND IF THERE'S A
18 BREACH IF AFFECTS THEM BUT IT DOESN'T AFFECT THE
19 PUBLIC INTEREST, AND THAT'S ONE OF THE KEY ELEMENTS OF
20 AN UNFAIR TRADE PRACTICE CLAIM.

21 THE NEXT CAUSE OF ACTION THAT
22 THEY'VE RAISED IS ABUSIVE PROCESS. AGAIN IT GOES BACK
23 TO THE FILING OF A LIS PENDENS WHICH THEY HAD AN
24 ABSOLUTE PRIVILEGE TO FILE, AND THEY HAD A PROPER
25 MOTIVE IN FILING. THERE'S ALLEGATIONS THAT IT WAS

1 IMPROPER, THAT THEY NEVER WANTED TO CLOSE, BUT THERE'S
2 NOT ANY TESTIMONY OTHER THAN THEIR OWN WHERE THEY
3 SURMISE THAT. NOBODY FROM D. R. HORTON HAS SAID, WE
4 DON'T WANT TO CLOSE AND WE'RE NEVER GOING TO CLOSE.
5 AND SO, TO ESTABLISH A CLAIM FOR ABUSIVE PROCESS THEY
6 HAVE TO SHOW THAT THERE'S SOME ULTERIOR PURPOSE IN
7 WHAT D. R. HORTON, AND THERE WASN'T ANY. D. R. HORTON
8 WANTED TO BUY THE PROPERTY, WESCOTT REFUSED TO
9 ACKNOWLEDGE THEIR OBLIGATION TO SATISFY THE CONDITIONS
10 PRECEDENT, AND WHEN THAT HAPPENED D. R. HORTON
11 EXERCISED ITS REMEDY UNDER THE CONTRACT TO FILE THIS
12 LAW SUIT.

13 THE COURTS HAVE SAID IF THE
14 PURPOSE OF THE PROCESS IS TO GAIN ADVANTAGE WHICH IS
15 NOT LEGITIMATE THEN THERE MAY BE A CLAIM. BUT AGAIN,
16 THIS IS, THERE'S NO ALLEGATION THAT THIS WAS NOT
17 LEGITIMATE OTHER THAN WHAT THEY'VE FABRICATED IN THEIR
18 OWN MIND. NOBODY FROM D. R. HORTON AND NO OTHER
19 SOURCE, BY AFFIDAVIT OR OTHERWISE, HAS INDICATED THAT
20 THERE'S ANY ULTERIOR PURPOSE IN PURSUING LIS PENDENS
21 OR THIS CAUSE OF ACTION.

22 THE NEXT CLAIM IS -- WELL, JUST TO
23 GO BACK TO THAT. ABUSIVE PROCESS CAN'T APPLY TO MR.
24 HAWKINS, THEY'VE NEVER SERVED ANYTHING ON MR. HAWKINS.

25 MALICIOUS PROSECUTION REQUIRES

1 THAT SOMEONE BE CHARGED WITH A CRIME AND THEN
2 EXONERATED. THAT CAN'T APPLY HERE. THIS CASE ISN'T
3 OVER YET SO IT CAN BE -- EVEN IF IT APPLIED TO CIVIL
4 ACTIONS THEY HAVE TO BE FOUND EXONERATED FROM THE
5 CLAIMS THAT D. R. HORTON ASSERTED AGAINST WESCOTT OR
6 MR. HAWKINS. THEY'VE NOT ASSERTED ANYTHING AGAINST
7 MR. HAWKINS, AND WESCOTT'S NOT BEEN EXONERATED OR
8 FOUND IN THE RIGHT ON ANY CAUSE OF ACTION. AND BEFORE
9 YOU CAN EVEN ASSERT A CLAIM FOR MALICIOUS PROSECUTION
10 THE PROCESS HAS TO BE TERMINATED IN THEIR FAVOR.
11 AGAIN, THIS IS ONGOING, SO IT'S NOT RIPE YET, EVEN AS
12 TO WESCOTT, AND IT CAN'T APPLY TO MR. HAWKINS.

13 WE'RE GETTING NEAR THE END, WE
14 HAVE TWO MORE CAUSES OF ACTION. THE NEXT ONE IS A
15 BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.
16 ELEMENTS OF THAT, YOU HAD TO HAVE A BREACH, FRAUDULENT
17 INTENT RELATED TO THE BREACH, A FRAUDULENT ACT
18 ACCOMPANYING A BREACH. FAILURE TO DO SOMETHING LIKE
19 NOT CLOSING -- LET'S SAY THAT THEY WERE RIGHT, THAT D.
20 R. HORTON DECIDED AT THE LAST MINUTE, WE'RE JUST NOT
21 GOING TO CLOSE. EVEN IF THAT'S THE CASE THERE HAS TO
22 BE SOME FRAUDULENT INTENT IN DOING THAT. AND AGAIN,
23 THERE'S NO ALLEGATION, BY AFFIDAVIT OR OTHERWISE, THAT
24 WOULD INDICATE THAT THERE WAS ANY FRAUDULENT INTENT.
25 IN FACT, THE TESTIMONY IS ALL TO THE CONTRARY. D. R.

1 HORTON WANTED TO CLOSE ON THIS, WANTED TO ENFORCE
2 THEIR RIGHTS UNDER THE CONTRACT. WESCOTT REFUSED TO
3 SATISFY THEIR OBLIGATION OF THE CONTRACT AND THIS LAW
4 SUIT ENSUED. FAILURE TO DO SOMETHING IS NOT ENOUGH.
5 FAILURE TO CLOSE ON THE PROPERTY, EVEN AT THE LAST
6 MINUTE THEY DECIDED NOT TO DO IT, IS NOT ENOUGH. THE
7 FRAUD MUST BE OF AN EXISTING FACT, NOT PROMISES OR
8 STATEMENT AS TO FUTURE EVENTS WHICH WERE LATER
9 UNFULFILLED. SO, EVEN IF THE CONTRACT, AS IT DOES,
10 SAID, WE'LL CLOSE ON THIS WHEN YOU GET DONE DOING WHAT
11 YOU'RE SUPPOSED TO DO, IF THAT WAS THEIR INTENT, WHICH
12 IT WAS AS THEY EXHIBITED THROUGH THREE HUNDRED PLUS
13 ACRES AND ON THE FIRST EIGHTY-THREE LOTS OF THIS
14 PARCEL, THEN THEY MADE A PROMISE TO DO SOMETHING IN
15 THE FUTURE AND INTENDED TO FOLLOW THAT BUT FOR
16 WESCOTT'S FAILURE. AGAIN, MR. HAWKINS DIDN'T HAVE A
17 CONTRACT SO HE CANNOT HAVE A POSITIVE ACTION FOR
18 BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

19 FINALLY, INTENTIONAL INTERFERENCE
20 WITH THE CONTRACTUAL RELATIONS, THERE HAS TO BE
21 INTENTIONAL INTERFERENCE WITH WESCOTT'S POTENTIAL
22 CONTRACTUAL RELATIONSHIP. THE SECOND ELEMENT, THERE
23 HAS TO BE IMPROPER PURPOSE OR METHOD IN THAT
24 INTERFERENCE, AND IT HAS TO CAUSE INJURY. THERE'S NO
25 ALLEGATION THAT ANYBODY AT D. R. HORTON HAD ANY

1 KNOWLEDGE THAT WESCOTT WAS ENTERTAINING BID OR
2 RECEIVING BIDS OR PROPOSALS TO BUY THIS PROPERTY. SO,
3 THEIR ACTIONS COULDN'T HAVE INTERFERED WITH SOMETHING
4 THAT THEY DIDN'T KNOW ABOUT. THE SECOND ELEMENT, AN
5 IMPROPER PURPOSE OR METHOD, THE FILING OF LIS PENDENS
6 MAY HAVE THE CONSEQUENCE OF MAKING IT DIFFICULT FOR
7 WESCOTT TO SELL THAT PROPERTY, OR MR. HAWKINS TO SELL
8 THAT PROPERTY, BUT IT'S A LEGITIMATE PURPOSE, IT'S NOT
9 AN IMPROPER PURPOSE. THE LAW SAYS THAT YOU CAN FILE
10 LIS PENDENS IF YOU HAVE AN INTEREST IN LAND, AND
11 THAT'S EXACTLY WHAT D. R. HORTON WAS DOING. IF IT --
12 EVEN IF IT DID RESTRICT WESCOTT'S ABILITY OR TOMMY
13 HAWKINS'S ABILITY TO SELL THIS PROPERTY, AS I STATED
14 EARLIER, THEY MADE THE DECISION. THERE'S NOBODY THAT'S
15 COME FORWARD AND SAID, I WAS INTERFERED WITH, OR I
16 WOULD HAVE BOUGHT THAT PROPERTY BUT FOR D. R. HORTON'S
17 LIS PENDENS. I WOULD HAVE BOUGHT THAT PROPERTY BUT
18 FOR THIS LAW SUIT. NOBODY HAS COME FORWARD, NO THIRD
19 PARTY HAS COME FORWARD TO INDICATE THAT THAT
20 INTERFERED WITH ANY RELATIONSHIP. THEY'VE NOT EVEN
21 NAMED ANYBODY FROM K. V. HOMES OR JESCO, THE PARTIES
22 THAT WE HAVE LENGTHY CONTRACTS FROM. TWO OF THEM ARE
23 SIGNED BY K. V. HOMES. ALL IT REQUIRED WAS A
24 SIGNATURE BY WESCOTT, AND THAT WOULD HAVE BEEN A DONE
25 DEAL.

1 AGAIN, THIS IS A BREACH OF
2 CONTRACT CASE. YOU CAN DRESS IT UP AND ADD TO IT, AND
3 COMPLICATE THINGS AS MUCH AS YOU WANT BY MAKING BALD
4 ALLEGATIONS THAT DON'T HAVE ANY BASIS IN FACT. AND D.
5 R. HORTON DID EXACTLY WHAT IT WAS ENTITLED TO. IT
6 TRIED TO EXTEND THE DATES FOR CLOSING BECAUSE THIS WAS
7 ALL TRIGGERED BY WESCOTT'S MATERIAL BREACH OF THE
8 CONTRACT BY FAILING TO CONVEY ANY OF THE PROPERTY
9 WITHIN ANY OF THE TIME FRAMES INDICATED IN THE
10 CONTRACT. AND SO, WHAT D. R. HORTON WAS TRYING TO DO
11 WAS TO EXTEND THE DATES AND MAKE THIS DEAL HAPPEN.
12 BUT THEY WEREN'T GOING TO GIVE UP THEIR RIGHTS TO
13 REQUIRE WESCOTT TO DO WHAT IT WAS REQUIRED TO DO.
14 WESCOTT REFUSED TO DO IT, D. R. HORTON FILES THIS LIS
15 PENDENS AND THIS LAW SUIT. AND SO, I THINK THAT THERE
16 IS ENOUGH TODAY WITHOUT DOING FURTHER DISCOVERY THAT
17 YOU HAVE TO RULE ON THESE SUMMARY JUDGEMENT MOTIONS IN
18 FAVOR OF D. R. HORTON.

19 WE'VE ALSO FILED A MOTION TO
20 STRIKE WHICH ESSENTIALLY IS THE SAME THING. THE
21 CONTRACT IS CLEAR ON ITS FACE. WITHIN THE FOUR
22 CORNERS OF THE DOCUMENT IT INDICATES WHAT THE REMEDIES
23 OF THE PARTIES ARE, AND THOSE REMEDIES ARE, IN THE
24 EVENT OF D. R. HORTON'S BREACH THAT WESCOTT IS
25 ENTITLED TO RETAIN THE EARNEST MONEY THAT'S BEEN PAID

1 BY D. R. HORTON, AND THAT SINCE THAT IS THE SOLE AND
2 EXCLUSIVE REMEDY AND THE LANGUAGE IS CLEAR IN THE
3 CONTRACT, THEN ALL THESE OTHER CAUSES OF ACTION
4 OUTSIDE OF THAT REMEDY SHOULD BE STRICKEN. AND SO, IF
5 YOU DON'T RULE ON THE BREACH OF CONTRACT ACTION FOR
6 SUMMARY JUDGEMENT YOU SHOULD RULE TO STRIKE ALL OF THE
7 OTHER CAUSES OF ACTION AND JUST LEAVE BREACH OF
8 CONTRACT. BUT I THINK THAT THERE'S ENOUGH TO SHOW
9 THAT WESCOTT WAS IN MATERIAL BREACH OF THE CONTRACT IN
10 FAILING TO SATISFY THE CONDITIONS PRECEDENT, AND
11 THAT'S UNDISPUTED BY MR. WRIGHT'S AFFIDAVIT.

12 THE COURT: ALRIGHT. THANK YOU,
13 SIR.

14 YES, SIR.

15 MR. COOKE: THANK YOU, YOUR HONOR,
16 DAWES COOKE AND MICHAEL BARFIELD FOR WESCOTT, AND
17 BEHIND US HERE IS TIM FRALICK, AND AS I THINK IT WAS
18 MENTIONED OFF THE RECORD, MR. HAWKINS WOULD HAVE BEEN
19 HERE BUT HE'S IN THE HOSPITAL RIGHT NOW, AND HOPEFULLY
20 DOING WELL.

21 THE COURT: HE'S THE PATIENT, OR
22 HIS FATHER'S THE PATIENT?

23 MR. COOKE: HE IS THE PATIENT.

24 THE COURT: OKAY.

25 MR. COOKE: HE'S THE PATIENT,

1 HIMSELF.

2 AND YOUR HONOR SORT OF GOOD
3 NATUREDLY CHIDED US FOR NOT GIVING YOU A BRIEF SOONER,
4 AND WE ACTUALLY WOULD HAVE MADE MORE OF AN EFFORT BUT
5 WE DID KNOW THAT YOU ARE IN TRIAL THIS WEEK AND
6 THERE'S A FAIR AMOUNT OF MATERIAL IN THERE. AS FAR AS
7 THE EXHIBITS, MUCH OF IT YOU'VE ALREADY GOTTEN A
8 PREVIEW OF THAT IN THE EARLIER MEMORANDUM THAT WAS
9 SUBMITTED BEFORE THE AMENDMENTS TO THE COMPLAINT. BUT
10 I WOULD LIKE TO REVIEW SOME OF THE FACTS WITH YOU.

11 THE COURT: YES, SIR.

12 MR. COOKE: YOUR HONOR, AS WE WERE
13 PRETTY CANDID IN SAYING THE LAST TIME WE WERE HERE, WE
14 UNDERSTAND THAT AS A BREACH OF CONTRACT CASE A LOT OF
15 THEM THERE ARE LIMITATIONS IN DAMAGES THAT LORD KNOWS
16 FULL WELL THAT IT CAN ENTER INTO THIS CONTRACT AND
17 BREACH IT, AND ACCORDING TO THE CONTRACT ALL THEY'VE
18 GOT TO DO IS FORFEIT THEIR EARNEST MONEY WHICH IS A
19 MINIMAL AMOUNT HERE. AND SO, YOU KNOW, I THINK WE'RE
20 PRETTY STRAIGHTFORWARD IN SAYING THAT THAT'S WHY IN
21 COMMERCIAL -- COMMERCIAL TORT LAW HAS DEVELOPED
22 CERTAIN CAUSES OF ACTION THAT ALLOW YOU TO AVOID THOSE
23 CONTRACTUAL LIMITATIONS. AND I WOULD LIKE TO TALK A
24 LITTLE BIT ABOUT THE BREACH OF CONTRACT AS WELL AS
25 THESE TORT CAUSES OF ACTION THAT ALSO ARISE.

1 THE GRAVAMEN OF OUR CLAIM, YOUR
2 HONOR, IS THAT WESCOTT DID FULFILL THE CONDITIONS
3 PRECEDENT. THOSE THAT WERE NOT TIMELY FULFILLED WERE
4 PRIMARILY BECAUSE OF THE WAY THE CONTRACT WAS
5 STRUCTURED COULDN'T BE BY THE VERY NATURE. FOR
6 EXAMPLE, THE CONTRACT SAYS THAT THE CLOSING WILL OCCUR
7 AT THE LATTER OF JULY FIRST OF TWO THOUSAND SIX OR
8 WHEN ALL THE FINAL PLATS ARE RECORDED WITH, APPROVED
9 BY NORTH CHARLESTON. WELL, HORTON SUBMITTED THE
10 PLATS, HAD THE PLATS DONE, SUBMITTED IT TO NORTH
11 CHARLESTON, BUT DID IT AS ONE UNIT, WHEREAS, WHAT
12 THEIR INTENTION WAS, WAS TO TAKE IT DOWN IN PHASES.
13 AND SO, THEY KNEW, THEY KNEW THAT THERE WAS NO WAY
14 THAT NORTH CHARLESTON COULD APPROVE ALL OF THE PLATS
15 UNTIL ALL OF THE PROPERTY HAD BEEN TAKEN DOWN. SO,
16 YOU HAD A CATCH TWENTY-TWO BUILT IN. EVERYBODY
17 UNDERSTOOD THAT, BUT FOR THEM TO NOW SAY, WELL,
18 WESCOTT DIDN'T FULFILL THEIR CONDITIONS IS A BIT
19 DISINGENUOUS AND AT THE VERY LEAST CREATES A FACTUAL
20 ISSUE AS TO, AS TO WHETHER WESCOTT OR HORTON DID NOT
21 FULFILL THE CONDITIONS. BUT REGARDLESS OF WHO CAST
22 THE FIRST STONE IN THAT REGARD, THE ISSUE IS RESOLVED
23 IN WHAT WE HAVE MARKED AS EXHIBIT FIVE TO OUR
24 MEMORANDUM, AND I BELIEVE IT WAS ALREADY SUBMITTED
25 PREVIOUSLY, BUT THIS IS THE LETTER DATED AUGUST

1 ELEVEN, TWO THOUSAND SIX, FROM MR. BAGWELL, WHO I
2 BELIEVE WAS THE IN HOUSE ATTORNEY FOR D. R. HORTON, TO
3 STEVEN SMITH, WHO WAS THE ATTORNEY FOR WESCOTT. AND
4 THEY HAD SOME ARGUMENTS BACK AND FORTH ABOUT WHETHER
5 THE CONDITIONS WERE MET, WHEN ALL THE CONDITIONS WERE
6 MET. BUT HERE MR. BAGWELL HIMSELF STATES, "DEAR MR.
7 SMITH, I RECEIVED A COPY OF YOUR LETTER TO BRYAN
8 GARDNER DATED AUGUST TEN, TWO THOUSAND SIX, AND I'M
9 WRITING TO RESPOND ON BEHALF OF HORTON." NOW, THAT
10 LETTER OF AUGUST TEN OF TWO THOUSAND SIX WAS THE ONE
11 IN WHICH MR. SMITH STATED THAT ALL THE CONDITIONS HAD
12 BEEN FULFILLED AS OF, I THINK HE SAID JULY NINETEEN.
13 ALL THE DOCUMENTATION THAT YOU WANTED, EVERYTHING WE
14 WERE SUPPOSED TO DO. AND THE WAY THE CONTRACT READS
15 IS, ONCE YOU GET NOTICE OF THAT FULFILLMENT, THEN
16 HORTON HAS TWENTY DAYS OF DUE DILIGENCE TO SATISFY
17 ITSELF THAT, IN FACT, EVERYTHING WAS DONE, AND THEN
18 IT'S GOT TO CLOSE. SO, THAT LETTER OF AUGUST TEN WAS
19 INTENDED TO PUT THEM ON NOTICE THAT ALL THE CONDITIONS
20 WERE FULFILLED, AND YOUR CLOCK IS RUNNING NOW. TELL
21 US NOW, OR WITHIN THE NEXT TWENTY DAYS IF THERE'S ANY
22 CONDITION YOU DON'T THINK WE'VE SATISFIED. SO, MR.
23 BAGWELL WRITES BACK, AND HE DOESN'T ARGUE THAT THE
24 CONDITIONS AREN'T SATISFIED, HE ONLY ARGUES AS TO THE
25 DATE ON WHICH THEY WERE SATISFIED. HIS NEXT PARAGRAPH

1 SAYS, "THE CONDITIONS PRECEDENT TO CLOSING STATED IN
2 SECTION FIFTEEN OF THE CONTRACT WERE NOT SATISFIED
3 WITH REGARD TO THE TOWN HOUSE LOTS UNTIL THE AFTERNOON
4 OF AUGUST NINE, TWO THOUSAND SIX. WESCOTT MAY NOT
5 REQUIRE HORTON TO CLOSE ON THE PURCHASE OF ANY LOT
6 UNTIL AT LEAST TWENTY DAYS AFTER WESCOTT HAS PROVIDED
7 HORTON DOCUMENTATION AND CERTIFICATION OF SATISFACTION
8 OF ALL CONDITIONS PRECEDENT TO THE PURCHASE OF THAT
9 LOT. THE LAST OF THAT DOCUMENTATION AND CERTIFICATION
10 FOR THE TOWN HOUSE LOTS WAS RECEIVED ON THE MORNING OF
11 AUGUST TEN, TWO THOUSAND SIX. HORTON CANNOT BE IN
12 DEFAULT UNDER THE CONTRACT FOR FAILING TO CLOSE ON THE
13 PURCHASE OF ANY OF THE TOWN HOUSE LOTS UNTIL AUGUST
14 THIRTY-ONE, TWO THOUSAND SIX, AT THE EARLIEST." AND
15 HE GOES ON AND TALKS ABOUT VARIOUS OTHER ASPECTS OF
16 THE CONTACT. SO, BY HORTON'S OWN ADMISSION, ALL THE
17 CONDITIONS WERE SATISFIED, THEIR TWENTY DAY CLOCK
18 BEGAN TO RUN. AND AUGUST THIRTY-FIRST CAME AND WENT
19 WITHOUT ANY FURTHER CONDITIONS BEING IMPOSED OR
20 CONDITIONS BEING QUESTIONED. WHAT HAPPENED INSTEAD
21 WAS, HORTON SAID, ALL THOSE, EVEN IF ALL THOSE
22 CONDITIONS ARE SATISFIED, WE REALLY INTEND TO TAKE
23 THESE DOWN IN PHASES. NOW, WHAT HAD HAPPENED WAS,
24 IT'S TRUE, THE ORIGINAL CONTRACT DID PROVIDE FOR IT TO
25 BE TAKEN OUT IN PHASES, BUT THE VERY LAST WAS TO BE

1 DONE AS OF JULY FIRST OR WHEN THE PLATS WERE RECORDED.
2 AND SO, ALL THE INTERIM DEADLINES FOR TAKE DOWNS HAD
3 PASSED, AND BY AUGUST THIRTY-FIRST AT THE VERY LATEST
4 ALL THOSE DEADLINES WOULD BE PASSED. BUT WHAT HORTON
5 WANTED TO DO WAS SAY, NO, NO, NO, WE'RE GOING TO START
6 TAKING THEM DOWN ON AUGUST THIRTY-FIRST, BUT WE'RE
7 STILL GOING TO DO IT IN PHASES. WELL, THAT'S NOT WHAT
8 THE CONTRACT SAID. THE CONTRACT WAS DESIGNED TO
9 PERMIT PHASES, BUT ALL THE DEADLINES HAD PASSED, ALL
10 THE CONDITIONS HAD BEEN SATISFIED. SO, THEY HAD TO
11 BUY ALL OF THE LOTS AT THAT POINT. WHY IS THAT
12 IMPORTANT? WELL, IT TURNS OUT THAT THAT'S ABSOLUTELY
13 CRITICAL TO THE BUSINESS MODEL THAT HORTON USES,
14 BECAUSE THEY DON'T WANT TO USE THEIR OWN MONEY TO BUY
15 THESE LOTS. WHAT THEY WANT IS, THEY WANT TO TAKE DOWN
16 THE FIRST PHASE, BUT THEY'RE ALREADY PRE-SELLING THE
17 CONDO'S, AND THEY DON'T WANT TO HAVE TO CLOSE ON
18 ANOTHER SECTION UNTIL THEY'VE ALREADY SOLD ENOUGH
19 CONDO'S THAT HAVEN'T BEEN BUILT YET, BUT HAVE ALREADY
20 SOLD ENOUGH THAT THEY CAN USE THAT MONEY TO FUND THE
21 CONTRACTS. AND WHAT WE'VE DISCOVERY IN DISCOVERY IS
22 THAT THEY HAD ONLY SOLD ABOUT NINETEEN, PRE-SOLD ABOUT
23 NINETEEN OUT OF THE HUNDRED AND SIXTEEN OR SOME ODD
24 THAT THEY REALLY NEEDED TO SELL TO FUND THIS. SO,
25 THAT'S WHY WE BELIEVE THAT THEY KEPT COMING UP WITH

1 PRETEXTS OF WHY WE CAN'T CLOSE YET, YOU HAVEN'T MET
2 THIS CONDITION, YOU HAVEN'T MET THAT CONDITION. YOU
3 KNOW, ALL OF THAT WAS OKAY TO A POINT WITH WESCOTT.
4 THEY STILL WANTED TO SELL, AND THEY STILL WANTED THE
5 DEAL TO GO FORWARD. SO, EVEN AFTER AUGUST THIRTY-FIRST
6 CAME AND WENT, OR WHATEVER DATE THAT THEY THOUGHT,
7 THEY'RE STILL TALKING ABOUT, LET'S GET EVERYTHING
8 TOGETHER, LET'S MAKE SURE YOU'RE SATISFIED, AND LET'S
9 -- AT ONE POINT THERE WAS AN E-MAIL FROM HORTON IN
10 WHICH THEY SAY, OKAY, WE NOW HAVE THE FUNDING, WE NOW
11 HAVE THE FUNDING IN PLACE TO DO THIS TAKE DOWN. HE'S
12 LATER ADMITTED IN HIS DEPOSITION THAT, WELL, MAYBE
13 THEY DIDN'T REALLY HAVE THE FUNDING, MAYBE HE WAS JUST
14 SORT OF SAYING THAT TO ENCOURAGE THINGS TO MOVE ALONG.
15 BUT ON SEPTEMBER -- AND BY THE WAY, THAT WAS IN
16 EXHIBIT SIX TO THIS SAME MEMORANDUM, IS AN E-MAIL FROM
17 MR. FLANNERY TO MR. FRALICK HERE WHERE HE DOES SAY
18 THAT THEY'VE GOT THE FUNDING IN PLACE. EXHIBIT SEVEN
19 IS ANOTHER MEMORANDUM OF SEPTEMBER EIGHTEEN WHICH HAS
20 ATTACHED TO IT A PROPOSED SECOND AMENDED TO THE LANDS
21 PURCHASE CONTRACT. NOW, WE THINK THAT THAT'S AT LEAST
22 EVIDENCE SUFFICIENT TO DEFEAT SUMMARY JUDGEMENT, THAT
23 HORTON IS NOW ACKNOWLEDGING THAT THEIR CONTRACT HAS
24 EXPIRED, THAT THE TIMES HAVE RUN, THERE IS NO PENDING
25 CONTRACT AT THIS POINT THAT REQUIRES A PURCHASE OR A

1 SALE BECAUSE THEY'VE LET THEIR TIME RUN AND LET THE
2 TWENTY DAYS RUN, AND THEY DIDN'T CLAIM ANY CONDITIONS
3 HADN'T BEEN MET, BUT THEY NOW WANT ANOTHER AMENDED
4 CONTRACT. WESCOTT ACTUALLY WASN'T NECESSARILY OPPOSED
5 TO THAT, BUT WHAT THEY DECIDED WAS, WE'RE NOT GOING TO
6 USE THIS, LET THEM USE THIS AS A WAY TO STRING THIS
7 OUT FURTHER. WHAT WE'RE GOING TO DO IS, WE'RE GOING
8 TO GET EVERYTHING IN PLACE, WE'RE GOING TO GO TO THE
9 CLOSING TABLE, AND AT THE CLOSING TABLE IF EVERYTHING
10 IS THERE AND THE MONEY, AND THEY SHOW US THE MONEY,
11 WE'LL SIGN THAT CONTRACT THEN. WE'RE STILL WILLING TO
12 GIVE THEM THE TIME AND CLOSE THIS DEAL IF WE CAN DO
13 THAT. BUT THAT DIDN'T HAPPEN. THEY -- WESCOTT, I
14 MEAN, HORTON RAISED NEW CONDITIONS. THEY SAID, YOU
15 HAVEN'T PROVIDED EROSION CONTROL MEASURE APPROVED BY
16 THE CITY OF NORTH CHARLESTON, AND YOU HAVEN'T PROVIDED
17 STREET LIGHTS. WELL, THERE'S NOTHING IN THE CONTRACT
18 THAT SAYS THAT THEY HAVE TO DO THAT. THEY HAD
19 PROVIDED EROSION CONTROL, BUT THERE'S NOTHING THAT
20 SAYS YOU HAVE TO GET IT CERTIFIED BY THE CITY. S.C.E.
21 AND G. IS THE ONLY ONE THAT HAS AUTHORITY TO PUT
22 STREET LIGHTS IN PLACE, SO THAT WAS A FALSE CONDITION
23 AS WELL. I WOULD ARGUE, WE CONTEND THAT THERE WAS AT
24 LEAST AN ISSUE OF FACT OF THAT BEING A PRETEXT TO DRAG
25 OUT THE DEAL EVEN FURTHER SO THEY CAN CONTINUE TO TRY

1 TO PRE-SELL CONDO'S AND PRESUMABLY RAISE THE MONEY TO,
2 OR AT LEAST DECIDE WHETHER THEY WANT TO GO FORWARD OR
3 NOT. THERE WAS A MEETING ON DECEMBER TWENTY-FIRST OF
4 TWO THOUSAND SIX AT STEVEN SMITH'S OFFICE AT WHICH
5 THEY SAT DOWN AND SAID, ONCE AND FOR ALL, LET'S TRY TO
6 HAMMER OUT THESE DETAILS. ON, THEY HAD SCHEDULED A
7 CLOSING FOR, I BELIEVE IT WAS FEBRUARY SECOND OF TWO
8 THOUSAND SEVEN, AND IT WAS THEN, AT THE ELEVENTH HOUR,
9 THAT HORTON CAME UP WITH THIS COMPACTION ISSUE. NOW,
10 REMEMBER THAT IT WAS, BY THEIR OWN ADMISSION, ALL THE
11 CONDITIONS HAD BEEN MET WAY BACK IN AUGUST. ALL THE
12 CONDITIONS PRECEDENT HAD BEEN MET WAY BACK THEN, AND
13 NOW ALL OF A SUDDEN, MONTHS LATER, THEY COME UP WITH A
14 NEW REQUIREMENT, BECAUSE GUESS WHAT, IT MAY HAVE BEEN
15 COMPACTED BACK THEN WHEN WE WERE REQUIRING YOU TO
16 CERTIFY COMPACTION, BUT NOW ALL THESE MONTHS LATER,
17 IT'S BEEN RAINING AND THE LOTS PROBABLY AREN'T AS
18 COMPACTED, SO WE WANT YOU TO CERTIFY IT AGAIN. EVEN
19 THOUGH THERE'S NOTHING IN THE CONTRACT THAT SAYS THAT
20 THEY HAVE TO DO IT AGAIN. AND SO, THE CLOSING WAS
21 SCHEDULED AT THEIR ATTORNEY'S OFFICE, MR. DODD'S OVER
22 IN MOUNT PLEASANT, IT'S THEIR CLOSING ATTORNEY. MR.
23 SMITH SHOWS UP WITH HIS CLIENTS AND NOBODY SHOWS UP
24 FROM THE OTHER SIDE. MR. DODD SAYS, YOU KNOW, I DON'T
25 KNOW WHERE THEY ARE BUT I DON'T HAVE ANY MONEY IN MY

1 ESCROW ACCOUNT TO CLOSE THIS. AND MR. SMITH CALLS MR.
2 SHEDDERLY, I BELIEVE, AND MR. SHEDDERLY SAYS, WELL,
3 YOU NEVER AGREED TO DO THE COMPACTION SO WE'RE NOT
4 SHOWING UP, OR WORDS TO THAT EFFECT. AND THEN IT WAS
5 AT THAT POINT THAT THEY FILED A LIS PENS WHICH THEY
6 THEN ALLOWED TO EXPIRE WITHOUT FILING THE LAW SUIT
7 THAT YOU'RE SUPPOSED TO FILE WITH IT, AND THEN THEY
8 FILED ANOTHER ONE ONCE THEY WERE PREPARED TO FILE THIS
9 LAW SUIT. SO, THOSE ARE THE FACTUAL ALLEGATIONS.

10 YOU KNOW, IF THEY HAD SIMPLY LET
11 THE TIME RUN AND SAID, WE'VE CHANGED OUR MIND, WE'RE
12 GOING TO FORFEIT OUR EARNEST MONEY LIKE THE CONTRACT
13 SAYS, AND LET'S JUST SHAKE HANDS AND GO OUR OWN WAY,
14 THEN, YOU KNOW, WE WOULD BE LOOKING HARD AT JUST A
15 BREACH OF CONTRACT CAUSE OF ACTION. BUT WHAT OUR
16 CLIENT EARNESTLY BELIEVES, WHAT WE BELIEVE THAT WE CAN
17 SHOW TO A JURY, AND WE BELIEVE THAT THERE'S AT LEAST
18 AN ISSUE OF FACT, IS THAT IT WASN'T JUST THAT, IT WAS,
19 IT WAS A BREACH OF CONTRACT ACCOMPANIED BY A
20 FRAUDULENT ACT; THAT THE WAY THEY DID IT WAS
21 POTENTIALLY AN UNFAIR TRADE PRACTICE, AND I'LL ADDRESS
22 EACH OF THESE CAUSES OF ACTION; THAT BY FILING A LIS
23 PENS WHICH THEY DID NOT PERFECT, THAT'S THE FIRST LIS
24 PENS, THAT THEY DID NOT PERFECT BY ACTUALLY FILING A
25 LEGAL PROCEEDING WITH IT, THAT THAT DOES NOT ENJOY THE

1 PRIVILEGE THAT THE PONDS CASE SAYS YOU WOULD NORMALLY
2 HAVE FOR LIS PENS. SO, THAT IS A DEFAMATION, IT
3 FALSELY STATED THAT THERE'S AN ACTION TO BE PENDING
4 WHICH CHALLENGES TITLE, AND THERE WAS, IN FACT, NO
5 ACTION FILED FOR THAT LIS PENS. AND WE BELIEVE THAT
6 IT WAS A TORTUOUS INTERFERENCE WITH PROSPECTIVE
7 ECONOMIC ADVANTAGE, AND THAT IT WAS AN ABUSIVE
8 PROCESS. AND I'D LIKE TO ADDRESS EACH OF THOSE CAUSES
9 OF ACTION BRIEFLY IF I MAY.

10 THE COURT: YES, SIR.

11 MR. COOKE: FIRST, AS TO THE
12 SLANDER OF TITLE. THE PONDS CASE DOES -- THE PONDS
13 PLACE CASE DOES SAY THAT A PROPERLY FILED LIS PENS,
14 ONCE SUPPORTED BY A COMPLAINT THAT DOES CHALLENGE THE
15 TITLE TO THE PROPERTY IS PRIVILEGED, IT'S A JUDICIAL
16 COMMUNICATION. I THINK IT'S ABSOLUTELY PRIVILEGED,
17 JUST LIKE A SUMMONS AND COMPLAINT. THE COMPLAINT IS
18 FILED IN COURT, IT'S ABSOLUTELY JUDICIALLY PRIVILEGED.
19 BUT WE READ THE PONDS PLACE CASE AS BEING LIMITED TO A
20 SITUATION WHERE THE LIS PENS ACTUALLY IS A PART OF A
21 JUDICIAL PROCESS, THAT IS, THAT'S IT'S BEEN PERFECTED
22 BY THE FILING OF A SUMMONS AND COMPLAINT THAT DOES, IN
23 FACT, CALL INTO QUESTION THE TITLE OF THE PROPERTY.
24 BECAUSE IF YOU WILL RECALL, THE LIS PENS ITSELF IS
25 JUST A NOTICE TO THE WORLD THAT THERE IS AN ACTION

1 PENDING. AND ACTION HAS TO BE, OR WILL BE WITHIN
2 NINETY DAYS THAT DOES CALL INTO QUESTION THE TITLE TO
3 THE PROPERTY. OUR CONTENTION IS, IF YOU DON'T FILE
4 THAT ACTION THEN YOU'VE MADE A FALSE STATEMENT TO THE
5 PUBLIC, AND ALL IT IS IS A NOTICE, YOU'VE SAID, THERE
6 IS A CHALLENGE TO THE TITLE, IT WILL BE FILED WITHIN
7 NINETY DAYS, AND THAT DIDN'T HAPPEN. SO, THAT IS A
8 SLANDER OF TITLE, AND IT'S NOT PRIVILEGE ACCORDING TO
9 PONDS PLACE. ALL I CAN ASK THE COURT TO DO IS READ
10 PONDS PLACE BECAUSE THAT'S OUR READING OF THE CASE, IT
11 DOESN'T EXPLICITLY SAY THAT, BUT TO THE CONTRARY, IT
12 DESCRIBES THE LIS PENS IN THAT CASE AS ONE THAT WAS
13 PROPERLY FILED AND PERFECTED WITH ACCOMPANYING
14 COMPLAINT.

15 THE BREACH OF CONTRACT CAUSE OF
16 ACTION, I THINK I'VE ALREADY DESCRIBED THE FACTS TO
17 YOU. AT THE VERY LEAST, AT THE VERY LEAST, WITHOUT
18 SAYING WHO BREACHED WHAT FIRST, THE LETTER, WHICH IS
19 EXHIBIT FIVE, CONSTITUTES A WAIVER OF ANY FAILURE
20 WHATSOEVER BY WESCOTT TO MEET ANY CONDITIONS, BECAUSE
21 BY THEIR OWN STATEMENT THEY STARTED THEIR OWN TWENTY
22 DAY CLOCK RUNNING, AND THE TWENTY DAYS CAME AND WENT
23 WITHOUT THEM DECLARING A BREACH OF THE CONTRACT OR
24 ASKING, OR MAKING ANY DEMANDS OR RESCISSION THAT ANY
25 OTHER CONDITIONS BE MET. SO, AT THE VERY LEAST, YOU

1 HAVE AN ISSUE OF FACT AS TO WAIVER OF ANY UNMET
2 CONDITIONS BY WESCOTT.

3 ABUSIVE PROCESS. THE CONTENTION
4 WAS MADE THAT, NO, LIS PENS IS PRIVILEGED. WELL, NO,
5 THAT'S A SLANDER PRIVILEGE. IT'S NOT A PRIVILEGE OF
6 ABUSIVE PROCESS. AND WE'VE ACTUALLY CITED A CASE, LET
7 ME FLIP TO OUR SECTION, YEAH, IT'S BROADMORE
8 APARTMENTS OF CHARLESTON VERSUS HUROWITZ, REPORTED AT
9 THREE O SIX SOUTH CAROLINA FOUR EIGHTY-TWO, FOURTEEN
10 SOUTHEASTERN, SECOND, NINE. IT'S A NINETEEN NINETY-ONE
11 CASE. THE SUPREME COURT THERE EXPLICITLY HELD THAT
12 THE FILING OF A LIS PENS, EVEN WHEN ACCOMPANIED BY A
13 SUMMONS AND COMPLAINT, COULD CONSTITUTE AN ABUSIVE
14 PROCESS WHEN IT'S DONE WITHOUT JUSTIFICATION AND FOR
15 THE PURPOSE OF PREVENTING THIRD PARTIES FROM
16 PURCHASING THE SUBJECT PROPERTY. AND ACTUALLY, THAT'S
17 EXACTLY WHAT WAS INTENDED HERE. BY THEIR OWN
18 ADMISSION THEY WANTED TO PREVENT THE SALE TO A THIRD
19 PARTY, THAT'S WHY YOU FILE A LIS PENDENS. BUT THAT
20 CASE DID SAY THAT YOU COULD HAVE A CLAIM FOR ABUSIVE
21 PROCESS IF IT WAS DONE IMPROPERLY AND WITHOUT PROPER
22 CAUSE.

23 MALICIOUS PROSECUTION IS NOT
24 LIMITED TO CRIME. NUMEROUS CASES HAVE SAID THAT YOU
25 COULD HAVE A MALICIOUS PROSECUTION IN A CIVIL

1 PROCEEDING, AND THE POND PLACE CASE ITSELF I BELIEVE
2 SAYS EXACTLY THAT, YOUR HONOR. WE AGREE THAT AS TO
3 THE PENDING ACTION AND THE PENDING LIS PENS WE WILL
4 HAVE TO SHOW, WE WILL HAVE TO HAVE A FAVORABLE OUTCOME
5 OF THAT BEFORE WE CAN HAVE A CLAIM FOR MALICIOUS
6 PROSECUTION. BUT THE FIRST LIS PENS DID EXPIRE, AND
7 OUR CONTENTION IS THAT AT LEAST AN ISSUE OF FACT
8 EXISTS AS TO WHETHER THAT'S CONSIDERED A FAVORABLE
9 OUTCOME SUCH THAT THE FILING OF THAT AND NOT FOLLOWING
10 IT UP WITH A TIMELY LAW SUIT IS IN ITSELF A MALICIOUS
11 PROSECUTION.

12 BREACH OF CONTRACT ACCOMPANIED BY
13 FRAUDULENT ACT. YOUR HONOR, THE COURT, THE SUPREME
14 COURT HELD IN CONNOR VERSUS CITY OF FORREST ACRES,
15 THREE FORTY-EIGHT SOUTH CAROLINA FOUR FIFTY-FOUR, FIVE
16 SIXTY SOUTHEASTER, SECOND, SIX O SIX, TWO THOUSAND
17 TWO, THE SUPREME COURT SAID THAT VIEWING THE EVIDENCE
18 IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF THERE WAS
19 A QUESTION OF FACT AS TO WHETHER THE REASONS GIVEN BY
20 THE DEFENDANT FOR TERMINATING THE PLAINTIFF'S
21 EMPLOYMENT WERE PRETEXTURAL. AND THEN THERE'S ANOTHER
22 CASE, I BELIEVE JUDGE DUFFY FOLLOWED THAT SAME
23 APPROACH. IN OTHER WORDS, THE MERE ACT OF GIVING
24 PRETEXTURAL REASONS FOR NOT FOLLOWING THROUGH WITH THE
25 CONTRACT OR NOT OBEYING THE TERMS OF THE CONTRACT CAN

1 ITSELF BE THE FRAUDULENT ACT THAT SUPPORTS A CAUSE OF
2 ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY A
3 FRAUDULENT ACT. SO, IF OUR THEORY IS CORRECT, AND
4 THAT IS THAT D. R. HORTON WANTED TO STRING THIS
5 AGREEMENT OUT BECAUSE THEY WEREN'T SELLING, THEY
6 WEREN'T PRE-SELLING THE CONDO'S FAST ENOUGH TO FUND
7 THE TAKE DOWNS THAT THEY WANTED TO DO, AND THAT THEY
8 WERE COMING UP WITH PRETEXTS LIKE THE COMPACTION NEEDS
9 TO BE REDONE, OR YOU'RE SUPPOSED TO HAVE STREET
10 LIGHTS, OR YOU'RE SUPPOSED TO HAVE EROSION CONTROL
11 APPROVED BY NORTH CHARLESTON OR, YOU KNOW, WHATEVER,
12 WE WERE CONFUSED ABOUT WHETHER WE WERE SUPPOSED TO
13 SHOW UP AT THE CLOSING. IF THOSE ARE FOUND TO BE
14 PRETEXTURAL THEN THAT IS A BREACH OF CONTRACT
15 ACCOMPANIED BY FRAUDULENT ACT.

16 THE UNFAIR TRADE PRACTICE CAUSE OF
17 ACTION WE BELIEVE SURVIVES BECAUSE ONE OF THE ELEMENTS
18 OF THAT IS THAT IT HAS THE CAPABILITY OF REPETITION.
19 WE DON'T THINK THE CASES REQUIRE US TO SHOW THAT, IN
20 FACT, THEY HAVE REPEATED IT ON NUMEROUS OCCASIONS,
21 ALTHOUGH WE HOPE TO DO SO, BUT THEY'RE A NATIONAL HOME
22 BUILDER. THEY ENTER INTO CONTRACTS ALL OVER THE
23 COUNTRY ALL OF THE TIME. THEY'RE PROBABLY
24 SUBSTANTIALLY SIMILAR CONTRACTS AND SO THE CAPABILITY
25 OF REPETITION, AGAIN, IF THE JURY BELIEVES US THAT

1 THIS WAS A PLAN ON THEIR PART TO ENTER INTO A
2 CONTRACT, TO DELAY, TO DELAY, DELAY UNTIL THEY
3 ACQUIRED THE FUNDING THROUGH PRE-SALES OF CONDO'S OR
4 UNITS, THAT THAT COULD BE CAPABLE OF REPETITION
5 ELSEWHERE IN THE PUBLIC, THEREFORE DOES HAVE AN
6 INTEREST TO SUSTAIN A CAUSE OF ACTION FOR UNFAIR TRADE
7 PRACTICES.

8 INTENTIONAL INTERFERENCE WITH
9 PROSPECTIVE CONTRACTUAL ADVANTAGE. THERE'S NO
10 REQUIREMENT THAT WE'VE BEEN ABLE TO FIND THAT SAYS
11 THAT THEY HAVE TO KNOW OF A SPECIFIC CONTRACT THAT WAS
12 IN PLACE. THEY OBVIOUSLY KNEW THAT THERE WOULD BE
13 OTHER PROSPECTIVE PURCHASES SINCE OUR CLIENTS WERE IN
14 THE BUSINESS OF TRYING TO DEVELOP AND SELL THIS
15 PROPERTY. AND WHY ELSE WOULD THEY FILE A LIS PENDENS
16 BUT TO TIE THE PROPERTY UP? AND AGAIN, THIS WOULD BE
17 AN ENTIRELY DIFFERENT CASE IF THEY HAD JUST SAID,
18 LOOK, YOU KNOW, THIS ISN'T WORKING OUT FOR US, WE'RE
19 GOING TO WALK AWAY. BUT INSTEAD THEY SAID, NO, NOT
20 ONLY DO WE NOT WANT IT BUT WE DON'T WANT ANYBODY ELSE
21 TO HAVE IT EITHER. OR MORE LIKELY WHAT THEY WERE
22 SAYING WAS, LET'S PLAY A LITTLE BIT OF HARD BALL HERE
23 AND FORCE WESCOTT TO COME BACK TO THE TABLE AND
24 NEGOTIATE BETTER TERMS FOR US. AND WE BELIEVE THAT
25 THAT IS A TORTUOUS INTERFERENCE WITH PROSPECTIVE

1 CONTRACTUAL ADVANTAGE. SEVERAL TIMES MR. HAWKINS'S
2 TESTIMONY WAS QUOTED TO THE EFFECT THAT, WELL, WE
3 DON'T REALLY HAVE ANY PROOF OF ANYBODY ELSE THAT WOULD
4 HAVE BOUGHT THE PROPERTY AND THEREFORE YOU DON'T HAVE
5 ANY DAMAGES. WELL, I THINK THEY BELIEVE THAT BY THEIR
6 OWN EVIDENCE, THEY SAID THAT K. V. HOMES HAD A SIGNED
7 WRITTEN OFFER READY TO BE SIGNED BY WESCOTT. AND WHY
8 DIDN'T WESCOTT SIGN IT? WELL, BECAUSE THEY COULDN'T
9 CONVEY MARKETABLE TITLE. YOU KNOW, WHY WOULD THEY
10 HAVE ENTERED INTO A CONTRACT WITH K. V. HOMES IF THEY
11 WERE GOING TO HAVE TO BREACH BY NOT BEING ABLE TO
12 CONVEY MARKETABLE TITLE TO THEM? AND THAT WAS, THAT'S
13 EXACTLY THE TESTIMONY THAT MR. HAWKINS GAVE. HE SAID,
14 THERE WASN'T ANY POINT OF ME SIGNING A CONTRACT
15 BECAUSE I COULDN'T CONVEY CLEAR TITLE TO THEM AS LONG
16 AS THIS LIS PENS WAS OUT THERE. WE BELIEVE THAT THAT
17 CREATES AN ISSUE OF FACT AT LEAST AND THE JURY COULD
18 EITHER BELIEVE MR. HAWKINS OR NOT BELIEVE HIM THAT HE
19 HAD THAT DEAL IN THE WORKS AND WOULD HAVE BEEN ABLE TO
20 SELL THIS PROPERTY BUT FOR THE PENDENCY OF THE LIS
21 PENS, AND THEN LATER, THE LAW SUIT.

22 I THINK I'VE ACTUALLY COVERED EACH
23 CAUSE OF ACTION. HAVE I MISSED ANY OF THEM? SO,
24 THAT'S IT. WE THINK THAT THERE IS SUFFICIENT
25 EVIDENCE, BOTH CIRCUMSTANTIAL AND DIRECT, FROM WHICH A

1 JURY COULD CONCLUDE THAT, ONE, ALL THE CONDITIONS WERE
2 MET BY HORTON AND/OR WAIVED BY -- OR EXCUSE ME, WERE
3 MET BY WESCOTT AND/OR WAIVED BY HORTON, AND THAT
4 HORTON DELIBERATELY DELAYED AND CAME UP WITH PRETEXTS
5 TO NOT TIMELY CLOSE SIMPLY BECAUSE THEY WANTED TO BE
6 ABLE TO FUND IT WITH SALES AND NOT HAVE TO PUT ANY OF
7 THEIR OWN MONEY INTO THE CLOSING. AND THAT BEING THE
8 CASE, THESE ARE COMMERCIAL TORTS. THAT'S EXACTLY WHY
9 THE COURT RECOGNIZES UNFAIR TRADE PRACTICES, ABUSE OF
10 PROCESS, BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT
11 ACT, AND INTENTIONAL INTERFERENCE WITH PROSPECTIVE
12 CONTRACTUAL RELATIONS.

13 THE COURT: YES, SIR.

14 MR. HALDRUP: COULD I RESPOND?

15 THANK YOU.

16 JUST TO HIT ON SOME OF THE ISSUES
17 THAT WERE RAISED, I DIDN'T ADDRESS THE ONE PLAT FOR
18 ALL THREE PHASES BEING FILED WITH THE CITY OF NORTH
19 CHARLESTON BECAUSE IT DOESN'T MAKE ANY SENSE, THE
20 ARGUMENT THAT THEY MADE, WITH ALL DUE RESPECT. THE,
21 THE REQUIREMENT THAT IT PLATTED IN ONE PLAT WE DON'T
22 DISPUTE, BUT WHAT D. R. HORTON DID DO WAS TO POST A
23 BOND TO GIVE THE CITY OF NORTH CHARLESTON ASSURANCES
24 THAT IF IT'S, IF THE PROPERTY ON THAT PLAT WAS TAKEN
25 IN CHUNKS THAT THE CITY OF NORTH CHARLESTON KNOWS THAT

1 D. R. HORTON IS GOING TO MAKE SURE THAT THE CONDITIONS
2 PRECEDENT THAT WESCOTT MAY NOT HAVE PERFORMED YET ARE
3 GOING TO GET PERFORMED. THAT'S THE VERY PURPOSE IN
4 THE AMENDMENT, IF YOU LOOK AT ATTACHMENT BE, THERE'S A
5 PARAGRAPH THAT SAYS, "THE CITY OF NORTH CHARLESTON MAY
6 REQUIRE A BOND BE POSTED BY D. R. HORTON, AND D. R.
7 HORTON, IF THAT'S REQUIRED, WILL AGREE TO DO THAT.
8 AND IF D. R. HORTON DOES THAT, THEN WESCOTT IS GOING
9 TO REIMBURSE D. R. HORTON DOWN THE ROAD FOR POSTING
10 THAT BOND. BUT WHAT THAT'S GOING TO ALLOW THE PARTIES
11 TO DO IS TO TAKE THESE PARCELS IN CHUNKS, EVEN IF THE
12 PLAT DOESN'T DIVIDE IT BETWEEN THREE E ONE, THREE E
13 TWO, AND THREE E THREE. SO, THERE'S NO DISPUTE THAT
14 WE HAD TO FILE THE ONE PLAT THAT HAD TO GET APPROVED
15 AS ONE PLAT, BUT THE CITY OF NORTH CHARLESTON AGREED
16 TO ACCEPT THAT KNOWING THAT ALL THE CONDITIONS
17 PRECEDENT MAY NOT BE DONE, THAT THERE MAY NOT BE WATER
18 SAMPLES TAKEN, THERE MAY NOT BE PROPER SEWER, THERE
19 MAY NOT BE STREETS IN, BUT THEY KNEW THAT THEY HAD IN
20 A SURETY THAT D. R. HORTON BROUGHT THAT WOULD PERFORM
21 THOSE THINGS IF THEY WEREN'T DONE AFTER A PARTIAL
22 CLOSING OF A PARCEL. SO, THAT'S JUST A NON-ISSUE.

23 THEY RELY HEAVILY ON MR. BAGWELL'S
24 LETTER OF AUGUST ELEVENTH, AND IT SAYS WHAT IT SAYS.
25 YOU CAN READ IT, YOU MAY HAVE READ IT. BUT IT SAYS

1 THAT THE FIRST TIME THAT WE HAD EVERYTHING, THE STACK
2 OF WHAT YOU SAY WE'RE SUPPOSED TO HAVE WAS ON THE
3 AFTERNOON OF AUGUST NINTH. WE CAN'T BE OBLIGATED TO
4 DO ANYTHING UNTIL WE'VE HAD A CHANCE TO REVIEW THAT AT
5 THE EARLIEST, THAT'S WHAT HE SAYS, AT THE VERY END OF
6 THAT PARAGRAPH IT SAYS, AT THE EARLIEST THAT WE COULD
7 BE IN DEFAULT IS AUGUST THIRTY-FIRST. IT DIDN'T
8 CONCEDE THAT EVERYTHING HAD BEEN DONE, IT DIDN'T
9 CONCEDE THAT THEY WERE RELIEVED OF DOING ANYTHING, IT
10 DIDN'T WAIVE ANYTHING. THERE'S NO WAY YOU CAN READ
11 THAT ANY OTHER WAY THAN TO SAY, OKAY, WE'VE GOT THE
12 STACK OF STUFF THAT YOU SAY WE'RE SUPPOSED TO HAVE.
13 THIS IS THE STACK OF STUFF YOU TOLD US THAT WE HAD ON
14 JULY NINETEENTH. WE DON'T HAVE IT, WE DIDN'T HAVE
15 THAT STACK UNTIL AUGUST NINTH, TENTH OR ELEVENTH,
16 SOMETIME IN THAT TIME FRAME OF TWO THOUSAND SIX. THE
17 EARLIEST WE COULD BE IN DEFAULT WOULD BE AUGUST
18 THIRTY-FIRST, THAT WOULD BE THE EARLIEST. AND SINCE
19 UNDER OUR CONTRACT IT SAYS, IF YOU FAIL TO MEET THE
20 TIME FRAME THEN WE CAN EXTEND THE DATE. AND SO,
21 THAT'S EXACTLY WHAT MR. BAGWELL DID IN SENDING THE
22 LETTER OF AUGUST EIGHTEENTH WITH THE ATTACHED
23 AMENDMENT, PROPOSED AMENDMENT THAT WOULD EXTEND THE
24 DATES FOR THE CLOSINGS. AND THAT IS ATTACHMENT G.
25 AND IF YOU LOOK AT THAT PROPOSED AMENDMENT, IT DOES

1 NOTHING BUT EXTEND THE DATES, IT DOES NOT RELIEVE
2 WESCOTT OF ANY OBLIGATION TO ASSURE D. R. HORTON THAT
3 THOSE CONDITIONS ARE SATISFIED. AND SO, JUST BY
4 OFFERING TO EXTEND THE DATES WAS EXACTLY WHAT D. R.
5 HORTON WAS ENTITLED TO DO UNDER THE CONTRACT. WESCOTT
6 DIDN'T RESPOND.

7 MR. COOKE RAISED THAT THE
8 COMPACTION ISSUES WERE RAISED AT THE ELEVENTH HOUR,
9 AND WE DON'T DISPUTE THAT THERE WAS A MEETING ON
10 DECEMBER TWENTY-FIRST OF TWO THOUSAND SIX, AND AS A
11 RESULT OF THAT MEETING THERE WAS AN E-MAIL SENT ON
12 DECEMBER TWENTY-SEVENTH OF TWO THOUSAND SIX THAT SET
13 FORTH WHAT THE PARTIES WERE GOING TO DO. AND ONE OF
14 THOSE LINE ITEMS WAS SPECIFICALLY THAT WESCOTT IS
15 GOING TO PROVIDE US PROOF OF COMPACTION. AND SO, THAT
16 ISSUES WAS NOT SECRET, IT WASN'T MADE UP, IT WASN'T
17 BROUGHT IN AT THE ELEVENTH HOUR. IT WAS TALKED ABOUT.
18 IF YOU READ THE BRIEF AND THE CITATIONS FROM MR.
19 SMITH'S DEPOSITION, WHEN HE RAISED THAT AND SAID, THIS
20 ISN'T AT ALL WHAT WE AGREED TO, HE ANSWERED A SERIES
21 OF QUESTIONS THAT MAKE IT CLEAR THAT THAT WAS NOT AN
22 ELEVENTH HOUR ISSUE. IT MAKES IT CLEAR THAT D. R.
23 HORTON EXPECTED THAT FROM THE VERY BEGINNING.

24 WHEN WESCOTT SHOWED UP ON FEBRUARY
25 SECOND OF TWO THOUSAND SEVEN FOR THE CLOSING MR. SMITH

1 TESTIFIED THAT HE CALLED SHEDDERLY, AND SO, I ASKED,
2 "AND SO YOU, SMITH, CALLED SHEDDERLY AND WHAT
3 HAPPENED, WHAT WAS THE CONVERSATION THAT YOUR RECALL?"
4 AND MR. SMITH ANSWERED, "I SAID, MIKE," MR. SHEDDERLY,
5 "ARE WE NOT CLOSING? AND MR. SHEDDERLY SAID, NO." I
6 ASKED THE QUESTION, "AND WHAT HAPPENED NEXT?" THE
7 ANSWER, "I SAID, WHY NOT? AND MR. SHEDDERLY SAID, WE
8 HAVEN'T WORKED OUT THE DETAILS, YOU KNOW, HE DID SAY
9 THE COMPACTION ISSUE IS STILL AN ISSUE." SO, MR.
10 SMITH ACKNOWLEDGES THAT MR. SHEDDERLY RAISED THAT. I
11 ASKED, "DID YOU ASK WHAT HE MEANT BY THAT?" HE
12 ANSWERED, "I THINK D. R. HORTON WANTED IT RETESTED,
13 AND WESCOTT SAID IT DOESN'T NEED TO BE, I MEAN, THE
14 ENGINEER SAID IT DIDN'T NEED TO BE." WE KNOW THAT'S
15 NOT TRUE BECAUSE MR. WRIGHT HAS SUBMITTED AN AFFIDAVIT
16 ATTACHED TO OUR MEMORANDUM THAT SAYS IT'S NEVER BEEN
17 TESTED. THEY HAVEN'T PROVIDED ANY PROOF TO THE
18 CONTRARY. I THEN ASKED, "ANYTHING ELSE THAT YOU CAN
19 RECALL THAT MR. SHEDDERLY SAID WAS THE REASON WHY D.
20 R. HORTON DIDN'T SHOW UP AT CLOSING?" MR. SMITH
21 ANSWERED, "NOT THAT I REMEMBER. I REMEMBER
22 SPECIFICALLY TALKING ABOUT THE COMPACTION TESTS, I
23 DON'T REMEMBER TALKING ABOUT ANYTHING ELSE." THERE'S
24 NO DECEPTION THERE, THERE'S NO ELEVENTH HOUR RAISING
25 THIS ISSUE, IT HAD BEEN RAISED FOR A LONG TIME. I

1 CONCLUDE BY SAYING, "THIS TELEPHONE CONFERENCE THAT
2 YOU HAD WITH MR. SHEDDERLY ON FEBRUARY SECOND, DID IT
3 INDICATE TO YOU THAT THAT WAS HIS UNDERSTANDING THAT
4 D. R. HORTON'S REQUIRED IT ALL ALONG?" MR. SMITH
5 SAID, "HE DID." I THEN ASKED, "MR. SHEDDERLY RELAYED
6 TO YOU THAT IT'S ALWAYS BEEN D. R. HORTON'S INTENT TO
7 REQUIRE NEW COMPACTION TESTING TO SHOW THAT THESE
8 PADS MEET THE CONDITIONS PRECEDENT TO THE CONTRACT?"
9 MR. SMITH ANSWERED, "NO DOUBT ABOUT IT. WE HAD TALKED
10 ABOUT IT FOR THIRTY DAYS." SO, TO SAY THAT THIS WAS
11 SOMETHING BROUGHT UP AT THE ELEVENTH HOUR WAS NOT
12 SOMETHING THAT WAS ACKNOWLEDGED OR A REQUIREMENT OF D.
13 R. HORTON IS JUST DISINGENUOUS.

14 THERE WERE TWO LIS PENS FILED.
15 ONE WAS IN DECEMBER OF TWO THOUSAND SIX THAT WAS FILED
16 AGAINST WESCOTT. PRIOR TO THAT WE'VE ALREADY SHOWN
17 YOU TWO PROPOSED CONTRACTS FROM K. V. HOMES PRIOR TO
18 THIS LIS PENS, THE FIRST LIS PENS THAT WAS FILED, THAT
19 WESCOTT, IF THEY BELIEVED THAT D. R. HORTON WAS IN
20 BREACH OF CONTRACT IN NOVEMBER OF TWO THOUSAND SIX,
21 WHICH IS THEIR TESTIMONY, THAT NOTHING WOULD HAVE
22 RESTRICTED THEM, THERE WAS NO LIS PENS, THERE WAS NO
23 PENDING ACTION, THEY COULD HAVE SIGNED THIS. BUT WE
24 DID FILE LIS PENS IN DECEMBER OF O-SIX. BY STATUTE,
25 I DON'T HAVE THE STATUTE IN FRONT OF ME, BUT IT WAS

1 FIFTEEN, DASH, ELEVEN, DASH, TWENTY, I BELIEVE, SAYS
2 THAT IF YOU DO NOT FILE AN ACTION WITHIN TWENTY DAYS
3 OF FILING A LIS PENS THE LIS PENS BECOMES INVALID.
4 IT DOESN'T GIVE RISE TO ANY CAUSE OF ACTION. NOTHING,
5 NOTHING HAS HAPPENED IN THAT TWENTY DAY PERIOD. BUT
6 WHAT IS INTERESTING THAT DID HAPPEN IN THE TWENTY DAYS
7 FROM THE FILING OF THE LIS PENS TO THE TIME THAT IT
8 EXPIRED AND BECAME INVALID, THAT'S IT, IT DIDN'T GIVE
9 RISE TO A CAUSE OF ACTION, WHAT'S INTERESTING THAT DID
10 HAPPEN IN THAT TWENTY DAY PERIOD IS, WESCOTT CONVEYED
11 THE PROPERTY TO TOMMY HAWKINS. SO, WHAT RESTRICTION,
12 OR WHAT IMPACT DID IT HAVE? IT HAD NONE. SO, THAT
13 DIDN'T GIVE RISE TO ABUSE OF PROCESS, MALICIOUS
14 PROSECUTION, SLANDER OF TITLE, BECAUSE, ONE, IT BECAME
15 INVALID; TWO, DURING THE PENDENCY OF IT, POTENTIAL TO
16 BECOME A VALID LIS PENS, WESCOTT SOLD THE PROPERTY.
17 THEY COULD HAVE SOLD IT BEFORE THAT. WESCOTT CONCEDES
18 THAT FILING A LIS PENS IS AN ABSOLUTE PRIVILEGE, I
19 APPRECIATE THAT, BUT THE FIRST LIS PENS THEY SAY IS
20 WHAT GIVES RISE TO THAT CAUSE OF ACTION. LIKE I TOLD
21 YOU, IT BECAME INVALID AFTER TWENTY DAYS. SO, THAT
22 CAN'T GIVE RISE TO A CAUSE OF ACTION.

23 WESCOTT MAINTAINS THAT HORTON
24 WAIVED WESCOTT'S OBLIGATION TO PERFORM BY MR.
25 BAGWELL'S LETTER OF AUGUST ELEVENTH. I WENT OVER

1 THAT. THAT LETTER SAYS, WE GOT THE STUFF, BUT NOT WE
2 HAVE TWENTY DAYS TO REVIEW IT, THAT THE EARLIEST WE
3 COULD BE IN DEFAULT IS AUGUST THIRTY-FIRST. AND
4 DURING THAT PENDENCY D. R. HORTON EXERCISED ITS RIGHT
5 BECAUSE WESCOTT WAS ALREADY IN BREACH, THEY FAILED TO
6 MEET THE JULY FIRST DEADLINE. THEY SAID, WE'LL EXTEND
7 THE DATES. AND THAT AMENDMENT, IF YOU LOOK AT IT, IT
8 DOESN'T SAY ANYTHING ABOUT RELIEVING WESCOTT OF ITS
9 OBLIGATIONS. THEY STILL HAVE TO PERFORM UNDER THE
10 CONTRACT.

11 MALICIOUS PROSECUTION, I DIDN'T
12 MEAN TO IMPLY TO THE COURT THAT IT COULDN'T BE USED IN
13 A CIVIL ACTION. I AGREE THAT IT CAN UNDER THE RIGHT
14 CIRCUMSTANCES. THIS IS NOT THE RIGHT CIRCUMSTANCE.

15 YOU HAVE AN ABSOLUTE PRIVILEGE,
16 THE PONDS PLACE CASE IS CLEAR, YOU HAVE AN ABSOLUTE
17 PRIVILEGE TO FILE THAT. THE FIRST LIS PENS BECAME
18 INVALID SO THAT CAN'T BE THE BASIS FOR IT.

19 BREACH OF CONTRACT ACCOMPANIED BY
20 FRAUDULENT ACT, THEY CITE TO AN EMPLOYMENT CONTEXT
21 THAT REFERENCES PRETEXTURAL REASONS FOR SUPPORTING
22 BREACH BY FRAUDULENT, I HAVEN'T SEEN THEIR BRIEF, I
23 HAVEN'T READ THAT CASE, BUT THE REASON IS NOT
24 PRETEXTURAL THAT D. R. HORTON DIDN'T GO THROUGH WITH
25 THE CLOSING, THE REASON IS BECAUSE WESCOTT DIDN'T

1 PERFORM. WE HAVE AN AFFIDAVIT FROM AN ENGINEER, THE
2 SAME ENGINEER THAT WESCOTT WAS USING THROUGHOUT THE
3 PROJECT THAT SAYS, WE'VE NEVER SATISFIED, NEVER GIVEN
4 YOU PROOF THAT THESE SOILS ARE COMPACTED AS REQUIRED
5 BY THE CONTRACT. IF YOU WANT TO LOOK AT ATTACHMENT F,
6 PARAGRAPH SIX, TO MR. WRIGHT'S AFFIDAVIT, HE SAYS,
7 "ALTHOUGH WE DID NOT DO COMPACTION TESTS ON THESE
8 LOTS, I CAN STATE, BASED ON MY ENGINEERING EXPERIENCE
9 AND KNOWLEDGE OF THE SOILS ON SITE, THAT DETERIORATION
10 OF THE UPPER ONE FOOT OF SOILS CAN OCCUR DUE TO THE
11 WEATHER AND SEASONAL CONDITIONS AND LENGTH OF TIME
12 OCCURRED BETWEEN THE TESTING REPORTED ON MAY FIRST OF
13 TWO THOUSAND AND SIX AND JULY NINETEENTH OF TWO
14 THOUSAND SIX. AND ATTACHED TO HIS AFFIDAVIT ARE THOSE
15 CERTIFICATIONS. THEY GAVE A CERTIFICATION FOR EACH
16 LOT, AND IF YOU READ THOSE CERTIFICATIONS THEY SAY
17 THAT THE ALLOWABLE SOIL CONTACT VARIED PRESSURE OF TWO
18 THOUSAND POUNDS PER SQUARE FOOT CAN BE ACHIEVED AT AN
19 INTERIM DEPTH OF TWELVE INCHES BELOW THE EXISTING
20 GROUND SURFACE. THAT CERTIFICATION ON MAY FIRST OF
21 TWO THOUSAND SIX DOESN'T SAY ANYTHING ABOUT THE
22 NINETY-FIVE PER CENT COMPACTION. AND IN FACT, MR.
23 WRIGHT SAYS, WE NEVER DID GIVE A CERTIFICATION OF
24 COMPACTION. THAT'S ALL THAT D. R. HORTON WAS ASKING
25 FOR, FOR THEM TO DO. I HAVEN'T BORED YOU WITH ALL THE

1 PICTURES, BUT ATTACHED TO HIS AFFIDAVIT ARE PICTURES
2 THAT SHOW THAT THERE ARE SOILS IN THE STREET THAT COME
3 FROM THE BUILDING PADS. HE SAYS, WITHOUT A DOUBT, TO
4 A REASONABLE DEGREE OF ENGINEERING CERTAINTY, THAT
5 THESE PADS, EVEN IF THEY WERE TESTED, EVEN IF THE
6 LETTER THAT WE SENT IN MAY SAID WE'D TESTED THEM, ON
7 JULY NINETEEN WHEN WESCOTT SAID THAT WAS THE FIRST DAY
8 THAT THEY HAD SATISFIED EVERYTHING THEY WOULD BE ANY
9 GOOD ANYMORE, THEY'D HAVE TO GO BACK AND RETEST THEM
10 ANYWAY. THAT'S ALL THAT THEY ASKED THEM TO DO AND
11 THEY NEVER DID IT.

12 ABUSIVE PROCESS, I THINK I SKIPPED
13 OVER THAT. THEY CITE THE BROADMORE CASE AS SUPPORTING
14 THAT. AND I'M VAGUELY FAMILIAR WITH THAT CASE SO THEY
15 CAN CORRECT ME IF I'M WRONG, YOU CAN READ THE CASE AND
16 I'LL BRIEF IT IF YOU WANT ME TO, BUT MY UNDERSTANDING
17 WAS THAT THERE'S A LAND CONTRACT OR PURCHASE OF AN
18 APARTMENT COMPLEX AND THE PURCHASER WAS REQUIRED TO
19 PUT SOME EARNST MONEY DOWN IN ORDER TO BUY THE
20 PROPERTY. AND IT STARTED OFF AT SEVENTY-FIVE THOUSAND
21 DOLLARS. THERE WAS AN AMENDMENT SO THEY ONLY HAD TO
22 PUT UP FIFTY THOUSAND DOLLARS, BUT YOU HAVE TO IT BY A
23 CERTAIN DATE. AND THE BUYER COULDN'T DO THAT. AND
24 SO, HE SAID, WELL, HOW ABOUT IF I GIVE YOU TWENTY-FIVE
25 THOUSAND DOLLARS? THE CONTRACT, THE AMENDMENT THAT

1 THEY HAD REACHED WAS FIFTY. AND SO, THE OWNER OF THE
2 APARTMENT COMPLEX SAID, NO. THE CONTRACT SAYS WHAT IT
3 SAYS, WE WANT FIFTY. WELL, STRUGGLING TO FIGURE OUT
4 WHAT TO DO THE BUYER WENT AND ASSIGNED HIS CONTRACT TO
5 SOME THIRD PARTY, AND IN THAT HE SAID, YOU HAVE THE
6 RIGHT TO BUY THE PROPERTY FROM THE ORIGINAL OWNER IF
7 YOU CAN PUT UP TWENTY-FIVE THOUSAND DOLLARS. AND SO,
8 THEY CAME, THE THIRD PARTY CAME AND HE SAID, YOU
9 CAN'T ASSIGN THAT CONTRACT TO HIM, PLUS, IT DOESN'T
10 SATISFY THE OBLIGATIONS OF THE UNDERLYING CONTRACT.
11 YOU HAVE BREACHED THE CONTRACT, WE DON'T HAVE TO
12 PROCEED. IN RESPONSE THE BUYER FILED A LIS PENS AND
13 WENT TO TRIAL, AND THE COURT SAID, THE BUYER IS
14 MATERIAL BREACH OF THE CONTRACT AND THE LIS PENS IS
15 DISSOLVED. THERE IS NO, THE CASE REALLY SUPPORTS, I
16 THINK, THE SLANDER OF TITLE, BECAUSE THEY GAVE
17 DIRECTED VERDICT TO THE BUYER ON SLANDER OF TITLE, BUT
18 THEY DID ALLOW THEM TO PURSUE THE ABUSIVE PROCESS
19 BECAUSE THEY HAD FILED A LIS PENS KNOWING THAT THEY
20 NEVER SATISFIED THE CONDITIONS OF THE CONTRACT. THAT'S
21 TOTALLY DIFFERENT THAN WE HAVE HERE. D. R. HORTON WAS
22 READY, WILLING AND ABLE AT ALL TIMES TO PERFORM THE
23 CONTRACT BUT FOR WESCOTT'S FAILURE TO DO WHAT THEY
24 WERE ASKING THEM TO DO. SO, IT'S TOTALLY DIFFERENT.
25 UNFAIR TRADE PRACTICES, THEY SAY

1 THAT ALL THEY HAVE TO DO IS SAY THAT IT'S CAPABLE OF
2 REPETITION. THEY DON'T THINK THEY HAVE TO SHOW THAT
3 IT'S EVER BEEN REPEATED. THEY CAN'T SHOW THAT IT'S
4 EVER BEEN REPEATED. THIS IS A DISPUTE AMONG PRIVATE
5 PARTIES THAT AFFECTS THESE PARTIES, IT DOESN'T AFFECT
6 THE GENERAL PUBLIC. THE UNFAIR TRADE PRACTICE STATUTE
7 IS INTENDED TO PROTECT THE PUBLIC FROM THESE KIND OF
8 THINGS HAPPENING AGAIN IF THEY WERE TRUE, AND THEY'RE
9 NOT TRUE.

10 INTENTIONAL INTERFERENCE, THEY
11 SAID THAT WE'RE NOT REQUIRED TO KNOW OF A SPECIFIC
12 CONTRACT, BUT WESCOTT'S NOT COME FORWARD WITH ANYBODY
13 WHO HAS SAID, I DIDN'T BUY THIS PROPERTY BECAUSE OF
14 SOMETHING THAT D. R. HORTON DID. THEY WANT YOU TO
15 BELIEVE THAT THAT'S WHY THEY DIDN'T DO IT, BUT THEY
16 HAVE TO COME FORWARD TODAY AND MEET THEIR BURDEN TO
17 OVERCOME SUMMARY JUDGEMENT. THEY DON'T HAVE ANYTHING
18 FOR YOU TO LOOK AT THAT SAYS, WELL, MAYBE THAT PARTY
19 DIDN'T BUY IT, BECAUSE THAT'S WHAT THEY SAID. THEY'RE
20 JUST SAYING THAT THEY COULDN'T SELL IT. MR. HAWKINS
21 TESTIFIED THAT HE DIDN'T SELL IT BECAUSE HE DIDN'T
22 WANT TO SELL IT FOR FEAR OF WHAT WOULD HAPPEN, BUT IF
23 HE WAS RIGHT, IF WESCOTT IS RIGHT THAT D. R. HORTON
24 WAS IN BREACH, THEY DIDN'T HAVE ANYTHING TO WORRY
25 ABOUT. SO, IT CAN'T BE INTERFERENCE WITH IT. THE

1 FIRST TWO CONTRACT OFFERS THAT THEY HAD, THERE WAS NO
2 LIS PENDENS, NO PENDING ACTION. THE THIRD AND FOURTH
3 CONTRACTS THAT WE KNOW ABOUT WERE MADE TO MR. HAWKINS
4 WHO OWNED THE PROPERTY, AND THE LIS PENDENS IN THEIR
5 ACTION THAT D. R. HORTON FILED WAS AGAINST WESCOTT.
6 SO, THERE WAS NOTHING THAT RESTRICTED HIM FROM SELLING
7 IT IF HE WAS RIGHT. SO, IF I CAN LOOK AT THESE NOTES
8 -- JUST TO POINT OUT, I THINK THAT WHAT MR. COOKE SAID
9 WAS THAT HE THINKS THAT THERE ARE PROBABLY
10 SUBSTANTIALLY SOME MORE CONTRACTS OUT THERE. THIS
11 CASE HAS BEEN GOING ON SINCE TWO THOUSAND SEVEN, AND
12 WE HAVEN'T SEEN ANY ENTITY OR AFFIDAVIT COME FORWARD
13 AND SAY, THIS HAPPENED TO US UNDER THE EXACT SAME
14 CIRCUMSTANCES.

15 AGAIN, IT COMES BACK, IT'S A
16 BREACH OF CONTRACT CASE, AND I THINK THAT IT'S
17 UNDISPUTED THAT WESCOTT DIDN'T SATISFY THE CONDITIONS
18 PRECEDENT REQUIRED BY THE CONTRACT, AND YOU CAN THROW
19 OUT ALL THE OTHER CAUSES OF ACTION AND FOCUS ON THAT
20 ONE. BUT EVEN WHEN YOU DO FOCUS ON BREACH OF CONTRACT
21 IT'S UNDISPUTED THAT WESCOTT DIDN'T SATISFY ONE OF THE
22 CONDITIONS OF THE CONTRACT, AND SO, D. R. HORTON IS
23 ENTITLED TO SUMMARY JUDGEMENT ON ALL THOSE CAUSES OF
24 ACTION.

25 THE COURT: ALRIGHT, SIR.

1 VERY BRIEFLY, ANYTHING ELSE?

2 MR. COOKE: JUST THAT I WAS GOING
3 TO ASK YOU FOR THREE MINUTES IF I COULD, YOUR HONOR,
4 AND IT WILL LITERALLY PROBABLY BE LESS THAN THAT.

5 GOING BACK TO, I SAID THAT THEY
6 BRING UP THESE CONDITIONS AT THE ELEVENTH HOUR, AND
7 HERE IS WHY I SAY THAT. THE LETTER OF AUGUST ELEVEN,
8 TWO THOUSAND SIX, WHICH IS EXHIBIT FIVE, AND AT THE
9 BOTTOM OF THE PAGE MR. BAGWELL WRITES, "FOR THE SAKE
10 OF CLARITY I PROPOSE THAT THE PARTIES EXECUTE A SECOND
11 AMENDMENT TO THE CONTRACT THAT ACKNOWLEDGES THAT THE
12 TOWN HOUSE LOTS ARE NOT SUBSTANTIALLY COMPLETE AND
13 THAT ESTABLISHES THE NEW TAKE DOWN SCHEDULE." NOW,
14 THE TERMS, SUBSTANTIALLY COMPLETE, IS A TERM OF ART
15 THAT'S DEFINED IN THE CONTRACT. IN PARAGRAPH FIFTEEN
16 IT SAYS THIS, "UPON SATISFYING ALL OF THE REQUIREMENTS
17 OF THIS PARAGRAPH SELLER SHALL SEND WRITTEN NOTICE TO
18 PURCHASER THAT THE LOTS TO BE CONVEYED HAVE SATISFIED
19 SAID REQUIREMENTS. QUOTE, SUBSTANTIAL COMPLETION,
20 CLOSED QUOTE, SHALL BE ACHIEVED UPON THE DATE
21 PURCHASER RECEIVES SELLER'S NOTICE PURSUANT TO THIS
22 PARAGRAPH ACCOMPANIED BY EVIDENCE SATISFACTORY TO
23 PURCHASER, IN PURCHASER'S REASONABLE DISCRETION, THAT
24 SAID REQUIREMENTS HAVE BEEN MET." AND SO, WHAT YOU
25 HAVE IS THE ATTORNEY FOR D. R. HORTON, ON AUGUST

1 ELEVEN, TWO THOUSAND SIX, PROPOSING THAT THEY ENTER
2 INTO A NEW CONTRACT THAT RECITES THAT IT'S
3 SUBSTANTIALLY COMPLETE AS OF THAT TIME. IN OTHER
4 WORDS, ALL OF THE CONDITIONS ARE MET. IT'S NOT UNTIL,
5 IF YOU WANT TO LOOK AT EXHIBIT EIGHT, THE NEW
6 ATTORNEY, MR. SHEDDERLY'S LETTER OF OCTOBER SIXTEEN,
7 TWO THOUSAND SIX, WHICH IS AUGUST, SEPTEMBER, OCTOBER,
8 TWO MONTHS LATER, NOW RAISED FOR THE FIRST TIME NEW
9 CONDITIONS. AND THEN WE'RE OFF TO THE RACES WITH RE-
10 NEGOTIATING, RE-NEGOTIATING, RE-NEGOTIATING. ANOTHER
11 FINAL IMPORTANT DOCUMENT IS EXHIBIT SEVEN WHICH IS THE
12 E-MAIL FROM MR. FLANNERY, OF D. R. HORTON, TO MR.
13 FRALICK DATED SEPTEMBER EIGHTEEN, TWO THOUSAND SIX.
14 "TIM, AS I MENTIONED LAST WEEK, WE HAVE THIRTY-SIX
15 UNITS FUNDED," AND THEN HE LATER TESTIFIES THAT MAYBE
16 THAT WASN'T EXACTLY RIGHT, "AND I NEED TO EITHER CLOSE
17 ON THIS IN THE NEXT FEW WEEKS OR I'LL HAVE TO SEND THE
18 MONEY BACK TO CORPORATE, AND THAT ISN'T ALWAYS A GOOD
19 THING. AS WE DISCUSSED, BOTH GROUPS DO NOT SEE EYE TO
20 EYE AS THE CONTRACT STANDS, AND IF WE DON'T AMICABLY
21 TRY TO MOVE FORWARD WE'RE GOING TO GET INTO SOMETHING
22 WE BOTH DON'T WANT TO DEAL WITH. TO GIVE A LITTLE I
23 AM PROPOSING TO SHRINK THE TAKE DOWN OVER TWO MONTHS
24 RATHER THAN THREE, AND BASICALLY IF WE CAN CLOSE NOW
25 YOU ARE REALLY ONLY FOUR MONTHS OUT OF THIS PHASE

1 BEING COMPLETELY TAKEN DOWN. IF YOU ALL DON'T AGREE
2 TO THIS THE PROPERTY COULD BE TIED UP FOR A LOT LONGER
3 THAN THAT, SO I HOPE YOU'LL CONSIDER MY PROPOSAL.
4 I'VE NOT RUN THIS BY CORPORATE BUT I HAVE RUN OUR
5 NUMBERS, AND SHRINKING TO TWO MONTHS MAY WORK. PLEASE
6 CALL ME TODAY TO DISCUSS WHAT DIRECTION YOU ALL WOULD
7 LIKE TO TAKE SO WE CAN PREPARE THE CLOSING." AND WE
8 THINK AGAIN THAT THAT'S EVIDENCE THAT THE LIS PENS AND
9 THE SUBSEQUENT LITIGATION, DESPITE THEIR FAILURE TO
10 CLOSE ON THE CONTRACT, WAS A TORT OF THE ONES THAT'S
11 WE'VE DESCRIBED.

12 MR. HALDRUP: IF I COULD JUST
13 BRIEFLY REPLY. ALL OF THESE DISCUSSIONS THAT TOOK
14 PLACE AFTER THE ALLEGATION OF BREACH ARE REALLY JUST
15 NEGOTIATIONS. SO, WHEN D. R. HORTON SAYS, WE PROPOSE
16 THIS AMENDMENT AND IN CONSIDERATION WE'LL SAY THESE
17 THINGS ARE SATISFIED, IS IN THE SPIRIT OF COMPROMISE
18 TRYING TO GET THIS THING RESOLVED. THAT'S WHY THERE
19 IS AN AMENDMENT. BUT I DON'T KNOW, IF WE GO TO TRIAL
20 WE WOULD NEED TO EXCLUDE ALL OF THESE NEGOTIATIONS
21 BECAUSE THEY NEVER CAME TO FRUITION. FOR THIS TO BE
22 AN ENFORCEABLE CONTRACT THERE HAS TO BE SOME AGREEMENT
23 IN WRITING. WE HAVE TO GO ALL THE WAY BACK TO WHAT
24 THE AMENDMENT SAID. AND SO, ALL THIS DISCUSSION THAT
25 THEY WANT TO SITE TO AS PROOF OF THEIR FRAUD, WHICH IT

1 DOESN'T EVEN COME CLOSE TO BEING A FRAUD OTHER THAN
2 THEY SAID, WE WANT TO CLOSE, HOW ABOUT WE DO
3 SOMETHING, IS A NEGOTIATION, THAT THERE WAS NOT AN
4 AGREEMENT, THERE WASN'T A MEETING OF THE MINDS AS TO
5 HOW TO GET OUT OF WESCOTT'S ALREADY ADMITTED BREACH.

6 THE COURT: I WANTED TO ASK YOU
7 ABOUT THE AUGUST ELEVENTH LETTER. I MEAN, THE THIRD
8 PARAGRAPH SAYS, "HORTON WILL CLOSE ON THIRTY-SEVEN
9 LOTS ON OR BEFORE THE THIRTY-FIRST OF AUGUST."
10 "HORTON WILL CLOSE THE TOWN HOUSE LOTS BEFORE NOVEMBER
11 THE THIRTIETH." "HORTON WILL CLOSE CERTAIN LOTS
12 BEFORE FEBRUARY THE TWENTY-EIGHTH." AND THEN THE
13 LANGUAGE THAT MR. COOKE POINTED OUT, I MEAN, THERE'S
14 NO CONDITIONS THERE, IT JUST SAYS, WE WILL CLOSE.
15 NOW, COULDN'T A JURY SAY THAT AT THAT POINT IN TIME
16 HORTON WAS EITHER ACCEPTING IT OR WAIVING ANY
17 ADDITIONAL, ANYTHING THAT HADN'T BEEN DONE AS FAR AS
18 THE CONDITIONS PRECEDENT? AND WHEN, IS THERE ANYTHING
19 IN WRITING AT SOME POINT IN TIME WHERE HORTON SAYS,
20 HEY, WAIT, WE WERE WRONG ON AUGUST THE ELEVENTH, AND
21 THESE OTHER THINGS HADN'T BEEN DONE? BECAUSE THEY
22 WOULD HAVE ONLY TWENTY DAYS FROM THIS LETTER TO DO
23 THAT. RIGHT?

24 MR. HALDRUP: IF EVERYTHING HAD
25 BEEN PROVIDED ON AUGUST ELEVENTH.

1 THE COURT: WELL, THIS LETTER SAYS
2 -- IT DOESN'T MAKE ANY CONDITIONS, YOU KNOW, IT JUST
3 SAYS, WE'VE GOT IT ALL NOW.

4 MR. HALDRUP: IT SAYS THAT WE HAVE
5 TWENTY DAYS, AND THE EARLIEST THAT WE COULD BE IN
6 DEFAULT. AND SO, THEY HADN'T MADE A DECISION WHETHER
7 WHAT IS SUBMITTED ON AUGUST ELEVENTH IS SUFFICIENT.
8 AND THEN, THEIR PROPOSAL IS SIMPLY THAT. D. R. HORTON
9 HAD THE RIGHT TO EXTEND THE DATE. THEY'RE ALREADY IN
10 MATERIAL BREACH OF THE CONTRACT AS OF JULY ONE OF TWO
11 THOUSAND AND SIX. AND SO, D. R. HORTON HAS THE RIGHT
12 TO EXTEND THE DATES BUT IT DOESN'T RELIEVE WESCOTT OF
13 ANYTHING, THEY STILL HAVE TO SATISFY THE CONDITIONS.
14 AND THAT'S ALL THAT D. R. HORTON WAS TRYING TO DO WAS
15 WHAT THEY WERE ENTITLED TO UNDER THE CONTRACT, AND
16 THAT IS TO EXTEND THE DATES. BUT IT DIDN'T RELIEVE
17 WESCOTT TO COME ON TO THE TABLE ON THAT CLOSING DATE
18 THAT THEY SAY, WE WILL CLOSE. IT'S NO DIFFERENT FROM
19 THE ORIGINAL TAKE DOWN SCHEDULE THAT SAYS, WE WILL
20 CLOSE ON JANUARY ONE. BUT IT DIDN'T RELIEVE WESCOTT
21 ON JANUARY ONE FROM SAYING, WE'VE SATISFIED THE
22 CONDITIONS PRECEDENT. THERE'S NOTHING THAT RELIEVES
23 WESCOTT FROM THAT.

24 THE COURT: I UNDERSTAND THAT, I
25 UNDERSTAND WHAT YOU'RE SAYING ABOUT THAT, BUT I MEAN,

1 THE LETTER JUST, IT SAYS, THE CONDITIONS PRECEDENT
2 WERE NOT SATISFIED UNTIL THE AFTERNOON OF AUGUST THE
3 NINTH, TWO THOUSAND AND SIX. I DON'T HAVE THE LETTER
4 OF AUGUST THE TENTH RIGHT IN FRONT OF ME, BUT IT
5 SOUNDS TO ME LIKE THERE MUST HAVE BEEN A THREAT OR
6 ALLEGATIONS OF BREACH AT THAT TIME AND THAT'S WHAT HE
7 WAS RESPONDING TO. I MEAN, WOULDN'T A REASONABLE
8 READING OF THAT AS SAYING, OKAY, HORTON IS SATISFIED
9 THAT EVERYTHING HAS BEEN DONE, WE'RE READY TO ROLL?

10 MR. HALDRUP: I JUST DISAGREE. I
11 THINK THAT THAT LETTER IS IN RESPONSE TO A THREAT THAT
12 YOU ARE IN MATERIAL BREACH, AND IT KIND OF TURNS IT ON
13 HIS HEAD, BECAUSE WESCOTT'S THE ONE, THAT IS THE ONE
14 THAT'S REALLY IN MATERIAL BREACH, AND THEY ARE TRYING
15 TO ENFORCE SOMETHING THAT THEY DON'T HAVE THE RIGHT
16 TO. AND WHAT IT INVOLVES NOW IN D. R. HORTON'S COURT
17 TO EITHER EXTEND THE DATE OR TO TERMINATE THE
18 CONTRACT. AND WHAT D. R. HORTON TRIED TO DO, IF YOU
19 LOOK AT ATTACHMENT G THAT FOLLOWED THAT AUGUST
20 ELEVENTH LETTER, ON AUGUST EIGHTEENTH, IN HIS LETTER
21 HE INDICATED -- IN HIS LETTER OF AUGUST ELEVENTH,
22 JUDGE, HE SAID, I'LL SEND YOU A PROPOSED AMENDMENT.
23 THAT'S EXACTLY WHAT HE DID WITH ATTACHMENT G.

24 THE COURT: B?

25 MR. HALDRUP: G, AS IN GIRL. I

1 BELIEVE THAT'S EXHIBIT SIX, BUT THE NEXT EXHIBIT IN
2 OUR BRIEF, ISN'T IT? THERE'S NOTHING IN THE PROPOSED
3 AMENDMENT THAT RELIEVES WESCOTT OF ITS OBLIGATION. IN
4 FACT, PARAGRAPH FOUR SAYS, "EXCEPT AS AMENDED HEREIN,"
5 WHICH IS REALLY JUST CHANGING THE DATES, IF YOU LOOK
6 AT THE SECOND PAGE, PARAGRAPH FOUR, "EXCEPT AS AMENDED
7 HERE, ALL TERMS AND PROVISIONS OF THE CONTRACT REMAIN
8 UNMODIFIED. AS AMENDED HEREIN THE CONTRACT REMAINS IN
9 FULL FORCE AND EFFECT." SO, WITHIN THAT TWENTY DAY
10 PERIOD D. R. HORTON DID EXACTLY WHAT IT'S ALLOWED TO
11 DO, AND WHEN MR. COOKE READ THAT PARAGRAPH FIFTEEN,
12 IT'S WITHIN D. R. HORTON'S REVIEW TO DETERMINE IF THE
13 CONDITIONS PRECEDENT HAVE BEEN MET, SO THEY HAVE TO
14 REASONABLY REVIEW THOSE AND APPROVE THEM IF THEY HAVE,
15 BUT IT'S AT THEIR DISCRETION. AT THIS POINT, I KNOW
16 I'VE SAID IT, BUT WESCOTT IS THE ONE THAT WAS IN
17 BREACH. D. R. HORTON HAS THE RIGHT TO EXTEND THE
18 DATES. THAT'S EXACTLY WHAT HE SAID IN THE AUGUST
19 ELEVENTH LETTER WHICH FOLLOWED UP WITH THE AUGUST
20 EIGHTEENTH LETTER. ALL IT DID WAS EXTEND THE DATES
21 AND SAID, EVERYTHING ELSE REMAINS IN FULL FORCE AND
22 EFFECT. IT COULDN'T BE ANYMORE CLEAR. THAT WAS WHAT
23 THE PROPOSAL WAS, AND IT WAS D. R. HORTON'S RIGHT
24 UNDER THE CONTRACT TO MAKE THIS PROPOSAL.

25 EVEN IF YOU FIND THAT D. R.

1 HORTON'S LETTER WAIVED IT, WHICH I'M NOT GOING TO
2 CONCEDE BECAUSE I THINK, I'VE COME UP WITH THIS THING
3 IN MY MIND THAT THIS COMPACTION IS, YOU CAN'T WALK OUT
4 THERE AND SEE WHETHER IT'S EIGHTEEN HUNDRED PSF OR
5 TWENTY-SIX HUNDRED PSF, YOU JUST CAN'T SEE IT. SO,
6 WHAT IF ONE OF THE CONDITIONS PRECEDENT WAS THAT YOU
7 HAD TO PUT A BIG PURPLE BOX OUT ON THIS PROPERTY. MR.
8 BAGWELL WRITES HIS LETTER OF AUGUST ELEVENTH AND SAYS
9 WHAT YOU SAY THAT IT SAYS, BUT LATER, WHETHER IT BE
10 TWENTY DAYS OR THIRTY DAYS LATER SOMEBODY GOES OUT AND
11 SAYS, THERE'S NO PURPLE BOX AS REQUIRED BY THE
12 CONTRACT, IT'S SOMETHING THAT'S EASY TO SEE AND NOBODY
13 CAN DISPUTE. WE REALLY HAVE THE SAME THING, THE
14 COMPACTION ISSUE. WE DIDN'T SAY THAT WITHIN TWENTY
15 DAYS THE COMPACTION IS AN ISSUE. WE DID RAISE OTHER
16 ISSUES, YOU KNOW, BUT THE ONE THAT REALLY MADE THIS
17 THING FALL APART WAS SOMETHING THAT YOU REALLY
18 COULDN'T SEE. BUT WHEN IT WAS SEEN, WHEN IT WAS
19 REALIZED, D. R. HORTON TRIED TO ENFORCE WHAT IT WAS
20 ALLOWED TO ENFORCE. AND WHAT IT SAID ON AUGUST
21 EIGHTEENTH WAS, WE'RE GOING TO EXTEND THESE DATES BUT
22 IT'S NOT GOING TO RELIEVE, WESCOTT, OF PUTTING THE
23 PURPLE BOX BACK ON THE PROPERTY IF IT EXISTS AT ALL.
24 AND THAT WAS THEIR POSITION ALL ALONG. AND IT'S
25 REALLY NOT DISPUTED THAT THEY DIDN'T DO THAT, THAT

1 WESCOTT DID NOT PUT THE PURPLE BOX OUT THERE.

2 THE COURT: ALRIGHT, AND A WHILE
3 AGO YOU SAID THAT IF THIS MOTION DIDN'T RESOLVE THE
4 CASE Y'ALL WERE GOING TO NEED TO DO SOME MORE
5 DISCOVERY.

6 MR. HALDRUP: YES.

7 THE COURT: BASED ON THE NEW
8 CAUSES OF ACTION.

9 MR. HALDRUP: YOUR HONOR, THEY'VE
10 NAMED MR. HAWKINS, AND WE'VE DONE THE DISCOVERY
11 THROUGH THE AGREEMENT WITH WESCOTT. AND WHAT THEY'VE
12 CLAIMED, THE DAMAGES THAT THEY SOUGHT. I DON'T KNOW
13 WHAT MR. HAWKINS THINKS HIS DAMAGES ARE UNDER THESE
14 OTHER CAUSES OF ACTION. THEY NAMED A WITNESS TODAY
15 THAT THEY SAY IN THEIR MEMORANDUM, IN THE FIRST PAGE I
16 THINK, THAT THIS WITNESS WILL SAY THAT THE SAME THINGS
17 HAVE HAPPENED TO HIM. AND HE'S IN VIRGINIA. AND I
18 DON'T KNOW WHERE THAT'S GOING TO LEAD, BUT I MEAN, IF
19 THESE CAUSES OF ACTION SURVIVE AND THOSE WITNESSES ARE
20 ABLE TO TESTIFY TO PROVE THAT D. R. HORTON DOES THIS,
21 THEN I DON'T KNOW THAT I'LL NEED TO GET THE NINE
22 THOUSAND NINE HUNDRED AND NINETY-NINE LAND
23 TRANSACTIONS WHERE THEY DIDN'T DO THIS TO SHOW THAT,
24 YOU KNOW, THERE'S NO CORRELATION WITH IT.

25 THE COURT: WELL, LET ME ASK MR.

1 COOKE, YOU DIDN'T ADDRESS THE INDIVIDUAL ALLEGATIONS
2 YOU'VE MADE THAT MR. HAWKINS IS CLAIMING.

3 MR. COOKE: WELL, HE WAS ADDED AS
4 A NECESSARY PARTY ON THE COUNTER-CLAIM BY VIRTUE OF
5 BEING THE CURRENT OWNER OF THE PROPERTY. SO, WHEN YOU
6 SLANDER TITLE YOU'RE SLANDERING TITLE TO A PIECE OF
7 PROPERTY, YOU'RE NOT SLANDERING AN INDIVIDUAL. AND
8 SO, WE FELT HE HAD TO BE NAMED AS AN ADDITIONAL
9 PARTY, AS A NECESSARY PARTY AS THE OWNER OF THE
10 PROPERTY. SO, AND IT'S PROBABLY TRUE, IF YOU PARSE
11 THROUGH IT YOU'LL FIND THAT SOME OF THE CLAIMS
12 PROBABLY RELATE, APPLY TO WESCOTT. BUT WE JUST DON'T
13 WANT TO GET TO TRIAL AND HAVE SOMEBODY SAY, HEY,
14 YOU'RE NOT EVEN THE OWNER OF THE PROPERTY, HOW ARE YOU
15 RAISING A CLAIM FOR ABUSIVE PROCESS AND SLANDER
16 ALLEGATIONS?

17 THE COURT: AND HOW CLOSE UP TO
18 THE TOP IS THIS CASE ON THE DOCKET?

19 MR. HALDRUP: A TRIAL HAS BEEN SET
20 FOR JUNE EIGHTH.

21 THE COURT: WHICH IS PROBABLY NOT
22 POSSIBLE NOW.

23 MR. HALDRUP: NO, UNLESS YOU KNOCK
24 OUT THE CAUSES OF ACTION.

25 THE COURT: WELL, ALRIGHT, I MEAN,

1 I'LL CERTAINLY PERUSE WHAT Y'ALL HAVE GIVEN ME AND
2 I'LL TRY TO GIVE YOU A DECISION AS QUICKLY AS I CAN.
3 IT WON'T BE THIS WEEK. THIS WEEK IS ABOUT GONE
4 ANYHOW. AND THEN WE'LL JUST HAVE TO DEAL WITH A
5 SCHEDULING ORDER OR SOMETHING WHEN I DO THAT, IF WE
6 NEED TO DO THAT, IF WE NEED TO DO IT.

7 MR. HALDRUP: JUST SO I'M CLEAR,
8 YOUR HONOR, IF YOU DON'T KNOCK OUT THE CAUSES OF
9 ACTION THEN WE'LL ENTER SCHEDULING ORDERS AND DO
10 SOME ADDITIONAL DISCOVERY AND SET A DATE AT ANOTHER
11 TERM?

12 THE COURT: YES..

13 MR. HALDRUP: IF YOU DO KNOCK THEM
14 ALL OUT, OBVIOUSLY, WE PROBABLY DON'T NEED TO DO
15 THAT.

16 THE COURT: YES, SIR, OBVIOUSLY.
17 ALRIGHT, ANYTHING ELSE?

18 MR. HALDRUP: WELL, WE DID BRING
19 OUR CLIENTS.

20 THE COURT: I WANT TO TALK WITH
21 YOUR CLIENTS IN A FEW MINUTES, AND I NEED TO GET MS.
22 WALKER OUT OF HERE. SHE'S GOT TO HAVE SURGERY ON HER
23 FOOT IN THE MORNING EARLY, AND I'VE KEPT HER HERE NOW
24 -- Y'ALL HAVE KEPT HER HERE UNTIL NEARLY SEVEN
25 O'CLOCK, SO - - -

1 MR. COOKE: I TAKE THAT
2 RESPONSIBILITY.

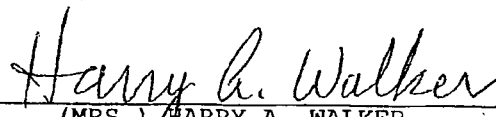
3 THE COURT: Y'ALL NEED TO
4 APOLOGIZE FOR KEEPING HER HERE.

CERTIFICATE

I, THE UNDERSIGNED, MRS. HARRY A. WALKER, OF ROWESVILLE, SOUTH CAROLINA, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE FOURTEENTH DAY OF MAY, 2009.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

DATE: DECEMBER 22, 2009


(MRS.) HARRY A. WALKER

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 : FIRST JUDICIAL CIRCUIT
 COUNTY OF DORCHESTER) Case No. 07-CP-18-337

D.R. HORTON, INC.,)
)
 Plaintiff,) DEPOSITION OF:
)
 -vs-) MITCHELL M. FLANNERY
)
 WESTCOTT LAND COMPANY, LLC,)
)
 Defendant.)

Given before G. Michael Alexander, Notary
 Public and Registered Professional Reporter, at the law
 offices of Elmore & Wall, P.A., 145 King Street, Suite
 302, Charleston, South Carolina, on Monday, November 17,
 2008, commencing at 10:27 o'clock, a.m.

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1 It was stipulated by and between counsel
2 for the parties that the deponent was explained
3 his right to read and sign the deposition and
4 did not waive that right.

5 (MITCHELL MICHAEL FLANNERY, having been
6 duly sworn testified as follows:)

7 DIRECT EXAMINATION BY MR. BARFIELD:

8 Q Mr. Flannery, good morning. My name is Michael
9 Barfield. I represent Westcott in this action. I
10 appreciate you coming here this morning.

11 Can I begin by having you state your full name
12 for the record, please.

13 A Mitchell Michael Flannery.

14 Q Mr. Flannery, just by way of background, can I
15 get you to give me your educational and professional
16 background, please.

17 A I have a BA in economics from Wofford. And I'm
18 a -- I've had -- I've been a realtor for ten years. And,
19 uh, been in real estate investment, real estate
20 commercial sales, and, uh, been a land acquisition
21 manager for D. R. Horton since May of '05.

22 Q Okay. So then if you came on board with Horton
23 in May of '05, the Westcott deal was already in the
24 works, so to speak, when you came on board; is that safe
25 to say?

1 A Obviously.

2 Q Right. And we're already into the August time
3 frame, as it were, of your coming on the scene.

4 A Uh-huh.

5 Q All right. At that point none of those three
6 phases had closed, correct?

7 A Correct.

8 Q All right. What was your understanding, or
9 what came to be your understanding, of why those phases
10 had not closed, as of you becoming involved in this
11 project in August of '06?

12 A Uh, a couple of things. We didn't have a final
13 plat approved, I do not believe, until -- my recollection
14 was mid July. And that kind of, I think, from what I
15 understand, is that kind of changed this entire contract
16 is that, you know, not all the conditions preceding the
17 closing were met. So, from my understanding, when I took
18 it up, was that we were trying to negotiate and try to
19 continue this takedown process.

20 Q Okay. Why was it important to Horton to close
21 this deal in a series of takedowns?

22 A Well, I mean, I think it's -- That's why we
23 negotiated the deal, to take at this time down in phases,
24 because it's easier. It's easier economically to take down
25 the phases. But, also, we had sales out there, and we

1 Phase 3E-1 --

2 A Uh-huh.

3 Q -- have been funded for takedown. And we'll
4 agree to take 40 units down, the second phase, and 36 the
5 last phase. So when you say that those had been funded
6 for takedown, what does that mean?

7 A My recollection that -- I'm not positive that
8 we got funding. But I'm pretty sure we, you know,
9 because we had the 40, or we had the, whatever number of
10 sales, that we possibly convinced corporate to fund us
11 this, uh, this takedown, this first takedown.

12 Q You go on to say, and you underline it, "I do
13 not want to have to send this money back and ask for it
14 again."

15 A I don't know whether that was a, you know,
16 whether I was trying to get them to work with me or
17 whether there was really money. I really don't know. I
18 don't remember.

19 Q Okay. Do you remember ever having to send any
20 money back to corporate on this deal?

21 A I don't -- Again, I don't remember. I mean,
22 I've sent money back a lot, people that don't show up at
23 the table. It's not uncommon.

24 Q Okay. Then you go on to say that you were
25 going to "propose to my division president." Was that

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF DORCHESTER) Case No. 07-CP-18-337
3 D.R. Horton, Inc.,)
4) Plaintiff,)
5 -vs-) DEPOSITION OF:
6 Westcott Land Company, LLC,) **MICHAEL SHETTERLY**
7) Defendants.)

8 Given before Angela M. Barrett, Court Reporter and
9 Notary Public, at the Law Offices of Ogletree Deakins,
10 300 North Main Street, Greenville, South Carolina, on
11 Thursday, November 20, 2008, commencing at 10:13 a.m.
12
13
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20

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1 It was stipulated by and between
2 counsel for the parties that this
3 deposition is taken pursuant to notice and
4 that all questions as to notice are
5 waived; that all objections, save as to
6 the form of the question, are reserved
7 until the time of trial; that the
8 deposition is taken pursuant to the South
9 Carolina Rules of Civil Procedure, for the
10 purposes allowed therein.

11 (MR. SHETTERLY, being duly sworn,
12 testified as follows:)

13 MR. BARFIELD: All right. Good morning
14 Mr. Shetterly. This again is Michael
15 Barfield on the telephone. I have one of
16 my clients here with me, Tim Fraylick, who
17 is one of the owners of Wescott Land, LLC.

18 DIRECT EXAMINATION BY MR. BARFIELD:

19 Q. Can I begin by having you state your full name
20 for the record, please?

21 A. Yes. Michael Montgomery Shetterly.

22 Q. All right. And Mr. Shetterly, you yourself are
23 an attorney up in Greenville, are you not?

24 A. I am.

25 Q. All right. And you, does part of your practice

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1 answers your question either. I'm trying to be
2 careful--

3 Q. Well, I, I, I guess I'm just, and it may be sort
4 of taking it to a silly extreme but at no point
5 did you go out to the property yourself, you
6 know, on your own time with a clipboard and a
7 checklist and, and make determinations, well,
8 this hasn't been done, this hasn't been done, we
9 need to--

10 A. I mean, I'll tell you what I saw on the day that
11 I went by, I mean, and what I did. I mean it
12 was, it, it was akin to a drive by. But what I
13 saw on the day I went by was I, in, in, in
14 spotty places what looked to me like it could of
15 been somebody's shoddy attempt at erosion
16 control but it clearly wasn't erosion control
17 because it wasn't working. There was mud all in
18 the streets.

19 The, the erosion control that I saw was
20 orange meshy looking stuff and, with wood
21 stakes. Part of the places it was knocked down
22 and other places it didn't appear to exist at
23 all. There were no street lights.

24 Q. Okay. And was it your understanding that street
25 lights were a, the installation of street lights

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1 were a condition precedent to the contract?

2 A. Well, early on, I, I think it's fair to say I
3 was under the misunderstanding that that was the
4 case. I, I, in looking carefully at the contract
5 they only had to have a contract for the
6 installation of street lights. But to tell you
7 the truth, I'm not sure sitting here today I can
8 recall getting any further than that.

9 Whether they, I, I remember, I remember
10 conversations about the street lights, and this
11 is from Fraylick or Steve Smith or somebody,
12 where the, it may have been in letters, it may
13 have been a lot of places. But the contention
14 was that that's a electrical company issue. We,
15 we're not responsible for it. I, I don't know
16 whether I was ever satisfied that actual
17 contracts or agreements for street lights were
18 in place with the electrical company. It was,
19 there was a lot of bantering about timing.

20 Q. Okay.

21 A. Whether, whether it was even possible before the
22 closing.

23 Q. Okay. Not to parse words but you used the
24 phrase you don't know if you were ever
25 satisfied. At, at some point was it, did it

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1 STATE OF SOUTH CAROLINA)
 2 : IN THE COURT OF COMMON PLEAS
 2 COUNTY OF DORCHESTER) CASE NO. 07-CP-18-337
 3 D.R. HORTON, INC.,)
 4 Plaintiff(s),)
 5 -vs) **DEPOSITION OF:**
 6 WESCOTT LAND COMPANY, INC.) **KEN BAGWELL**
 7)
 8 Defendant(s),)
 8 -----)

9
 10
 11 Given before Laura L. Lacour, Certified Shorthand
 12 Reporter and Notary Public, in the law offices of Barnwell,
 13 Whaley, Patterson & Helms, 881 Island Park Drive,
 14 Charleston, South Carolina on Thursday, April 30th, 2009,
 15 commencing at 10:15 o'clock, a.m.

16
 17
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KEN BAGWELL - DIRECT EXAMINATION BY MR. BARFIELD

1 (Ken Bagwell, having been first duly sworn,
2 testified as follows:)

3 DIRECT EXAMINATION BY MR. BARFIELD:

4 Q Can I begin by having you state your name for the
5 record, please?

6 A Ken Bagwell.

7 Q All right. Can I call you Ken?

8 A Please.

9 Q All right. Well, Ken, you yourself are an attorney as
10 I understand it.

11 A Yes.

12 Q All right.

13 A I'm not admitted in South Carolina.

14 Q That was my next question.

15 A North Carolina.

16 Q You are probably familiar with how depositions work so
17 I can probably spare the --

18 A Yes.

19 Q -- format, going into it. But, if at any time you have
20 a question, there's something about South Carolina procedure
21 in these things that seems odds to you, just stop me and ask
22 me.

23 And, likewise, if you need to take a break I think
24 this is probably going to be pretty short, but by all means
25 stop and ask and I will accommodate.

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1 A So I was going back and saying do we have them now.
2 And Scott Varn said I think we have everything except for
3 one item. And I couldn't remember what that was. And he
4 said I also think that he doesn't have his silt fencing up,
5 Wescott doesn't have its silt fencing up, and that we need
6 to see about that, but we want to close on the lots. You
7 know, we want the lots. And Doug and Richard were both
8 pushing hard to move forward because of the pre-sale.

9 Q Uh-huh.

10 A And so I responded I said, okay, do you have all this
11 documentation that you're supposed to have. And at some
12 point during the day on the 10th, and I think it was late on
13 the 10th, or it may have been the morning of the 11th, then
14 Scott told me okay, we've got all the documentation in now.
15 And I said all right.

16 And on the strength of that I sent the letter out
17 with my primary objective being to refute the claim of
18 default. And saying look, hey, we didn't even get all the
19 documentation until yesterday morning.

20 Q Right.

21 A Okay. So we can't be in default because we didn't even
22 have the making of substantial completion until then and now
23 we got twenty days to look at this stuff.

24 Q Okay.

25 A All right. So, ain't no way we can be in default

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

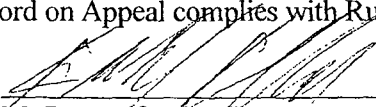
Case No. 07-CP-18-337

D. R. Horton, Inc.,.....Plaintiff,
v.
Wescott Land Company, LLC and Thomas R. Hawkins.....Defendant,

Thomas R. Hawkins and Wescott Land Company, LLC,.....Appellants,
v.
D.R. Horton, Inc.,.....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal complies with Rule 210(g), SCACR.



M. Dawes Cooke, Jr.
K. Michael Barfield
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Charleston, South Carolina 29492
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Attorneys for Appellants